BREXIT: MOVING TOWARDS THE FINAL DEAL

January 2020
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INTRODUCTION

With the House of Commons recently endorsing Boris Johnson’s revised Withdrawal Agreement, a 31 January 2020 Brexit date now appears a certainty. But a lot of questions remain about the shape of the future relationship between the EU and the UK. Talks on this future relationship deal are expected to start in February or March of this year.

Following the Conservative victory in the UK general election on 12 December 2019, the House of Commons voted in favour of the Withdrawal Agreement Bill on 9 January. The Withdrawal Agreement Bill ratifies the Withdrawal Agreement which the UK government and the EU negotiating teams signed in October 2019. This means that the deal is now passing to the House of Lords and the European Parliament and the Council for their final approval. Brexit will almost certainly take effect on 31 January 2020.

This briefing provides a high-level outline of the deal reached and highlights the impact on relevant practice areas. For each practice area, we distinguish between two phases: (i) the transition period and (ii) the future relationship. For the latter phase we address two scenarios: (i) agreement is reached on the future relationship and (ii) no such agreement is reached.

If you have any questions on how Brexit might impact your business, please contact our dedicated Brexit team at brexit@debrauw.com or contact your usual De Brauw contact.
WITHDRAWAL AGREEMENT

PURPOSE
This legally binding agreement sets out how the UK will leave the EU. Its scope includes free movement of goods, citizens’ rights, governance and matters relating to Ireland. The Withdrawal Agreement has essentially remained the same as under Theresa May’s November 2018 deal, with the exception of the revised protocol relating to Northern Ireland. The Withdrawal Agreement provides for a transition period allowing time to agree on a future relationship. During this period, EU law remains fully applicable in the UK, but the UK no longer takes part in EU decision-making. The transition period will run from 31 January 2020 to 31 December 2020, and can be extended until 31 December 2022 at the latest. Such an extension is only possible once, and it must be agreed before 1 July 2020. However, the UK government has announced it rules out any extension, as it wants to avoid further delays in the Brexit process. The UK’s Withdrawal Agreement Bill therefore prohibits the UK government from asking for an extension. The Withdrawal Agreement also contains a number of provisions for the orderly winding down of existing arrangements in various areas. This means that many rights relied upon, or procedures initiated, under EU law before the end of the transition period will continue to be recognised and have full effect after the end of the transition period.

GOVERNANCE AND DISPUTE SETTLEMENT
The Withdrawal Agreement establishes a joint committee of EU and UK representatives. This joint committee will be responsible for supervising how the Withdrawal Agreement is implemented and applied. Disputes between the EU and the UK about the interpretation and application of the Withdrawal Agreement must also be resolved in the joint committee. If no mutually agreed solution can be reached within three months, the EU or the UK may request that an arbitration panel be set up, which will give a binding ruling. In case of disputes involving questions of EU law, the arbitration panel must ask the EU Court of Justice to give a preliminary ruling.

FUTURE RELATIONSHIP
NEGOTIATING ARRANGEMENTS
The revised Political Declaration agreed between the EU and the UK sets out the framework for the future EU-UK relationship and for the negotiation process. It largely builds on the political declaration which formed part of Theresa May’s deal, but it differs in a number of respects. Like the 2018 deal, the Political Declaration urges commencement of negotiations as soon as possible after the UK’s withdrawal from the EU, to ensure that the future relationship is in place by the end of 2020. The intention is to expeditiously develop a clear programme and timetable for negotiations, and to convene at high level to take stock of progress in June 2020. As mentioned above, the UK’s Withdrawal Agreement Bill makes it impossible for the UK government to ask for an extension to the transition period beyond the end of 2020. If indeed the UK sticks to this position, the negotiations will need to progress with great speed or the EU and UK risk ending the transition period with only a partial agreement on the future relationship deal or with no agreement at all.

