

# Are We There Yet? Withdrawal Agreement Brings Brexit into Cloudy View

22 November 2018

Following several months of delay and uncertainty, on 14 November the United Kingdom (the “UK”) and the European Union (the “EU”) published a draft withdrawal agreement covering the UK’s exit from the EU (the “Withdrawal Agreement”). An outline of a political declaration framing the UK’s relationship with the EU following the transition period (the “Political Declaration”) was also published, but negotiations regarding that document are still ongoing and the Withdrawal Agreement will only be signed once the Political Declaration has been agreed (click [here](#)<sup>1</sup> for the full text of the Withdrawal Agreement and the Political Declaration). It is currently expected that both documents will be approved by EU leaders at a special summit on Sunday 25 November, but that is not yet certain.

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Whilst the Withdrawal Agreement represents a significant breakthrough, and has been welcomed by business as at least avoiding a “cliff edge” Brexit, the obstacles in the road ahead must not be underestimated. For one, it is uncertain whether the draft Withdrawal Agreement will be approved by the UK Parliament. At the time of writing, a no-confidence bid in Prime Minister May’s leadership appears to be losing momentum, with an apparent failure to reach the 48 letter threshold needed to call for her resignation and trigger a leadership election, but unease with the outcome of the negotiations is felt on all sides of the debate. Pro-European MPs argue the agreement leaves the UK in a worse position than remaining in the EU, bound by EU rules but with no voting power, whilst pro-Brexit MPs attack the concessions made as potentially leaving the UK inside the EU customs arrangements indefinitely and thus not delivering on the vote to leave the EU. The Withdrawal Agreement is also subject to the approval of the EU Parliament.

We set out below some of the most important aspects of the draft Withdrawal Agreement, with the caveat that key points may change as events unfold.

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<sup>1</sup> <https://www.gov.uk/government/publications/progress-on-the-uks-exit-from-and-future-relationship-with-the-european-union>.

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## 1. WITHDRAWAL AGREEMENT

### Transition Period

As discussed in our previous [update](#)<sup>2</sup>, the draft Withdrawal Agreement provides for a transition or implementation period of at least two years. During that time, whilst the UK will no longer be a member of the EU, common rules will remain in place with EU law continuing to apply in the UK, and the UK will also have to contribute to the EU budget. This period of continuity is currently proposed to last from the moment of exit on 29 March 2019 until 31 December 2020, unless further extended. At the end of the transition period, the application of common rules will cease (subject to the “Backstop”, discussed below), as will the existing arrangements under which EU law applies in the UK.

The confirmation of the two-year transition period has received widespread support across the UK business community. For example, the Confederation of British Industry has described it as “an essential step back from the cliff edge” of a no-deal Brexit. However, the shape of the UK’s future relationship with the EU has not yet been negotiated and concerns remain that no future agreement will have been reached by the end of the transition period, 21 months after the Withdrawal Agreement comes into force.

If the UK and the EU are unable to agree to the terms of their future relationship by the end of the transition period in December 2020, the transition period may be extended until the end of a subsequent year by the mutual agreement of the UK and the EU. (Although the length of the extension to the transition period is not yet specified in the draft Withdrawal Agreement, Prime Minister May has indicated that any such extension, if required, should expire before the next UK general election set to take place in May 2022. In contrast, the EU’s Chief Negotiator for the UK exiting the EU, Michel Barnier, has suggested that the transition period could be extended until 31 December 2022). Negotiations are ongoing as at the time of writing on the length of the transition period.

### Northern Ireland Protocol

The Northern Ireland Protocol (the “[Backstop](#)”) creates a “Single Customs Territory” between the UK and the EU. The Single Customs Territory will prohibit all customs duties and quantitative restrictions between the UK and the EU. It also requires the UK to remain aligned with the EU’s Common External Tariff, Common Commercial Policy,

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<sup>2</sup> [https://www.debevoise.com/~media/files/insights/publications/2018/07/20180718\\_no\\_divorce\\_a\\_new\\_cross\\_channel\\_relationship\\_the\\_implications\\_for\\_business\\_of\\_the\\_uk.pdf](https://www.debevoise.com/~media/files/insights/publications/2018/07/20180718_no_divorce_a_new_cross_channel_relationship_the_implications_for_business_of_the_uk.pdf).

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trade defence regime and the EU Council Directives on the administrative cooperation in the field of taxation and tax avoidance practices that directly affect the functioning of the EU internal market.

The Backstop will come into force in one of three circumstances. First, if the UK and the EU do not agree the terms of the future relationship by the end of the transition period, and there is no extension of the transition agreement. It will also be enforced if the UK and the EU do not agree the terms of the future relationship by the end of any extension to the transition period. The third scenario is if the agreement on the future relationship between the UK and the EU results in a hard border between Northern Ireland and Ireland or if the agreement does not uphold the 1998 Belfast (Good Friday) Agreement and its successors in full. The Backstop will remain in force unless and until an alternative solution is agreed between the UK and the EU.

Whilst the parties are to use “best endeavours” to reach an agreement to render the Backstop unnecessary by the end of the transition period, commentators have pointed out that most trade agreements take years to negotiate. During this period, the UK would not be able to exit the Backstop without the agreement of the EU (nor would the EU be able to leave it without the agreement of the UK). There is, however, a review mechanism which requires the UK and the EU, at the request of either party, to consider “in good faith” whether the continued use of the Backstop is necessary. Any disputes in relation to the use of the Backstop is to be resolved by an independent arbitration panel.

### **Security Partnership**

During the transition period, existing EU law will continue to apply to the UK in the areas of foreign policy, defence and security (except in exceptional circumstances in which the UK will not be required to apply an EU foreign policy decision that is not consistent with UK national policy).

