

## Brexit: Edging Closer

27 November 2018

### INTRODUCTION

#### A deal

On 14 November, the UK Government and European Commission published a further version of the [Withdrawal Agreement](#) in relation to the UK's withdrawal from the EU, an [outline Political Declaration](#) on the framework of the future EU/UK relationship, and a [joint statement](#). On 22 November, it was announced that further progress had been made on the Political Declaration, a [full version](#) of which was formally published shortly afterwards.

The Withdrawal Agreement and Political Declaration were formally approved by the European Council on 25 November. The remainder of the EU ratification process is not considered likely to be problematic. The Brexit deal (and whether there is a “deal” at all) therefore depends almost entirely on whether the Prime Minister is able to convince Parliament it is the right one for the UK.

#### Reaction to the deal

The prospect of a conclusion is attractive from a risk management perspective and the deal has been welcomed by some in the business community. The newly extendable transition period potentially enables businesses to plan for change over a longer period. The revised backstop proposal for Ireland drops a step-ladder down the second potential “cliff-edge” that would otherwise occur at the end of transition, if negotiations on the future EU/UK relationship remain ongoing.

However, the political backlash against the deal has been significant to put it mildly. Seven

ministers, including the ex-Brexit Secretary, Dominic Raab, have resigned since the Withdrawal Agreement was published, bringing the total number of ministerial resignations since the 2017 general election to 21, of which 12 have related to Brexit. To put that in context, the Iraq War prompted four. At the time of writing, the public position of the Labour party, the DUP, the Liberal Democrats, the SNP and a number of Tory Brexiteers and Remainers is that they will not vote in favour.

Views on the merits of its contents aside, the conclusion of the Withdrawal Agreement is a momentous step in the Brexit saga. Its sheer length is indicative of the complexity of the issues to be resolved. The text is in large part extraordinarily technical - suggesting that many (politicians included) may be relying to a greater or lesser extent on third party translation.

#### Contents of this Briefing

Part 1 of this briefing contains an overview of the most-discussed aspects of the Withdrawal Agreement and the Political Declaration.

Part 2 considers in more detail some of the key aspects likely to be of interest to corporates and the financial sector as the UK edges closer to a final conclusion.

# PART 1 - OVERVIEW OF THE DEAL

## THE WITHDRAWAL AGREEMENT

### Scope and content

The basic anatomy of the Withdrawal Agreement has not changed since the previous draft, circulated in March, although its provisions have been fleshed out in considerably more detail.

It comprises six Parts and three Protocols. Additional provisions relating to the interpretation and application of the Agreement (largely technical) are set out in a series of annexes:

- Part One - Common provisions:** This Part comprises interpretation provisions and defines the role of EU law in the context of the Agreement. It also provides (at A5) that the UK and EU shall assist each other in good faith in carrying out the tasks which flow from the Withdrawal Agreement.
  - Part Two - Citizens' rights:** The rights of UK citizens in the EU and EU citizens in the UK at the end of transition are addressed in detail, and can be relied on and enforced by those citizens directly. In essence, those exercising rights of free movement on expiry of the transition period, will be permitted to continue, subject to certain conditions. This Part also covers the recognition of professional qualifications, including lawyers' rights.
  - Part Three - Separation provisions:** This Part is aimed at facilitating an orderly withdrawal - and as a result, provides a checklist of areas where disruption or legal uncertainty might be anticipated if the Withdrawal Agreement is not concluded. For example, it clarifies that goods placed on the market on the basis of compliance with EU law prior to the end of the transition period may circulate freely between the EU and UK. Thus a car manufactured in the UK based on UK-type approvals prior to the end of transition
- may be sold to an EU distributor, registered and put in to service elsewhere in the EU thereafter.
- Other important areas addressed in this Part include the grandfathering of existing intellectual property rights, the application of the Brussels Regulation on civil jurisdiction and judgments to proceedings started prior to the end of the transition period and the impact of separation on data flows and privacy.
- Part Four - Transition:** The EU and UK agreed in principle almost a year ago that there would be a transition period following exit day, during which for most purposes, the status quo would be maintained, and the UK treated as if it remained an EU member state. The transition period extends to the end of 2020. The main adjustment to this Part compared to the previous draft Withdrawal Agreement is the addition of an extension mechanism, an aspect that has been received unenthusiastically by Brexiteers, in particular Tory backbenchers.
  - Part Five - Financial provisions:** The UK has agreed to contribute to the EU budget for the remainder of the current cycle which concludes at the end of 2020, including its share of any commitments made prior to that date. On that basis, the UK will continue to benefit from EU programmes financed under this budget. The financial provisions assume the UK's financial obligations end at the same point the transition period ends. Any extension to the transition period will therefore result in the UK incurring further financial liabilities to the EU.
  - Part Six - Institutional and Final provisions:** This Part addresses enforcement rights and governance arrangements, and includes the sort of provisions for the resolution of disputes that are found in all international agreements. The number of references to the Court of Justice of the European Union ("ECJ") has been highlighted by critics, although

