

## THE UK'S APPROACH TO BREXIT TRANSITION

The UK government has issued a response to the EU's proposals on how any transition period should apply. For the most part, the texts are broadly aligned. The [UK government's text](#) builds on the [draft text in the European Commission's position paper dated 7 February 2018](#).

The UK text accepts that the withdrawal agreement should secure a continuation of the status quo covering all aspects of the single market during the transition period, including all the four freedoms of goods, capital, services and labour.

Under both texts, EU law would continue to apply during the transition period, in both the UK and the EU, as if the UK were still a Member State, with only limited exceptions.

The UK and the EU hope to reach an agreement on transition at the meeting of the European Council on 22 and 23 March.

### THE WITHDRAWAL AGREEMENT

The transition arrangements will form part of the withdrawal agreement to be agreed between the UK and the EU under Article 50 of the Treaty on European Union. Therefore, nothing is finally agreed until everything is agreed. The withdrawal agreement will need to be finalised and ratified in accordance with the Treaties and the UK's constitutional arrangements before the UK leaves the EU on 29 March 2019 (although the UK and the European Council, acting by unanimity, could agree to extend this date). Therefore, it will be some time before market participants will have full legal certainty as to the transition arrangements.

### DURATION

The EU's proposed text envisages that the transition period would end on 31 December 2020 (which coincides with the end of the current EU multi-annual financial framework). The UK government says that what it calls

#### Key points

- The UK government has set out its position in relation to transition
- The UK and EU positions are broadly aligned
- The UK seems to want more flexibility on the date the transition ends
- The UK emphasises that "good faith" should apply to any measures the EU would seek to pass during the period
- The UK says it should be able to request to participate in Freedom, Security and Justice measures
- The UK says that measures relating to fishing should be agreed with the EU
- The UK proposes a number of technical changes to the text, although even these could prove contentious

the implementation period should be determined simply by how long it will take to prepare and implement the arrangements for the future UK-EU partnership. The UK agrees that this suggests a period of around two years but wishes to discuss the EU's assessment supporting the proposed end date.

## **NEW EU LAWS**

The EU proposed that the UK should be bound to give effect to new EU laws during the transition period (even though the UK will cease to have a vote on those laws) and would no longer be able to opt in to Freedom, Security and Justice Measures. The UK text accepts this position but proposes that the UK should be able to request to participate in Freedom, Security and Justice Measures (and some parts of the Schengen acquis) although it would be for the EU to decide on whether to agree to those requests.

The UK text does not contain a specific mechanism to protect UK interests in respect of new EU laws (which might include laws such as tax rules that today would require unanimity). However, the UK also proposes that the agreement should contain a general, mutual obligation of good faith on the parties "for example, in relation to acts of Union law adopted during the implementation period".

## **INSTITUTIONAL ARRANGEMENTS**

The EU proposed that the UK should cease to participate in EU institutional arrangements and envisaged that the UK would only have a very limited ability to participate in consultations, for example, on new laws. The UK government proposes that:

- The UK should also participate in consultations where "the presence of the UK will ensure the effective operation and application of Union law for the purposes of the [transition] Period".
- There should be a requirement that, during the transition period, the UK must be given copies of all proposals for new acts and a provision that UK experts may be consulted on the proposals.
- The UK and the EU must agree on fishing opportunities relating to the UK (and the UK must be able to participate alongside the EU in international fisheries negotiations).

## **THIRD COUNTRY AGREEMENTS**

The EU proposed that the UK would be bound by the EU's obligations under its external agreements, but would not participate in any institutional arrangements under those agreements (and it would be up to the third country whether to give the UK the benefit of those agreements). In addition, the EU proposed that the UK would not be able to become bound by agreements with third countries during the period unless this is authorised by the EU.

The UK proposes that it should be allowed to participate in bodies set up under the EU's international agreements. The UK also states its understanding that the EU's proposed restrictions would allow the UK to negotiate and conclude new agreements during the period so long as those agreements do not enter into force during the period without EU authorisation. The UK text deletes the EU proposal to restrict UK action in international bodies if prejudicial to EU interests (on the grounds that it is unnecessary).

In addition, the UK wants to be able to become bound by external agreements during the period (without EU authorisation) in order to give effect to the continuing application of the EU's external agreements by which the UK is bound under the withdrawal agreement. For example, the UK may wish to negotiate separate arrangements with the EEA EFTA states to give the UK the benefit of single market access to the rest of the European Economic Area as well as arrangements to secure for the UK the benefits of the EU's free trade and other agreements (including the customs union with Turkey).

## **SUPERVISION AND ENFORCEMENT**

The UK proposal deletes the notorious footnote 4 to the EU text which indicated that the EU would seek rights unilaterally to suspend the UK's Internal Market rights where the EU considers that a reference to the Court of Justice of the European Union (CJEU) would not secure timely and appropriate remedies.

The UK proposes that a Joint Committee of the parties should have certain functions with respect to the functioning of the transition period, including being able to take decisions on whether new EU acts are in scope, whether they need adapting in any way or resolving other issues (joint committees usually act by consensus so this would not be a dispute resolution mechanism as such). The UK also accepts that the CJEU

should have jurisdiction over the UK with respect to EU law (although it wants to delete the specific provision referencing this).

## **IMPLEMENTATION**

The UK wants to discuss the "means by which Union law will apply to the UK during the Period" but still accepts that the UK's domestic law will have to reflect EU law for the duration of the period. This may mean that the UK would prefer not to adopt new legislation like section 2 of the European Communities Act 1972 giving effect to the UK's obligations under the withdrawal agreement in UK domestic law.

## **LONG TERM RESIDENCE RIGHTS AND THE FINANCIAL SETTLEMENT**

The draft texts do not specifically address the long term residence rights of EU27 citizens moving to the UK during the transition period (or those of UK citizens moving to the EU27 in that period). The EU negotiating directives envisage that these would acquire the same rights as citizens who had exercised freedom of movement prior to 29 March 2019. The UK is also considering a registration scheme for EU citizens moving to the UK during the transition period. The draft texts also do not specifically address the financial settlement. This will be dealt with in other parts of the withdrawal agreement.

## **WHAT HAPPENS AT THE END OF THE PERIOD?**

Like the EU text, the UK text is silent about what happens at the end of the transition period. It does not propose any mechanism to agree an extension of the period (which might otherwise be difficult as it is unclear that the EU could agree an extension using Article 50 of the Treaty on European Union – thus an extension, or amendment, might require a full treaty process).

The agreement would move the 'cliff edge' of a 'hard Brexit' until 31 December 2020 (or whatever date is eventually agreed) but neither party has made proposals addressing issues such as contract continuity or how to transition EU27 or UK market participants or financial market infrastructure from their status within the single market to their new status when the transition period ends and the UK becomes a third country. Nor are there any proposals to deal with the implementation steps relating to any eventual long-term agreement concluded during the period (except in so far as the text envisages that the UK would drop out of the transition provisions relating to Freedom, Justice and Security measures if and when an EU-UK agreement on those subjects enters into force).

## 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



**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



**Mark Poulton**  
Partner

**T** +44 20 7006 1434  
**E** Mark.Poulton  
@cliffordchance.com



**Simon James**  
Partner

**T** +44 20 7006 8405  
**E** Simon.James  
@cliffordchance.com



**Simon Gleeson**  
Partner

**T** +44 20 7006 4979  
**E** Simon.Gleeson  
@cliffordchance.com



**Dan Neidle**  
Partner

**T** +44 20 7006 8811  
**E** Dan.Neidle  
@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](http://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](mailto: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.