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The Political Declaration still provides little detail about the substance of the future relationship. This has been left to further negotiation. The most relevant change to the November 2018 deal is that the Political Declaration now opts for a free trade agreement instead of a customs union. The declaration lists numerous areas which the EU and the UK plan to cover. It also mentions an overarching institutional framework, with the option of specific governance arrangements in individual areas. In terms of arrangements for dispute settlement and enforcement, the declaration foresees a role for formal resolution by the Joint Committee, for a flexible mediation mechanism in certain areas and – as under the Withdrawal Agreement – for an arbitration panel, which can refer questions of EU law to the European Court of Justice (ECJ).
NEXT STEPS

- **January 2020**
  Formal approval of the Withdrawal Agreement by House of Lords and European Parliament and Council

- **31 Jan 2020**
  Brexit day and start of preparations for trade talks

- **30 Jun 2020**
  Deadline for extending the transition period

- **31 Dec 2020**
  Has a future relationship been agreed?

- **January 2021**
  New EU/UK relationship starts

- **January 2021**
  Exit without agreed new relationship

*The Withdrawal Agreement Bill currently prohibits any extension*
IMPLICATIONS BY PRACTICE AREA

TRADE IN GOODS

TRANSITION PERIOD
- The UK will remain in the EU internal market and single customs union until the end of the transition period. Also, goods which started movement before the end of the transition period can continue to circulate after this, except for live animals or animal products. The EU’s VAT rules will continue to apply in respect of cross-border transactions that took place before the end of the transition period.

AGREEMENT ON FUTURE RELATIONSHIP
- The Political Declaration foresees a free-trade area combining deep regulatory and customs cooperation, underpinned by provisions ensuring open and fair competition. This free-trade area should feature zero tariffs, and no fees, charges or other quantitative restrictions across any goods sectors.
- Under the new Protocol on Northern Ireland, the UK as a whole, including Northern Ireland, will leave the EU customs union and form a separate customs territory. However, to prevent a hard border between Ireland and Northern Ireland, certain EU single market regulations on goods will remain applicable in Northern Ireland, including EU VAT rules. As a result, while formally a customs border will be in place between Ireland and Northern Ireland, in effect a customs border will be created between Northern Ireland and the rest of the UK.

NO AGREEMENT ON FUTURE RELATIONSHIP
- The UK will leave the EU internal market without any alternative arrangements in place. This will result in an immediate return of tariffs and other restrictions on imports and exports, such as licences and price controls. The UK will be treated as a “third country” for VAT purposes, which could significantly affect the VAT treatment of cross-border supplies of goods or services.
- The Protocol on Northern Ireland will be applicable in the same way as in case of a future relationship deal (see above).
CITIZENS’ RIGHTS

TRANSITION PERIOD
- Until the end of the transition period, EU and UK citizens and their family members will continue to rely on citizens’ rights under EU law, including freedom of movement and residence.
- The Withdrawal Agreement contains extensive provisions on the protection of citizens’ rights after the end of the transition period for EU and UK citizens and their family members who lived in each other’s territory at the end of the transition period. In short, these citizens can continue to rely on the right to reside in that territory indefinitely. EU citizens can already apply for permanent residence on this basis through the so-called EU Settlement Scheme. Once acquired, the right of permanent residence will only be lost if a person is absent from the host state for more than five consecutive years.
- The Withdrawal Agreement also contains specific implementing arrangements for the protection of citizens’ rights. Until eight years after the end of the transition period, UK judges may refer any questions about the interpretation of citizens’ rights provisions in the Withdrawal Agreement to the ECJ for a preliminary ruling, and the European Commission and an independent UK authority will monitor how these provisions are implemented and applied.

AGREEMENT ON FUTURE RELATIONSHIP
- EU citizens not yet living in the UK at the time of the end of the transition period will no longer be able to rely on EU free movement rights and become subject to a new UK immigration regime, which may introduce restrictions on travel to and residence and employment in the UK. The same applies to UK citizens living in the EU.
- The EU and the UK intend to make arrangements on temporary entry and stay for business purposes in defined areas. Reciprocal visa-free travel for short-term visits is also envisaged. However, the Political Declaration contains no wording on longer-term rights of residence. This area will be governed by future EU and UK immigration systems.