examined in context, most are uncontentious and respect the “red lines” set out by the Prime Minister in her Lancaster House speech.

- Protocol on Ireland and Northern Ireland:** Perhaps the most contentious aspect of the Withdrawal Agreement, this Protocol provides for the continuation of the Common Travel Area and sets out the backstop arrangement that will apply to ensure there is no hard border on the island of Ireland if the transition period comes to an end before the future relationship discussions have been concluded. It is detailed and highly technical, extending to some 173 pages - not an easy read for those attempting to evaluate its contents from a political perspective.
- Protocol on the Sovereign Base Areas in Cyprus:** These provisions aim to ensure the UK can continue to fulfil its international commitments in relation to the sovereign base areas in Cyprus and continue to operate them for military purposes.
- Protocol on Gibraltar:** Gibraltar, as an overseas territory of the UK, is treated as part of the UK for the purposes of the Withdrawal Agreement. This Protocol addresses some specific issues to be agreed between the UK, Spain and Gibraltar in the context of Withdrawal. This Protocol, is not of itself controversial. Spain’s objections to the deal, (which prompted the Spanish Prime Minister last week to indicate that Spain would “veto” the exit deal absent capitulation) relate primarily to whether arrangements in respect of Gibraltar and its future relationship with the EU would be addressed in bilateral discussions between the UK and Spain - or in the context of the UK’s overall relationship with the EU (the position put forward in the Political Declaration).

Some points of interest in Parts 2, 3, 4, 6 are discussed further below, together with a summary of the key features of the Protocol on Ireland and Northern Ireland.

## When would the Withdrawal Agreement (if signed and ratified) come into effect?

The Withdrawal Agreement, if concluded, will enter into force on 30 March 2019, the first day of the transition period. Parts Two and Three and the Protocols, which provide for the orderly wind-down of the application of EU rules once the UK ceases to be subject to them, are not required during the transition period, and become operative only when the transition period - as extended, if applicable - comes to an end.

## THE POLITICAL DECLARATION

### Scope and content

The Political Declaration was anticipated as a “Heads of Terms”, setting out the building blocks for an “ambitious, wide-ranging and balanced economic partnership” between the EU and UK, to come into effect at the end of the transition period. The text published last week has been expanded significantly from the outline made available alongside the Withdrawal Agreement, but provides little more substance.

The topics covered are set out in the table below.

Basis for co-operation	Data Protection	Participation in Union Programmes
Goods	Services and investment	Financial services
Digital	Capital movements and payments	Intellectual property
Public procurement	Mobility	Transport (air; road; rail; sea)
Energy	Fishing opportunities	Global co-operation
Level playing field	Security partnership	Governance and process

## Goods

With regard to goods, the Political Declaration expresses the Parties' intention to have a trading relationship that is "as close as possible".

This will take the form of a comprehensive free trade area (no tariffs or quotas), building on the single customs territory provided for in the Protocol on Northern Ireland and involving "deep regulatory and customs co-operation".

The FTA will be underpinned by a "level playing field for open and fair competition" and customs arrangements that make use of "all available facilitative arrangements and technologies".

### Does this mean we have "chucked Chequers"?

While the approach to goods appears to depart from the "common rule book" and innovative customs arrangements envisaged in the Chequers proposal, it is hard to see whether Chequers is dead, based on the text.

A common rulebook could be the outcome of the UK's commitment to "consider aligning with Union rules in relevant areas [of regulation]".