Beyond these basics, however, the UK and EU have not reached agreement on the larger shape of their future security relationship. The draft agreement specifies that they will have the opportunity to negotiate new agreements in these areas during the transition period. If the EU and the UK do not finalise an agreement in these areas, existing EU law in foreign policy, defence and security will cease to apply to the UK upon the expiry of the transition period, unless it is extended.

### **Mobility and Movement of People**

The draft Withdrawal Agreement provides some key protections to EU migrants in the UK and UK citizens residing in European countries. In the draft, existing rights to equal treatment and non-discrimination will be extended to EU citizens residing or working in

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the UK before the end of the transition period who continue to reside there thereafter, and to UK nationals residing or working in the EU at that time and to the family members of both sets of citizens. They will have broadly the same entitlements to work, study and access public services and benefits as currently exist where these entitlements have derived from UK membership of the EU. These entitlements for EU citizens will be subject to any future domestic policy changes that apply to UK nationals.

UK nationals who have been living in a Member State of the EU continuously and lawfully for five years or longer at the end of the transition period will have the right to reside permanently in that Member State. Equally, EU citizens who have been living in the UK continuously and lawfully for five years or longer at the end of the implementation period will have the right to reside permanently in the UK.

As part of the future relationship with the EU, the UK will also seek to secure onward movement opportunities (*i.e.*, the right to move from one Member State to another Member State) for UK nationals in the EU who are covered by the citizens' rights agreement. Any person who has not yet resided continuously and lawfully for five years in a host state by the end of the transition period will also be able to stay until he or she has reached the five-year threshold, at which point he or she will have the right to reside there permanently.

#### **Jurisdiction of the European Court of Justice and Civil and Judicial Cooperation**

Judicial cooperation is largely protected during the transition period. For example, the rules on applicable law in contractual obligations will continue to apply to contracts entered into before the end of the transition period. In the case of non-contractual obligations, EU rules on applicable law will continue to apply if the event giving rise to damage occurred before the end of the transition period.

Existing EU rules on jurisdiction will apply to cases commenced before the end of the transition period and related proceedings. This also applies to proceedings concerning civil and commercial matters, including EU intellectual property rights, data protection and posting of workers, family matters and maintenance.

The rules on the recognition and enforcement of judgments will also continue to apply to cross-border civil and commercial, family and maintenance cases that are commenced before the end of the transition period and court settlements and authentic instruments finalised before that point.

We will issue a separate and more detailed update on these matters.

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### Data Sharing and Cyber Security

The EU will ensure that UK data and information transferred to the EU before the end of the transition period, or under the provisions of the draft Withdrawal Agreement, are not treated differently on the grounds that the UK is no longer a Member State.

## 2. THE POLITICAL DECLARATION

The draft Political Declaration outlines a high-level aspirational framework for the long-term relationship between the EU and the UK after the transition period. The Political Declaration is currently very light on detail, so it is difficult to draw any firm conclusions on the likely content of the future relationship agreement between the EU and the UK at this stage. However, it is possible to ascertain from the Political Declaration that the broad outlines of certain aspects of that relationship are very similar to that proposed in Prime Minister May's White Paper or "Chequers agreement" earlier this year. For example, regarding trade in goods, it has been agreed in principle that there will be "*comprehensive arrangements creating a free trade area combining deep regulatory and customs cooperation*" and "*zero tariffs, fees, charges or quantitative restrictions across all goods sectors*". As for services, the Withdrawal Agreement refers to the desire by the UK and the EU to agree to "*ambitious, comprehensive and balanced arrangements on trade in services and investment, delivering a level of liberalisation in trade in services well beyond the Parties' WTO commitments*" (but in line with GATS). For financial services in particular, the Political Declaration says that future access will be determined by equivalence assessments, noting that equivalence assessments should be conducted by both parties as soon as possible after the UK's withdrawal from the EU, endeavouring to conclude these assessments before the end of June 2020. It is not clear whether this "equivalence" will go any further than the current EU rules on equivalence in financial services previously rejected as inadequate by the industry, or will be more ambitious with less ability for the EU unilaterally to withdraw equivalence assignments and with some degree of market access. Further information on these matters is expected to be provided by the UK government over the coming weeks.

On data protection there is some relief in the Commission beginning to assess the UK's data protection standards with a view to adopting an adequacy decision before the end of 2020. Similarly, there are statements on cooperation on security and information exchange.

As the Political Declaration will form the basis of the negotiations of the future relationship between the UK and the EU, we believe this supersedes the proposals contained in the White Paper. Accordingly, it is unclear if some of the key proposals contained in the White Paper, such as an "equivalence-plus" model for financial services, will be retained in the future relationship discussions.

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As noted above, it is expected that a more detail version of the Political Declaration will be published in the coming days, and is still under active negotiation.

### **The Future of the UK/EU Relationship**

The UK and the EU have agreed that after the Withdrawal Agreement has been finalised, they will begin to lay the groundwork for rapid commencement of negotiations for the future UK/EU relationship. The UK and the EU have also both committed to use their best endeavours to ensure that the future relationship agreement will take effect immediately following the expiry of the transition period.

As we have said, however, the entry into force of the Withdrawal Agreement cannot be guaranteed. If the draft Withdrawal Agreement is not approved by the UK Parliament, there is a real likelihood of a “no deal” Brexit or other outcomes, including a series of “mini-deals” on specific areas (such as aviation and security), deferral of the UK’s departure, a second referendum and/or a temporary arrangement similar to that currently enjoyed by Norway pending further negotiation. Unfortunately, therefore, the publication of the draft Withdrawal Agreement has not yet led to any greater certainty for business.

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Please do not hesitate to contact us with any questions.

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