NO AGREEMENT ON FUTURE RELATIONSHIP
- EU citizens not yet living in the UK at the time of the end of the transition period will no longer be able to rely on EU free movement rights and become subject to a new UK immigration regime, which may introduce restrictions on travel to and residence and employment in the UK. The same applies to UK citizens living in the EU.
- The UK government has set out its policy in relation to EU citizens moving to the UK in a no deal situation in a September 2019 policy paper. After Brexit, EU citizens who move to the UK will be able to apply for a 36 month temporary immigration status: European Temporary Leave to Remain (Euro TLR). The Euro TLR is, in principle, a temporary measure and the UK government intends to introduce a new, Australian-style points-based immigration system in January 2021.
FINANCIAL SERVICES

TRANSITION PERIOD
- During the transition period, EU and UK financial services firms can continue to rely on the passporting rights provided for in the respective EU directives and regulations.

AGREEMENT ON FUTURE RELATIONSHIP
- The Political Declaration mentions that the EU and the UK are committed to preserving financial stability, market integrity, investor protection and fair competition, while respecting both sides’ regulatory and decision-making autonomy, and their ability to adopt equivalence decisions in their own interest. Equivalence assessments by both sides should start as soon as possible after withdrawal, and they should be concluded before June 2020.
- As expected, there will be nothing similar to the current passporting regime. The Political Declaration also does not mention any form of “enhanced equivalence” as had been proposed in earlier plans. Therefore, equivalence may only cover those financial services areas where such regime currently exists, and it is likely that no treaty-based institutional arrangements will be put in place governing the granting and revocation of equivalence.
- Although designed for a hard Brexit, the UK’s “temporary permissions regime” (see below) will likely remain in place for incoming EU firms if, after the transition period, any agreement on the future relationship does not cover financial services.

NO AGREEMENT ON FUTURE RELATIONSHIP
- Passporting rights will no longer cover the UK, resulting in UK-licensed financial services firms losing access to the EU market and vice versa. However, the UK government and regulators have prepared a “temporary permissions regime” (TPR) which enables incoming EU firms to continue their activities after a hard Brexit, while applying for UK authorisation. While the TPR was designed for a hard Brexit (without transition period) it is likely that it will remain in place for incoming EU firms if, after the transition period, there is no agreement on the future relationship.
- In the absence of an overarching deal, the UK may, at most, receive equivalence status for certain areas of financial services. For example, EU regulators have confirmed their intention to allow the use of UK clearing houses by EU parties for a limited period of time.
- EU financial services firms that currently operate in the UK on the basis of passporting rights but did not enter the TPR, can run off their activities in an orderly manner under the Financial Services Contracts Regime (FSCR). Reciprocal temporary arrangements are in place in various EU jurisdictions, including Germany, France and Italy.
TAX

TRANSITION PERIOD
- Although the original Irish backstop has disappeared, the Withdrawal Agreement still provides for customs arrangements to ensure that Northern Ireland remains aligned with EU product standards. This ensures that Northern Ireland can operate within the UK customs territory while avoiding the need for regulatory or customs border between Ireland and Northern Ireland. The arrangements entail customs checks between Northern Ireland and the UK for products traded from or to the EU.
- The UK will be responsible for the collection of VAT and excise duties, including the enforcement of EU customs at points of entry into Northern Ireland. Northern Ireland will benefit from UK tariffs and trade deals with third countries, so that local enterprises continue to enjoy unhindered trade between UK and Northern Ireland.
- Although relevant principles of ECJ case law will be incorporated into the UK law upon the end of the transition period, courts or tribunals will be allowed to depart from those principles in specific circumstances. For VAT purposes, this could imply that UK and EU laws will soon start diverging.

AGREEMENT ON FUTURE RELATIONSHIP
- The Political Declaration does not specifically mention corporate taxation. It does, however, refer to state aid and to taxation and tax avoidance in the context of maintaining a robust and comprehensive framework that prevents undue distortions of trade and competition.
- Unlike the previous version, the Political Declaration now opts for a free trade agreement as the default basis for the future relationship, rather than a customs union. This means that the UK will be free to set its own import tariffs towards third parties.