The "level playing field" (paragraph 39) is intended to build on the equivalent provisions in the Withdrawal Agreement, which envisage non-regression by the UK from EU standards in relation to state aid, competition, social and employment standards, environmental standards, climate change and relevant tax matters. The wording does not shed light on whether the UK may intend to align fully with all future EU standards in these areas, or to maintain its non-regression commitments, although the latter might be implicit in the repeated statements about the Parties "retaining autonomy" and their "distinct legal orders".

### Existing third country regimes

In many areas, the Political Declaration broadly reflects the EU's starting position that the UK will be assessed according to its existing third country regimes, with no indications that new measures will be introduced to enhance the UK's access or treat it differently to any other non-EU country.

For example, in relation to financial services and data protection (each discussed further below), the basis of the future relationship is the existing equivalence/adequacy framework.

Similarly, in relation to the UK's participation in EU programmes (in areas including science and innovation, education and space), the text refers to the UK satisfying the conditions of relevant Union law.

In certain areas, the Declaration contains some helpful commitments on timing - for example, in relation to data protection, as noted below, the Commission commits to start an adequacy assessment of the UK regime as soon as possible after exit day. The Parties have also committed to conclude equivalence assessments in relation to financial services by June 2020.

### And beyond existing arrangements?

The Declaration is less specific on the nature of EU-UK co-operation which goes beyond existing third country regimes. This is, of course, the aspect in which there is the most political and business interest. In most instances, readers are provided with no information or at best, limited clues as to what might come next.

For example, in relation to trade in services and investment, we are told little other than the Parties aim to deliver a level of liberalisation "well beyond the Parties' WTO commitments and building on recent Union Free Trade Agreements" (the latter, presumably a reference to the EU-Canada FTA).

The phrasing of aspects such as these suggests a positive intention to build on existing third country arrangements. Others suggest a less supportive stance from the EU side ("the Parties note the UK's intention to explore options for a future relationship with the EIB Group").

### Firmer commitments in some areas

Firmer commitments are perceptible in limited areas where there is clearly a reciprocal interest in continuing market access. These include the areas of transport, energy and fishing opportunities.

The transport section provides, for example, that the Parties "should ensure" passenger and air cargo connectivity through a comprehensive air transport agreement, and comparable market access for freight and passenger road transport operators.

The section on fishing rights includes a specific obligation on the Parties to use their best endeavours to conclude and ratify their new

fisheries agreement by 1 July 2020 so as to be in place by the end of transition. It remains to be seen how quickly progress can be made on this particularly sensitive issue, especially in light of President Macron's suggestion earlier this week that if the UK is unwilling to compromise on fishing, progress talks on the wider future relationship would be affected.

### EU's negotiating strategy

The European Council's formal approval of the Political Declaration reiterates the EU's determination to have as close as possible a partnership with the UK. However, it also emphasises that the EU approach will continue to be defined by the overall positions and principles set out in the previously agreed European Council's guidelines, which is not indicative of any intention to blur pre-existing red lines. This echoes the text of the Declaration itself, which at a number of points notes that the EU and UK will form separate markets and distinct legal orders.

### Legal effect

The Political Declaration sets out the progress made on the framework for a future UK/EU relationship and identifies a number of areas of cooperation. It does not, however, of itself contain legally binding commitments (and in fact were it to purport to be legally binding, the manner in which it is drafted, involving vague concepts such as "commitments to consider" would be difficult to enforce). Accordingly, it could be changed.

Nonetheless, it has political weight and attempts appear to have been made to shore up the political intent reflected in the Declaration to reach a final deal. The Withdrawal Agreement (at A184) commits the Parties "to use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the [Declaration]...with a view to ensuring those agreements apply, to the extent possible, as from the end of the transition period." In addition, the Parties' good faith obligation in A5, already noted, is potentially relevant, the Declaration being a task which (arguably) flows from the Withdrawal Agreement.

Businesses will wish to review the Declaration to determine the aspects likely to be of relevance

specifically or generally to the sector in which they operate.

# PART 2 - KEY POINTS OF INTEREST

## 1. CITIZENS' RIGHTS

### Rights of citizens resident in a host state at the end of transition

The Agreement reflects the position agreed some time ago, that citizens lawfully residing in a host state on expiry of the transition period, together with their family members, are able to stay, and may obtain rights to permanent residence after a five year period of continuous residence. Close family members (as defined) may join such citizens in the host state at a later date, provided the relationship existed at the end of the transition period.

