

BREXIT – Transitional Arrangements

(This information paper updates some of the information given in CPA’s 2017 information paper “What would a Hard Brexit Look Like?”)

The UK and the EU have broadly agreed the “transitional arrangement” which will take effect as from 29th March 2019 and will last for a period of 21 months (31st December 2020). While the majority of the existing EU legislation will continue to apply to the UK, there are still some disagreements as to the full extent of the application of EU law to the UK and on various aspects of a transition period. Additionally, the House of Commons European Scrutiny Committee considers that greater detail is required on what unilateral safeguards will be available to the UK if it had to apply new EU law which is considered detrimental.

The UK has accepted that the following will apply:

- In principle, the UK accepts that it will continue to be bound by EU law, including new EU legislation which only takes effect during the transition period
- In effect this means that the UK will continue to participate in the Customs Union and the Single Market (with all four freedoms) during transition
- The UK will no longer have a right to political representation or a vote in EU institutions
- The UK could potentially have to accept fines handed down by the CJEU
- The EU’s supervisory, judiciary and enforcement instruments would continue to apply.

Areas of agreement between the UK and the EU

1. Duration of transition period

- This commence at 11.00 pm (BST) on 29th March 2019 (12.00 pm Central European Time) and last until 31st December 2020.

2. Applicability of General EU Law

- EU legislation will be applicable to the UK with the exception of areas of enhanced cooperation (a procedure where a minimum of 9 EU countries are allowed to establish advanced cooperation in an area within EU structures but without the other EU countries being involved e.g. financial transactions, tax. It is designed to overcome any paralysis where a proposal is blocked by the veto of an individual state or a small group who do not wish to be part of the initiative)
- With regards to the opt-ins on the laws covering Justice and Home Affairs, the UK may be invited to cooperate in a particular law as a non-EU country.

3. Applicability of the Free Movement of Persons Laws

- The EU’s free movement of persons laws will continue in force
- The limitations on family reunification and CJEU oversight are not reflected in this agreement.

4. Applicability of the Customs Union and the Common Commercial Policy

- The UK may negotiate, sign and ratify international agreements in areas of exclusive EU competence provided they do not come into force or apply during the transition period.

5. Applicability of EU foreign policy and participation in EU foreign policy

- It is agreed that the UK has the option not to apply EU decisions on foreign policy for vital and stated reasons of national policy
- In terms of participation, additional consultation mechanisms are available when EU foreign policy decisions are taken based on earlier drafts.

6. On rolling over third country Free Trade Agreements

- The EU will inform non-EU trading partners that the UK is to be treated as a Member State during transition
- It is important to note that, at best, this is only a request from the EU and the third country trading partner do not have to agree to it.

7. EU Court of Justice enforcement during transition

- Both sides have agreed to CJEU jurisdiction on all matters during the transition period
- All provisions on alternative enforcement mechanisms are to commence only following the transition period.

8. UK participation in EU agencies/bodies/institutions

- The UK can participate in EU decision making but not as a Member State
- The UK, can be consulted on EU legislative proposals during transition
- UK representatives may be invited to attend meetings of EU bodies/agencies/institutions if participation by non-EU Member States is permitted by the agreements.

9. Regarding the applicability of the European Arrest Warrant

- EU Member States can object to surrendering their citizens to the UK on the basis of a European Arrest Warrant during the transition period if they raise issues related to the fundamental structures of the Withdrawal Agreement
- This is reciprocal i.e. the UK can also stop surrendering its nationals to Member States if it gives notification of this decision within one month of the Member State's objection
- The UK could be invited to cooperate with the new defence policy "permanent structured cooperation", which it has opted out of, as a non-EU country.

10. Fishing quotas

- The UK will be consulted on the allocation of fishing quotas during the transition period whether at the EU level or in international fora.

11. Defence and Security Cooperation

- The possibility exists for further cooperation between the EU and the UK in areas of defence and security.

Overlap between the Withdrawal Agreement and the Transition Arrangements

The Transitional Arrangements form part of the draft Withdrawal Agreement between the UK and the EU with the Transitional Arrangements starting on 29th March 2019 and the Withdrawal Agreement commencing on 30th March 2019. However, the transitional arrangements run until the 31st December 2020.