NO AGREEMENT ON FUTURE RELATIONSHIP
- The key tax factors that are likely to have an immediate and major impact on cross-border business are related to customs and VAT matters, but also to corporate taxation.
- Directives removing tax on cross-border cash flows and corporate transactions within the EU will cease to apply between the EU and the UK. As a result, withholding tax leakage may become an issue, and tax-neutral treatment of corporate transactions involving UK companies may no longer be available.
- The EU’s fundamental freedoms, which have played a crucial role in securing non-discriminatory tax treatment of cross-border business activities, will cease to apply in relation to the UK.
COMPETITION LAW

TRANSITION PERIOD
- The European Commission (and other EU agencies) will continue to be competent to deal with mergers and investigations which were initiated before the end of the transition period. The EU should provide the UK with a list of all ongoing cases within three months after the end of the transition period. After the transition period, the UK’s Competition and Markets Authority’s (CMA) could launch its own review of mergers still pending with the European Commission.
- During the transition period, the European Commission will be competent to initiate new state aid procedures against the UK. For a period of four years after the end of the transition period, the European Commission may continue to initiate state aid cases where the aid was granted before the end of the transition period. After the transition period, the CMA will be the state aid regulator in the UK, but it will have to consult with the European Commission about all its draft decisions, and take “utmost account” of the Commission’s findings, before issuing decisions.

AGREEMENT ON FUTURE RELATIONSHIP
- The Political Declaration does not contain any specific information on this topic. However, many amendments proposed in the draft UK legislation do not depend on the outcome of the negotiations with the EU. In general, no changes are proposed beyond those necessary to manage the Brexit process.

NO AGREEMENT ON FUTURE RELATIONSHIP
- EU companies doing business in the UK may find themselves subject to parallel EU and UK merger assessments. Mergers that need to be notified to the EU may also need to be notified in the UK if no clearance decision has been obtained before 31 January 2020. In the UK, the CMA’s advice is to engage with it at an early stage if the merger review period will run beyond the end of the transition period. The CMA has signalled that in the months before the transition period ends, it will monitor non-notified merger cases over which the UK may obtain jurisdiction after the transition period.
- Similarly, the CMA has indicated that in cases where the European Commission has not made a decision before the transition period ends, the CMA may conduct investigations into breaches of UK competition law provisions occurring before or after Brexit. Companies seeking leniency should consider making a separate leniency application to the CMA.
- Draft UK legislation provides that UK competition regulators and courts must continue to follow pre-Brexit EU competition case law when interpreting UK competition law, but may depart from this case law where appropriate in the light of specified circumstances. The current European block exemption regulations (for example, those relating to vertical agreements and technology transfers) will be incorporated into UK law. Any commitments in EU Decisions remain enforceable by the CMA insofar as they relate to the UK.
- The UK has agreed to adopt the body of EU state aid law into UK law. The CMA has indicated that in a no-deal scenario it will ensure that the state aid regime is ready before the end of the transition period, “if necessary.”
EXPORT CONTROLS AND TRADE SANCTIONS

TRANSITION PERIOD
- During the transition period, EU export controls and trade sanctions regulations will continue to apply to and in the UK.

AGREEMENT ON FUTURE RELATIONSHIP
- Export of dual-use items to and from the UK will require a type of export authorisation. Existing export licences issued in the UK will no longer be valid for exporting dual-use items from the EU, and vice versa; consequently, a new licence will be required.
- EU companies with a UK nexus will find themselves subject to parallel EU and UK sanctions, as the UK can no longer rely on the EU sanctions regime. The UK will likely adopt all EU sanctions in force on 31 January 2020. The UK will implement sanctions regimes through new legislation made under the Sanctions and Anti-Money Laundering Act 2018. This act will ensure that the UK can continue to implement UN sanctions regimes and adopt new measures to prevent money laundering and terrorist financing, allowing it to keep in step with the EU if it wants.
- Pursuant to the Political Declaration, there will be consultations between the EU and the UK on sanctions, with an intensified exchange of information where foreign policy objectives are aligned and with the possibility of adopting mutually reinforcing sanctions.