The Agreement acknowledges that procedures for acquiring settled status may vary in each host state. It provides that where applications are required, the process must be short and user friendly and charges (if applicable) must not exceed that for issuing similar residence documents.

### Continued recognition of professional qualifications

Professionals whose qualifications are recognised or in the process of recognition by the host state at the end of transition are protected. To take an example put forward by the EU, this means that a British physiotherapist living in Belgium and working as a physiotherapist in the Netherlands, whose British professional qualifications were recognised before the end of the transition period will be able to continue residing in Belgium and carrying out professional activities in the Netherlands as a frontier worker or, as applicable, a frontier self-employed person.

### Political Declaration provisions on "Mobility"

The Declaration notes that free movement will come to an end and states that the Parties will "aim to provide" for visa-free travel for short-term visits and will "consider" conditions for

entry and stay for purposes such as research, study, training and youth exchanges. Arrangements will also allow for temporary business travel.

Beyond that, the Parties commit only to explore the possibility of facilitating the crossing of borders for legitimate travel.

### The position of in-house lawyers

The Withdrawal Agreement should bring some welcome clarity for legal departments with pan-European operations, at least during the transition period. In addition to confirming that EU and UK employees, and their families, who are resident and working in the UK and EU before the end of the transition period, will be entitled to remain and work in their host country and have their rights protected indefinitely, the Withdrawal Agreement also grandfathers any rights acquired under EU law by lawyers to practice using host state titles (A27).

During the transition period UK and EU lawyers will continue to be able to move freely between the UK and the EU and advise on the laws of their home state, the EU and the host state. Lawyers' existing rights of establishment will also continue (A126 and A27 preserve rights under Lawyers' Services and Lawyers' Establishment Directives).

The position after transition remains unclear. The statement in the Political Declaration that an "ambitious" agreement will be sought in respect of services that will go beyond WTO commitments might suggest that it will confirm the ability of London-based legal teams will be able to give advice on UK and public international law to colleagues in the EU, either from London or on a temporary fly-in/fly-out basis, in any cases where there is doubt. The Political Declaration gives no indication of whether there is any political will to agree wider rights guaranteeing the ability of UK qualified lawyers to advise on EU (or even host state) law or practice on a longer term basis in the EU under their home state title.

## 2. TRANSITION ARRANGEMENTS

### Duration and extension

The Withdrawal Agreement provides for a transition period until 31 December 2020. Under the Agreement, a Joint Committee established by

the Agreement and made up of UK and EU representatives (and provided for in Part 6, explained below) can agree to extend the transition period on one occasion only, provided such agreement is reached before 1 July 2020.

The period of any such extension is not currently specified. The drafting of A132 of the Agreement suggests that it would be at least one year (or a multiple thereof), although the Prime Minister has stated her preference for any extension not to extend beyond the next general election, anticipated in June 2022.

### Application of EU law during transition

During the transition period, the UK will continue to be treated as if it were an EU Member State, with only limited exceptions. It will continue to participate in the EU Single Market (including all four freedoms) and Customs Union, and the full body of EU law, including any changes made to it during the transition period, will apply to and in the UK. The UK will not, however, be part of EU decision-making: its representation in EU institutions, agencies and bodies will cease and persons appointed, nominated or representing the UK, and persons elected in the UK, will mostly cease to take part in these organisations.

A127 provides that EU law shall be applicable to and in the UK during the transition period. A7 provides that references to Member States and competent authorities of Member States in provisions of EU law made applicable by the Withdrawal Agreement are to be interpreted as including the UK and its competent authorities, subject to limited exceptions.

As a result, the provisions of the EU Withdrawal Act, which repeals and on-shores the EU acquis, will not be needed until the end of the transition period. The application of EU law to the UK during transition will be achieved via the proposed EU Withdrawal Agreement Bill. This will implement the terms of the Withdrawal Agreement into English law.

The Bill is yet to be introduced to Parliament. The Government's intention is to put forward the Bill after the successful conclusion of the "meaningful vote" of the House of Commons.

## 3. DISPUTE RESOLUTION AND GOVERNANCE

The first section of Part 6 of the Withdrawal Agreement is concerned with the enforcement of the provisions on citizens' rights and financial arrangements. For eight years following the termination of the transition period, courts in the UK may refer questions to the ECJ on citizens' rights, in which case the decision of the ECJ will be binding. To that extent, the ECJ will have a continuing role.

