



BREXIT - WHAT DOES THE TRANSITION AGREEMENT MEAN?

On Friday 23 March 2018, the EU announced that agreement in principle had been reached on a transition (or 'implementation') period running from the UK's withdrawal from the EU on 29 March 2019 to the end of 2020, during which the UK would retain access to the EU Internal Market and Customs Union on its current terms.

The European Council also adopted guidelines for the EU's negotiators with a view to opening the negotiations with the UK to agree a framework for the future relationship between the EU and UK post Brexit.

WHAT HAS BEEN AGREED ON TRANSITION?

The EU and the UK have achieved a political agreement on transition to what is an as yet uncertain future relationship, negotiations on which are only starting now.

The negotiators have also agreed the draft legal text to be included to give effect to this agreement in the Withdrawal Agreement under negotiation between the EU and the UK governing the terms of the UK's exit from the EU.

The terms of this transition agreement would mean the UK will be treated as if it were an EU Member State for most relevant purposes from when it leaves the EU on 29 March 2019 to 31 December 2020. However, this agreement will not be legally binding until the Withdrawal Agreement is formally agreed and ratified, a process which is expected to start in October 2018 and must conclude by 29 March 2019.

Assuming that the transition agreement does come into force, UK rights derived from EU law, for example the passporting rights of financial institutions, would be preserved until 31 December 2020.

EU law would apply in both the UK and the EU as if the UK continued to be a Member State for most relevant purposes during the transition period. This would also include all new EU laws that come into effect during that period.

Voting rights and UK participation in EU institutions would however cease when the UK leaves the EU in March 2019, although the UK has secured some limited rights of consultation on proposed new EU laws.

Key issues

- A Brexit transition period to run from March 2019 to the end of 2020 has been agreed in principle
- The UK and EU now start negotiations on their future relationship post-Brexit
- The transition arrangements will come into force only as part of an overall Withdrawal Agreement
- The process for finally agreeing and ratifying the Withdrawal Agreement is unlikely to start before October 2018
- There are still open issues that could mean that the parties fail to agree the Withdrawal Agreement

WHAT IS NOT COVERED?

The transition arrangements included in the draft Withdrawal Agreement would not preserve a UK firm's rights to passport into the EEA / EFTA states under the EEA Agreement or to benefit from other EU-third country agreements already in place, unless the third countries otherwise agree. However, the UK would be bound to give effect to these agreements with third countries even if there is no reciprocity.

The transition arrangements also do not address:

- any issues that UK or EU firms may have in winding down legacy portfolios of cross-border contracts with clients and counterparties after 31 December 2020 when their passport rights will have ceased to apply;
- any arrangements for the UK to transition to becoming an "equivalent third country" under various pieces of EU legislation without there being any gap after the end of the transition period; or
- any arrangement to extend the transition should the period to December 2020 prove too short to reach a long-term agreement between the UK and the EU.

CAN COMPANIES NOW RELY ON THERE BEING A TRANSITION PERIOD?

Both the EU and the UK maintain that "nothing is agreed until everything is agreed". As such, the transition elements in the draft Withdrawal Agreement represent a political agreement which depends on signature and ratification by both parties. This requires the approval of the European Council and the European Parliament, as well as approval by the UK in accordance with its constitutional procedures (which, in practice, will require primary legislation).

Whether there will be sufficient political consensus at that time around all the elements of the withdrawal agreement is an open question. The next European Council meeting is in June, followed by the meeting in October where it is hoped that final agreement will be reached with a view to ratification after that.

There are a number of open issues that might still prevent the conclusion of the Withdrawal Agreement, for example the issues relating to customs and other arrangements at the Northern Ireland border or any Spanish objections to the inclusion of Gibraltar in the scope of the agreement.

Despite its legal uncertainty, the political agreement may, however, inform the implementation by companies of contingency plans.

The pressure on the UK, the EU and EU27 national governments to reach an agreement will likely rise over time, and both the European Commission and the UK Government negotiation teams were keen to emphasise that they are converging towards a deal, the text of which includes a transition period. Firms will need to assess the implications for their contingency planning taking account into their individual circumstances and risk appetite (and that of their regulators).

WHAT IF THERE IS NO DEAL?

The UK Government and regulators have indicated their willingness to address the "cliff edge" for EU27 firms conducting regulated financial services business with UK clients and counterparties, for example through the use of temporary permissions, should the discussions on the Withdrawal Agreement fail to deliver a transition period. The UK is putting in place the legal framework to introduce this unilaterally, although some aspects of this are dependent on cooperation by EU27 firms' home state regulators.

By contrast, there are no public plans to put in place any legislative machinery at EU27 or EU27 Member State level to address "cliff edge" issues affecting UK firms conducting business with EU27 clients and counterparties should the discussions on the Withdrawal Agreement fail. Were such legislation proposed now, the timeline for implementation would be challenging. The EU may be able to take some actions at reasonably short notice following a no-deal exit to mitigate some of the adverse effects on the EU, for example by activating some of the existing third country regimes in EU legislation, but their scope is limited and there may be a gap after the UK leaves the EU before these actions can take effect.

WHAT NOW?

The EU has also agreed its own guidelines on what it considers a future EU-UK relationship should look like. The EU and UK will now seek to agree a "political declaration" on what that should be by October alongside their agreement on the final text of the Withdrawal Agreement.

Negotiations on the content of a future relationship will now begin, whilst resolution continues to be sought for the remaining "withdrawal issues", not least the Northern Ireland border.

So far, the EU has maintained a cohesive approach to talks, however as substantive trade talks begin, a splintering of this unity may be expected as each member state's vested interests, of which some may conflict, are aired. This leaves uncertainty as to the speed of conclusion of a declaration sought by the UK government on the "heads of terms" of a future partnership agreement.

The next key staging post in the Brexit process will be the European Council meeting in June.

CONTACTS



Phillip Souta
Head of UK Public Policy
T +44 20 7006 1097
E phillip.souta@cliffordchance.com



Chris Bates
Partner
T +44 20 7006 1041
E chris.bates@cliffordchance.com



Simon James
Partner
T +44 20 7006 8405
E simon.james@cliffordchance.com



Thomas Vinje
Partner
T +32 2533 5929
E thomas.vinje@cliffordchance.com



Caroline Meinertz
Partner
T +44 20 7006 4253
E caroline.meinertz@cliffordchance.com



Kate Gibbons
Partner
T +44 20 7006 2544
E kate.gibbons@cliffordchance.com



Jessica Gladstone
Partner
T +44 20 7006 5953
E jessica.gladstone@cliffordchance.com



Dr. Markus Stephanblome
Partner
T +49 69 7199 1516
E markus.stephanblome@cliffordchance.com



Michel Petite
Avocat of Counsel
T +33144055244
E michel.petite@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2018

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.



Our dedicated Brexit hub contains our latest thinking on the process for implementing Brexit and the implications for businesses, financial services and trade. It is aimed at helping readers to navigate through the complexities of the UK's withdrawal from the EU and to make sense of what Brexit might mean for UK's ongoing relationship with the EU.

www.cliffordchance.com/brexit