

Brexit Essentials Implementing Transition

27 March 2018

Phase II of the Brexit negotiations has concluded, the negotiators having reached consensus, among other things, on the terms of a transition period to follow formal departure from the EU in March 2019. With 12 months to go until the UK's expected "exit" day, agreement that there is to be a period of transition is welcome, although there remains a widely held belief that the agreed 21 month period is not long enough - and a concern as to what happens if it turns out not to be.

Our Brexit Essentials Briefing of [6 March](#) outlined the contents of the EU's initial draft Withdrawal Agreement of 28 February and the parties' positions on some of the main issues following Mrs May's Mansion House speech.

This Briefing provides an update on key developments since our previous Briefing and a reminder of the major milestones ahead.

Status of the draft Withdrawal Agreement

The draft Withdrawal Agreement was revised on [15 March](#), and again on [19 March](#), to reflect continuing discussions. The latest draft has been colour-coded to illustrate progress:

- Green denotes issues that are agreed. The main oases of green in the current draft include Part 2 on citizens' rights, Part 5 on the financial

settlement and, of course Part 4, which deals with transition.

- Areas where there is broad policy agreement, but more work to do, are yellow. These include the Protocol on Northern Ireland.
- The islands of unshaded white text reflect the EU's position on areas where the parties' positions continue to diverge. The unshaded areas represent a minority of the text by length, but still a significant percentage by weight, including some headline (and redline) issues such as the ECJ's role in resolving disputes.

Areas of movement

The draft reflects a number of relatively significant areas of movement compared to the 28 February version, including the following:

- **Citizens' rights:** The main outstanding issue, namely the EU's view that EU citizens arriving in the UK during the transition period should have the same rights as those in the UK before transition, has been resolved. The UK has agreed that EU citizens that arrive in the UK during the transition period will have the same rights and guarantees as those who arrive before exit day. The same will apply to British emigrants to the EU.

- **Length of transition:** Until 19 March, the UK's position on the length of transition was that it should be determined by how long it will take to prepare and implement the future relationship. The UK has now agreed to the EU's position that the transition period should end on 31 December 2020.

There are reports that some member states were supportive of the inclusion of a mechanism for extending the transition period, although this does not appear in the current text. It has also been suggested in press reports that the possibility of including in the Withdrawal Agreement an extension to - or a means of extending - the transition period, could be revisited by the negotiators at a later date. If the Withdrawal Agreement itself is concluded without an extension mechanism for transition, that is a cause for concern. No-one who believes a transition is necessary also believes the current period to be sufficient.

- **Third country agreements:** As regards the third country trade framework applicable to the UK during transition, a footnote has been added to the effect that the EU will notify the other parties to its international agreements that the UK should be treated as an EU member state during transition. This is a modest step forward from the EU's original position that ensuring the continuing protection of the EU's 750+ trade and other international agreements was for the UK alone to deal with. The updated text clarifies

that the UK is free to "negotiate, sign and ratify" its own trade agreements during transition, provided they do not come into force or apply until the transition period ends. The EU wryly remarked there was a lot to do.

It awaits to be seen whether third countries accept the notification or seek to agree changes. Likewise it is not clear that the UK will be able in practice to conclude third country trade deals whilst its agreement with the EU remains under discussion.

On other topics, there is evidence of more limited movement:

- **Other separation issues:** In relation to the separation issues addressed in Part 3, the parties have edged slightly forward on some of the detailed points. However, there is continuing doubt as to whether further concessions are likely, following a [Technical Note](#) circulated by the Government on 6 March, which states that the UK believes many of the outstanding "wind-down" points will be superseded by agreement on the future relationship.
- **Jurisdiction and enforcement of judgements:** The EU has conceded one of the points highlighted in our Briefing of 6 March: judgements handed down after the transition period in respect of proceedings started before or during transition will be enforceable across the EU in accordance with the Brussels Recast Regulation. However, the EU has still not conceded that judgements in respect of post-transition proceedings, but arising from jurisdiction agreements made before

or during transition should be afforded the same protection.

The provisions with regard to **new EU laws during transition** and the UK's role in the EU decision-making process have not changed materially. During the transition period EU law will be applicable in the UK. The UK may be consulted but will in general no longer be able to participate in the decision-making processes of the EU. Significant store has been set on a mutual duty of good faith (see further below) as a protection mechanism during this period of obligation without representation.

Ireland/Northern Ireland

The entirety of the Protocol on Northern Ireland has been shaded in yellow to acknowledge the agreement in December's [Joint Report](#) that if no other agreement is reached, the backstop is that Northern Ireland will effectively remain part of the single market and customs union. The acceptance of the need for this backstop is a significant development.

There remains no indication how the Irish Border issue will be solved, beyond a reiteration from the Prime Minister of her commitment to the Joint Report, meaning the fleshing out of a "fully operational backstop" and the pursuit of the UK's preferred options in the context of negotiations on the EU-UK future relationship. David Davis admitted "there is as yet no agreement on the operational approach" although he has also confirmed that the Government agreed there could be no infrastructure at the border.

The Labour Party have said that it will seek to amend the EU Withdrawal Bill to entrench this policy position in legislation. It awaits to be seen if this will attract cross-party support.

Dispute Resolution

The majority of the dispute resolution provisions remain resolutely white, providing for the ECJ to take the role of ultimate arbiter of disputes under the Agreement, should the Joint Committee be deadlocked. This is one of the UK's consistent redlines and arguably the most contentious.

There is some suggestion that a new Article 4a, which did not feature in the 28 February draft, and which places a general duty of good faith on the parties to assist each other in carrying out and achieving the objectives of the Withdrawal Agreement, is intended to provide some comfort in that regard. It is not clear however, quite how this is intended to operate in the specific context of the dispute resolution provisions.