This Part also contains the dispute settlement provisions. These establish a Joint Committee comprised of EU and UK representatives, which is responsible for the implementation and application of the agreement, as well as more technical tasks. Any decisions reached are legally binding on both the UK and EU, and require joint consent. If the Joint Committee cannot reach consensus, either side may refer the dispute to arbitration by the Permanent Court of International Arbitration in The Hague. A174 makes further provision for a continuing role for the ECJ - it requires any disputes concerning EU law to be referred by the arbitrators to the ECJ for determination. As in relation to citizens' rights, however, the ECJ's role is limited to EU law.

The only other unusual aspect of the dispute resolution provisions (in the context of an international treaty) is the ability for the arbitrators to impose fines under A178, rather than simply damages, if an award is not complied with.

## 4. THE IRISH BACKSTOP

### Why the controversy?

As already noted, the Protocol on Ireland and Northern Ireland is possibly the most contentious provision in the whole Withdrawal Agreement. It contains the "backstop", so-called because the arrangements described come into force on the termination of the transition period, and will apply until a new agreement is reached at EU and UK level, unless an alternative is agreed.

It has excited opposition across the political spectrum for four key reasons:

- First, it is by its nature open-ended.

- Second, any termination or modification requires EU agreement, so the UK cannot unilaterally end the arrangements.
- Third, it treats Northern Ireland in important respects differently from the rest of the United Kingdom.
- Fourth, as it establishes a customs union, obliging the UK to adopt the EU's common external tariff, the UK will be unable to conclude trade agreements with other countries on goods under WTO GATT rules.

### How does it work?

The Protocol establishes a single customs territory for goods, with no tariffs on trade between the UK and EU, subject to continued compliance with EU laws on taxation, environmental protection, labour and social standards, state aid and competition. VAT and excise, agriculture and electricity in Northern Ireland will be expressly subject to the EU acquis. The European Commission and the ECJ will have power to determine whether the UK has correctly applied EU law in Northern Ireland. The UK will also be bound by any amendments to existing EU law referred to the Protocol. In new areas, if the Joint Committee does not agree to adopt the proposal, the EU may take "appropriate remedial measures" against the UK.

In respect of trade in goods, the EU Customs Code will apply. Unless something else is agreed before 1 July 2020, trade will, not, however, be frictionless, as a movement certificate, specified by the EU, will need to be sent and stamped by customs officials, generally in advance of export, together with other appropriate documents. Separately, a long list of EU legislation will be made specifically applicable to Northern Ireland relating, inter alia, to customs, trade in agriculture, manufactured goods, pharmaceuticals, waste, the environment, oil, intellectual property and, even, sanctions policy. Goods manufactured in Northern Ireland will have a separate designation from goods made in the rest of the UK.

### Will it be used?

The ostensible purpose of these provisions is to avoid a hard border on the island of Ireland (which both the UK and EU have agreed). Whether they are in fact necessary to achieve this aim continues to be debated.

It is of course possible that the Protocol will never come into effect, if, in accordance with the intention that underpins the Political Declaration, the EU and UK can conclude alternative arrangements prior to the end of the transition period - as extended, if applicable. The Political Declaration (at paragraph 19) purports to underline this point, recalling the Parties' "determination to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing".

It is worth emphasising that the result of the backstop is that Northern Ireland will effectively enjoy frictionless trade with the EU (excluding the UK). However, the UK will not enjoy frictionless trade with the EU including Northern Ireland. As a result, there is likely to be a strong preference from a practical and business perspective to extend the transition period rather than rely on the backstop - an option which is also likely to be preferable from a political perspective (with some exceptions, notably the European Research Group). The backstop appears very much to be a last resort.

## 5. DATA PROTECTION AND PRIVACY

### Data privacy laws during the transition period

The draft Withdrawal Agreement provides that, in line with other EU legislation, the General Data Protection Regulation ("GDPR") and other EU data privacy legislation will continue to apply during the transition period.

### Data privacy laws post the transition period

The Withdrawal Agreement also covers the position post the transition period, with the GDPR (and other EU data privacy laws) continuing to apply in the UK after the end of that period in certain cases if the UK has not been determined by the EU Commission as providing an adequate level of data protection (an "adequacy decision"). In this case, the GDPR will continue to apply to personal data which relates to individuals outside the UK if either (i) the personal data was processed before the end of the transition period

or (ii) it is processed on the basis of the Withdrawal Agreement (although what this exactly means is not clear).