As the Withdrawal Agreement covers both the transition period and final exit from the EU, some parts of the Withdrawal Agreement will not commence until the end of the transition period. These areas cover:

- The majority of the provisions on citizens' rights
 - Free movement rights
 - Coordination of social security provisions
- Institutional provisions administrating the Withdrawal Agreement
- CJEU oversight of the Withdrawal Agreement concerning dispute settlement
 - Due to the overlap between the periods for transition and the withdrawal, there is no clean start and end date for the following issues
 - The jurisdiction of the CJEU will extend to the UK and all cases involving the UK during transition
 - Documentation relating to cases registered at the CJEU before the end of 2020 will continue within the CJEU's jurisdiction when the case concludes so the concluding date of that case is not relevant for the Withdrawal Agreement
 - The jurisdiction of the CJEU in enforcing EU law shall continue to apply to the UK during the transition period
 - For any cases at the CJEU which commenced proceedings during the transition period and which are not concluded until after the Transition period ends, the outcome will be binding on and in the UK. Non-compliance with these judgements will incur pecuniary penalties for the UK.
 - For any CJEU cases involving the UK which are in progress at the end of the transition period, the UK may intervene in and submit written observations
 - Only when all the UK's CJEU proceedings have been resolved does its right to intervene in other CJEU cases end
 - Persons qualified in the UK and involved in proceeding of the CJEU that commenced before the end of the transition period, or any enforcement procedure involving the UK, may continue to represent the UK for the duration of those proceedings
 - The CJEU will provide the interpretation and application of the Withdrawal Agreement
 - The EU has proposed mechanisms to sanction the UK if it does not follow the rulings of the CJEU during the implementation period. These include suspending the benefits of participation in the internal market.
- The Protocols on Ireland/Northern Ireland and the Sovereign Base Areas in Cyprus
 - Negotiations on the Northern Ireland border with the Republic of Ireland continue to be separated from other withdrawal issues

- Negotiations continue to resolve the position of the UK's two sovereign bases which effectively become part of a 'third country' after Brexit and the rest of Cyprus which remains an EU Member State.

It is not clear from official government sources what will be the outcome of these continued discussions.

In addition to the above, it was agreed that some other separation issues may be ongoing when the transition period ends. These areas are outlined below:

- Goods placed on the market
 - Goods placed on the market before withdrawal may freely circulate in the UK and the EU with no need for product modification or re-labelling
 - They can be put into service where provided by EU law and the goods concerned should be subject to continued oversight
 - Certain information will be shared between supervisory bodies in the UK and the EU for goods that continue to be on the market after the end of the transition period
- Ongoing customs procedures
 - Both parties have agreed with the broad principle that the movement of goods started before the UK's withdrawal from the EU Customs Union should be allowed to complete their movement under the laws in place at the start of their movement
 - The EU view is that customs debts could arise and be collected while the UK has suggested these should be considered alongside the wider financial settlement
- VAT and excise matters
 - Current EU VAT arrangements will apply to goods where their despatch or transportation started before the end of the transition period and ended afterwards
 - The UK wants to discuss with the EU how the agreed 'broad principles' will be applied practically after withdrawal. The government's general position has been that the administration of VAT and excise regimes will remain largely as is.
- Intellectual property
 - The aim here is to ensure that the UK's withdrawal does not result in holders of intellectual property rights from losing out in either the UK or the EU
 - It is proposed that UK holders of EU intellectual property rights will be granted a comparable and enforceable UK intellectual property right
 - Holders of 'geographical indication' guarantees that are protected on the last day of transition should be entitled to use a UK based right that provides the same level of protection, without re-examination
 - These provisions are all reciprocal
 - The Commission has proposed that registration for the new UK based intellectual property rights be free of charge in the first instance and not be contingent on residence or proof of a UK address. Further renewal charges and requirements will be up to UK law
 - The EU has promised to continue to honour those in the UK who indicated the EU as the relevant jurisdiction in registering a trademark or a design in international law
 - This commitment is also applicable to unregistered Community designs which will be protected by an equivalent status in UK law