Impact of the Withdrawal Agreement

The revised draft has been hailed by negotiators as a "decisive step forward". The agreement on transition provides some assurance to businesses that there will be more time to reach a deal, but as highlighted in our previous Briefing, it is not a legally binding text and therefore remains vulnerable to political derailment. All other aspects need to be agreed, including Northern Ireland. There is no transition without a Withdrawal Agreement.

It is also "only" a Withdrawal Agreement. In the absence of a deal on the parties' future

relationship, even when finalised, the Withdrawal Agreement can only lengthen the path to the cliff (as a result of the agreement on transition), rather than operate to smooth or to lower the cliff edge.

Implementing transition

The UK Government has consistently (if alone) referred to whatever time is agreed for transition as an “implementation” period. It is notable that the latest draft Withdrawal Agreement describes the transition period as a “transition or implementation period” (although perhaps it is better thought of as a standstill).

The term “implementation” suggests that the 21 months starting on 29 March 2019 will provide a glide-path to life outside the EU – a time for the Government, citizens and businesses to put into place the changes necessary to accommodate the EU and UK’s future relationship. This will be the case only if the parties are able to reach agreement – swiftly – on the shape of that relationship. Otherwise, it is likely that a real implementation period will need to follow the standstill period, from 1 January 2021.

The most significant impact of the progress represented by the 19 March draft therefore, is that it paved the way for the adoption by the European Council on Friday of a first set of negotiating guidelines on the EU-UK future relationship. These have been approved with a view to opening preliminary discussions, alongside talks on the outstanding aspects of the Withdrawal Agreement.

EU negotiating guidelines 23 March

The [new guidelines](#) are characteristically short and broad brush. They purport to set forth what is possible within the confines of the UK’s position that it will be outside the single market and customs union, although note that were the UK’s position to evolve, “the Union will be prepared to reconsider its offer”. This “inevitably” results in frictions in trade and excludes the participation of the UK in EU decision-making and bodies. The current intention is nonetheless to work towards a “balanced, ambitious and wide-ranging” free trade agreement. Importantly, the free trade agreement is envisaged to cover both goods and services, although there is no direct mention of financial services.

This must involve “robust guarantees” of a level playing field, which includes regulatory alignment and appropriate enforcement mechanisms. The UK must not undercut levels of protection in relation to, inter alia, competition and state aid, tax, social, environment and regulatory measures and taxes.

Key issues singled out include:

- Transport services: This sector should be included in the FTA, with the aim of ensuring continued connectivity between the UK and the EU, including aviation, road transport and other services.
- Rules on data: as regards personal data, protection should be governed by EU rules on adequacy.

The guidelines conclude with a paragraph on dispute resolution, which repeats the

requirement that governance must take into account the role of the ECJ in the EU legal order.

It should be recalled that, despite the positive aspirations in the guidelines, the “most favoured nation” elements of the EU’s other FTAs, such as with South Korea and CETA with Canada, may operate as a limit on what the EU is prepared to give in an FTA with the UK. Mrs May’s aspirations for a deep and special partnership are most easily accommodated within the Norway option (EEA membership) - for now, at least, the wrong side of political red lines.

The (some would say frustratingly) vague manner in which the guidelines deal with services is also worthy of comment. They mention the aim of allowing market access under host state rules (including rights to establish branches), but then state that the extent of this right should be consistent with the fact that the UK will become a third country and will no longer share a common regulatory, supervisory, enforcement and judicial framework with the EU. While this appears on one level to be a statement of the obvious, it leaves outstanding the fundamental question of how far the EU is prepared to go in agreeing market access arrangements for services with the UK when the UK has become a third country.

Next steps

So far each European Council meeting has been preceded by an accelerated period of activity, aimed at enabling EU27 leaders to assess progress and update their negotiators’ mandate. The Council’s meetings are expected to continue to punctuate the proceedings.

Council President Donald Tusk said on Friday that the EU wants the Irish border issue settled in time for the next Council meeting on 28-29 June. Intensive talks on Northern Ireland resume this week. Mr Tusk indicated that the Council will also assess in June “how to go about a common declaration on our future”, referring to the political declaration or heads of terms which is proposed to be finalised alongside the Withdrawal Agreement.

The subsequent Council meeting on 18-19 October is likely to be the next decision point, marking the effective deadline for agreement on both the legal text of the Withdrawal Agreement and the political declaration on the future relationship, if ratification is to be completed by the March 2019 deadline.

Meanwhile, the Government’s domestic preparations continue as the various Brexit Bills and related legislation make their way through the Parliamentary process. The EU Withdrawal Bill and certain other of the key Brexit Bills are currently anticipated to receive Royal Assent in May/June. It is also expected that the first batches of secondary legislation will emerge over the summer, although it is conceivable that the timetable for delivery may change following political agreement on transition.

The next six months will therefore be crucial - both in terms of the negotiators’ ability to reach consensus and the need for UK businesses to reiterate to Government the key risks they face and their final deadlines should contingency plans need to be implemented.

Comment

It is scarcely necessary to repeat that there remains an enormous amount to do. Until there are more watertight guarantees, businesses must continue to plan for all contingencies and consider the date they feel it most appropriate to work to (March 2019 or December 2020). This is an acute issue for the financial sector, which will generally require permission from regulators to adjust contingency plans from March 2019 to December 2020, but no business can be certain that contingency plans will not be needed.

If the Withdrawal Agreement is finalised at a point where the parties' future relationship has not been agreed - or cannot be articulated in sufficient detail, the length of the transition period is likely to come back into focus. The incorporation of a renewal or extension mechanism, to be invoked should extra time be required either to conclude negotiations or to accommodate implementation measures, would provide businesses with greater comfort that the status quo will be maintained until the time is right.



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