There is, however, a caveat to this, as it is specifically stated that the provisions in Chapter VII of the GDPR will not apply. Importantly this includes the one-stop shop mechanism. From the end of the transition period, unless an organisation's main establishment is in an EU member state (and not the UK for this purpose), it will therefore cease to benefit from the one-stop shop regime.

There does not appear to be a mechanism for such organisations to be required to appoint a representative in the EU, such as the requirement that exists under the GDPR for organisations who are caught by its extra-territorial scope. This is surprising and may well be an oversight that is corrected in future.

### Data transfers

Whilst the Withdrawal Agreement does not explicitly state that flows of personal data can continue from the EU to the UK (or indeed vice versa) during the transition period, this is clearly implicit and the legal basis can be argued in a couple of ways. It would, however, be preferable if this had been clearly spelt out to avoid any unnecessary misunderstanding or indeed legal challenge.

The Political Declaration specifies that the EU Commission will commence the process of assessing the UK's data protection regime as soon as possible after the UK's exit, and will endeavour to complete this process by the end of 2020. There is thus no guarantee at this stage that an adequacy decision will be forthcoming, although this clarity around the timeframe is helpful for contingency planning purposes.

### Position of the UK Information Commissioner's Office ("ICO")

The ICO will continue as a supervisory authority for GDPR purposes during the transition period. However, despite this, the Withdrawal Agreement does not preserve the ICO's seat at the European Data Protection Board even for the transition period. There is flexibility for the ICO to be invited to attend in a non-voting capacity, but even this is not a given.

The Political Declaration states that the EU and the UK should make arrangements for "appropriate co-operation" between data protection regulators. Whether this would include the ICO having a full seat at the EDPB is however doubtful.

## 6. CIVIL JURISDICTION AND JUDGMENTS

### Withdrawal Agreement

The EU has developed various measures to promote and facilitate judicial co-operation in cross-border civil and commercial cases. EU rules prescribe how the governing law of contracts and non-contractual obligation is determined, the circumstances in which a member state court has (or does not have) jurisdiction to hear a dispute, and when and how member state courts will enforce each other's judgments.

Title VI of Part 3 of the Agreement sets out the situations in which these rules will continue to apply after the end of the transition period and reflects the position settled in June 2018 and described in our briefing "[Jurisdiction agreements: new developments](#)". In summary, legal proceedings begun before the end of the transition period will continue, after the end of transition, to be treated by UK and EU27 courts in accordance with EU rules. Most notably, judgments delivered post-transition will continue to be enforceable across the EU, provided the relevant legal proceedings were begun before the end of transition. However, exclusive jurisdiction clauses in favour of the English courts agreed before the end of transition will not, post-transition, be upheld in accordance with the Brussels Regulation as they are at the moment.

### What about Lugano?

The terms of the Agreement leave some uncertainty over the fate of the Lugano Convention, the agreement which extends the broad scheme of EU law to matters involving Switzerland, Norway and Iceland. The Convention will continue to bind the UK during the transition period, but it is not yet clear whether the non-EU contracting states will continue to uphold it in respect of the UK. It is understood that agreements on a number of separation issues are being negotiated with the EFTA states and Switzerland, which echo certain

aspects of the Withdrawal Agreement. It is not known whether the application of the Lugano Convention is part of this discussion.

### Post-transition?

As regards the position post-transition, the UK's aspirations for a post-transition bilateral agreement that would replicate the effects of the current EU regime are not reflected in the Political Declaration which refers only to potential co-operation in the fields of family law and criminal law. Hopes for future cross-border co-operation now vest in a more limited international agreement to which EU member states (and others) are already party and which the UK can and intends to accede to: the 2005 Hague Convention on Choice of Court Agreements.

## 7. INTELLECTUAL PROPERTY

### Withdrawal Agreement

Broadly Part 3 of the Withdrawal Agreement provides continuity of protection for owners of EU-wide rights. Both UK and EU rights owners in future will have to hold both EU and UK rights to have the territorial protection they have today and these rights will need to be separately enforced. The Agreement generally reflects what was agreed between the EU and the UK in March's draft Withdrawal Agreement as discussed in our previous briefings "[Deal or No deal: IP](#)" and "[IP rights post-Brexit](#)".