- Anyone who files an application before the end of the transition period for first-time trademarks and Community plant variety rights will have within UK law a 'right to priority' on identical goods and services for a period of 6 months
- Applications for supplementary protection certificates for plant protection products filed in the UK before the end of the transition period, will be handled in line with currently existing EU law
- Rights exhausted in both the EU and the UK before the end of the transition period shall remain exhausted
- Ultimately, the UK's ambition is to have a "substantial future relationship on intellectual property". The UK government is also of the opinion that these separation provisions outlined above are unlikely to be used as new arrangements for intellectual property rights will take their place.
- Ongoing police and judicial cooperation in criminal matters
 - Currently applicable EU law will continue to apply if initiated by the relevant competent authority before the end of the transition period (e.g. European arrest warrants, freezing orders, mutual recognition of financial penalties, confiscation orders, prisoner transfers, criminal records, requests for information about convictions, EU orders covering supervision, protection and investigation, joint investigation teams)
 - Regarding ongoing cooperation on law enforcement and policing and the exchange of information before the end of the transition period:
 - The existing provisions of the Schengen Implementing Convention and the Treaty on European Union on mutual assistance and cooperation will continue to apply
 - Existing measures will also cover the exchange of information and intelligence between law enforcement agencies, requests made by Financial Intelligence Units and Asset Recovery offices, requests on the use of passenger name record data
- Ongoing judicial cooperation in civil and commercial matters
 - In the UK, the relevant EU law covering contracts and damages in non-contractual matters will apply to all contracts concluded and events giving rise to damage that has taken place before the end of the transition period
 - In the UK and EU Member States, for all situations involving the UK, all legal proceedings commenced before the end of the transition period will be completed under EU law
 - EU law will continue to apply to the recognition and enforcement of all legally binding decisions taken before the end of the transition period and to all requests made by relevant authorities before the end of the transition period as part of any ongoing judicial cooperation
 - EU law will also apply to all requests for legal aid and mediation agreements received before the end of the transition period
- Protection of data obtained prior to the end of the transition period
 - The EU's data protection framework changes in May 2018. This covers the General Data Protection Regulation (GDPR) and the Police and Criminal Justice Directive (PCJD)

- Under these, personal data can only be transferred to a 'third country' when an adequate level of protection is guaranteed
- EU law shall apply in the UK in respect of the processing of personal data of people outside the UK
- The mutual assistance provisions of the GDPR and the PCJD will apply to data obtained by the UK before the end of the transition period
- EU law on the confidential treatment, restriction of use, storage limitation and requirements to erase data will apply to data obtained by the UK before the end of the transition period
- The UK has stated that its data protection law will be aligned with EU law at the point of exit.
- Ongoing public procurement procedure
 - The EU has proposed that the detailed rules and the general principles should continue to apply in the EU and the UK
 - The UK is broadly in agreement with this EU position but is seeking:
 - Further assurances about the ability of UK companies to bid for EU procurement contracts before the end of the withdrawal period and to be treated equally without discrimination
 - An extension to cover ongoing procurement contracts with both the EU Member States and EU institutions.
- Euroatom
 - Both side have agreed on the future of nuclear safeguards in the UK and agreed on the principles of ownership of and responsibility for special fissile material, spent fuel and radioactive waste
 - Aspects of research have not been mentioned.
- Commons Fisheries Policy
 - The EU position is that fisheries should form part of the transition agreement with the UK complying fully with the Common Fisheries Policy until the end of the transition period
 - Indications are that the UK has accepted the EU position.
- Ongoing EU judicial/administrative processes, privileges and immunities
 - For UK nationals working for EU institutions/agencies and for EU staff working for EU bodies in the UK, any new contracts or contract renewals signed before Brexit will run beyond 29th March 2019 in line with existing rules.

UK participation in EU programmes in 2019 and 2020

- These are outlined above – see *Areas of agreement between the UK and the EU, Item 8*
- The UK will be able to participate in programmes under the current 2014 - 2020 budget plan and previous budget plans
- The UK shall be eligible for financial operations provided the relevant instruments were established by the EU before the date the Withdrawal Agreement comes into force (30th March 2019)

- Some EU laws will apply to the UK while it is still receiving funding from EU programmes
- UK representatives will only be able to attend meeting when invited and then without voting rights
- The UK will contribute to financial commitments made in 2021 that are carried over from 2020
- The EU will provide the UK with a list of outstanding financial contributions covering the UK's stated commitments to EU programmes and the EU pension fund.

Conclusion

Clearly these transitional arrangements are an integral part of the final Withdrawal Agreement, however, they highlight that negotiations still have a long way to go before a final document can be mutually acceptable to both sides.

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