NO AGREEMENT ON FUTURE RELATIONSHIP
- Export of dual-use items to and from the UK will require a type of export authorisation (see above).
- The UK will introduce its separate sanctions regime to implement UN sanctions regimes and other measures (see above) but without a mechanism for alignment of EU and UK sanction regimes as foreseen in the Political Declaration.
DISPUTE RESOLUTION

TRANSITION PERIOD
- EU regulations on conflict of laws (Rome I and Rome II), on jurisdiction and on enforcement of judgments (Brussels Ibis) will continue to apply throughout the transition period.
- UK courts will apply Rome I to contracts concluded before the end of the transition period, and they will apply Rome II in respect of events giving rise to damage where those events occurred before the end of the transition period. The remaining EU member states will continue to apply the Rome I and II regulations to EU-UK relationships beyond the transition period, as these regulations provide for universal application.
- The Brussels Ibis regulation will be applicable to proceedings instituted before the end of the transition period. Brussels Ibis will also apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period.

AGREEMENT ON FUTURE RELATIONSHIP
- It is currently unknown whether and in what form EU private international law regulations will be part of a future deal.
- The UK has declared it is keen to explore a new bilateral agreement with the EU, containing a comprehensive package of rules on jurisdiction and on recognition and enforcement of judgments in civil, commercial, insolvency and family matters. This new bilateral agreement may provide for the continuation of some, of most or of all existing regulations.
- The UK has indicated it intends to incorporate the Rome I and II regulations into domestic law. This means that the UK will continue to apply the same conflict of law rules regarding contractual and non-contractual obligations. As a result, clauses specifying which law governs contractual obligations will continue to be recognised by the UK courts.

NO AGREEMENT ON FUTURE RELATIONSHIP
- The EU regulations on conflict of laws, jurisdiction and enforcement of judgments will no longer apply to the UK, making UK judgments less effective in the EU, and vice versa.
- The UK has acceded to the Hague Choice of Court Convention, effective from the date of withdrawal from the EU (1 February 2020). This provides a baseline mutual recognition of jurisdiction clauses in business-to-business contracts in a no-deal scenario.
- The UK has indicated it intends to incorporate the Rome I and II regulations into domestic law (see above).
RESTRUCTURING AND CROSS-BORDER INSOLVENCIES

TRANSITION PERIOD
- The Insolvency Regulation will continue to apply to restructuring and insolvency proceedings started before the end of the transition period. This includes any action which derives directly from and is closely connected with those proceedings.
- The Withdrawal Agreement does not specify whether the Insolvency Regulation will continue to apply to secondary proceedings.

AGREEMENT ON FUTURE RELATIONSHIP
- The Political Declaration does not contain any specific guidance on restructuring and insolvency. See "Dispute resolution" for the UK’s intention to enter into a new bilateral agreement, which will include insolvency matters.

NO AGREEMENT ON FUTURE RELATIONSHIP
- The EU Insolvency Regulation will cease to apply. In EU-UK cross-border situations, the national law of each EU member state and the UK will consequently govern (i) the recognition of restructuring and insolvency proceedings and (ii) the appointment and powers of bankruptcy trustees or other insolvency practitioners. As a result, UK restructuring and insolvency proceedings will no longer be automatically recognised in the EU, and vice versa. The coordination of these proceedings in the EU and the UK, which the Insolvency Regulation currently provides for, will also end.
- UK schemes of arrangement are outside the scope of the Insolvency Regulation. It has been argued that these schemes will currently be recognised elsewhere in the EU on the basis of the Brussels Ibis regulation, but in a no-deal scenario, the parties involved will have to fall back on the application of general principles of private international law, unless the UK accedes to the Lugano convention (see also “Dispute resolution”).
INTELLECTUAL PROPERTY