The registration and enforcement of EU IP rights will continue as currently during the transition period. At the end of this period owners of EU registered rights (principally EU trade marks and Community registered designs) will be granted a comparable and enforceable right in the UK under English law. Importantly for rights owners, the Agreement now confirms that these rights will be granted without any need for new applications or re-examination and will be free of charge.

Another area on which there has been progress is the contentious issue of Geographical Indications. Owners of EU rights existing at the end of the transition period will be entitled to use their right without any re-examination in the UK: these will be granted at least the same level of protection under English law. This will apply unless and until

an agreement on the future relationship between the EU and the UK enters into force.

### Post-transition?

The Political Declaration states that IP rights will be provided for in a manner that "goes beyond" WTO protections in the future economic partnership agreement and maintaining current "high levels" of protection.

The Declaration identifies areas where more progress is needed to protect IP owners:

- Certain areas of cross-border copyright protection which will cease from exit day such as the provision of database rights to UK nationals from EEA states.
- Appropriate arrangements to protect Geographical Indications so as to reflect the Withdrawal Agreement (see above).

It is also interesting that the document states that the UK and the EU should be free to establish their own regimes for the exhaustion of intellectual property rights. As discussed in our earlier briefing "[Deal or No deal: IP](#)", clarity on the future exhaustion regime is an important issue for UK rights owners. An unbalanced EU/UK regime would be of great concern as this could put UK businesses at a competitive disadvantage.

Helpfully, there is a desire to establish a mechanism for cooperation and exchange of information on IP issues (though nothing has been agreed as yet); previous EU/UK cooperation in these areas has been important in managing IP enforcement.

## 8. ONGOING COMPETITION AND STATE AID CASES

The Withdrawal Agreement also provides much-needed answers to who will have jurisdiction over ongoing competition and state aid cases. The European Commission will maintain jurisdiction over all cases that are commenced prior to the expiry of the transition period. For state aid cases, a case will be deemed to have been commenced by the Commission when the procedure has been allocated a case number; for antitrust cases, this is when the Commission initiates proceedings; and for merger control, this is primarily the date of notification to the Commission (with specific technical timing rules

in the case of referrals from Member States to the Commission).

With respect to any state aid granted by the UK Government during the course of the transition period, the Commission will retain jurisdiction to investigate the compatibility of such aid with the internal market for a period of four years after the end of the transition period.

Commission decisions that are either adopted before the end of the transition period or relate to cases that are ongoing at the end of the transition period will be binding on, and in, the UK. In respect of cases resolved by the Commission through commitments, the default position is that the Commission will retain jurisdiction to monitor and enforce such commitments in relation to the UK unless the Commission specifically agrees to transfer their monitoring and enforcing role to the UK authority for that case.

transparency and stability, recognising this is in the parties' mutual interest.

The commitments make it clear that equivalence, rather than mutual recognition, is intended to be used as a basis for a future relationship concerning financial services. "Equivalence" is not currently defined in the document, but it is reasonable to assume that it will be given the meaning contained in existing EU legislation, which will become UK legislation once on-shored. Although there is no mention of any extension to the scope of the existing equivalence regimes, which has been lobbied for as necessary by certain areas of the financial services industry, it is notable that equivalence assessments are to be made by both the EU and UK (and there is no existing UK equivalence regime outside of the EU framework, suggesting there will need to be some extension, at least on the UK side).

## 9. FINANCIAL SERVICES

The Withdrawal Agreement does not address financial services specifically. Separation issues (for example, with regard to the continuity of financial services contracts) have been left to the financial sector (and individual Member States, if so minded) to manage.

The provisions of the Political Declaration in relation to financial services cover the following:

- Commitments to preserving financial stability, market integrity, investor protection and fair competition, while respecting the parties' regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest. This is without prejudice to the parties' ability to adopt or maintain any measure where necessary for prudential reasons.
- Commencement of equivalence assessments by both parties as soon as possible after the United Kingdom's withdrawal from the Union, endeavouring to conclude these assessments before the end of June 2020.
- Close and structured cooperation on regulatory and supervisory matters, grounded in the economic partnership and based on the principles of regulatory autonomy,

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