TRANSITION PERIOD
- The protection of IP rights in the UK during the transition period will, in principle, not change.
- Holders of EU trademarks, Community design rights and Community plant variety rights that are registered before the end of the transition period, will obtain equivalent rights for the UK.
- Where these rights have been applied for but have not been registered by the end of the transition period, applicants may apply for similar protection in the UK within nine months after the end of the transition period, claiming priority of their earlier EU application.
- Holders of unregistered Community design rights or database rights that arose before the end of the transition period will obtain similar protection in the UK.
- EU law governing exhaustion of IP rights will continue to apply without limitation during the transition period, in both the UK and the EU.
- No significant changes in UK patent law or trade secret protection are currently foreseen.
- The framework for the granting of supplementary protection certificates will continue to apply, in any case for applications filed before the end of the transition period.
- The future of the unitary patent system and the Unified Patent Court is unclear, partly because ratification by Germany is uncertain.

AGREEMENT ON FUTURE RELATIONSHIP
- Under the Political Declaration, the EU and the UK should provide for the protection and enforcement of IP rights to stimulate innovation, creativity and economic activity. This will preserve high levels of protection, including on the sui generis right on databases.
- The EU and the UK should maintain the freedom to establish their own regimes for the exhaustion of IP rights.
- A mechanism for cooperation and exchange of information on IP issues of mutual interest should be established.

NO AGREEMENT ON FUTURE RELATIONSHIP
- After the transition period, IP rights in and to products first sold with the right holder’s consent in the EU will not automatically be exhausted in the UK, and vice versa.
- EU residents holding newly created database rights will not automatically enjoy similar protection in the UK, and vice versa.
DATA PROTECTION

TRANSITION PERIOD
- EU data protection law will continue to apply in the UK. After the end of the transition period, EU data protection law will continue to apply in the UK to personal data of non-UK individuals if the data was processed under EU law before the end of the transition period or is processed on the basis of the Withdrawal Agreement.
- Personal data can flow freely from the EU to the UK during the transition period, but the rules described in the “No agreement on future relationship” scenario will apply after the transition period ends.

AGREEMENT ON FUTURE RELATIONSHIP
- Regulators in the field have expressed their commitment to a high level of personal data protection and cooperation. The EU will start assessing the UK’s data protection framework as soon as possible after the UK’s withdrawal, with a view to adopting an “adequacy decision” by the end of 2020 if the relevant conditions are met. The UK will take steps to facilitate transfers of personal data to the EU. Both the EU and the UK have agreed that cross-border data flows should not affect data protection rules on either side.

NO AGREEMENT ON FUTURE RELATIONSHIP
- The free flow of personal data from the EU to the UK will be impacted, unless the UK obtains an “adequacy decision” from the EU, or unless companies arrange for alternative data transfer mechanisms, such as standard contractual clauses or binding corporate rules.
ENERGY AND ENVIRONMENT

TRANSITION PERIOD
- EU energy legislation (including the “third energy package”) will remain applicable during the transition period.
- The level of environmental protection provided by law, including on industrial emissions and climate change, will remain the same during the transition period and will not be reduced below the level of the common standards already in existence in the EU and the UK.

AGREEMENT ON FUTURE RELATIONSHIP
- The EU and the UK have committed to open and fair competition, explicitly mentioning environmental standards (and hence, also industrial emissions and climate change).
- The EU and the UK have agreed to facilitate technical cooperation between electricity and gas networks operators and any organisations involved in the planning and use of energy infrastructure that connect the EU and the UK’s energy systems. In this regard, the security of supply and efficient trade regarding interconnectors will also be considered.
- The EU and the UK will consider linking a UK national greenhouse gas emissions trading system with the EU’s emissions trading system.

NO AGREEMENT ON FUTURE RELATIONSHIP
- The EU’s “third energy package” legislation, facilitating the internal energy market and other energy directives has already been incorporated in UK domestic legislation. If there is no agreement on the future relationship, the UK will be free to amend this legislation. UK governmental papers suggest a preference for future energy integration and for remaining in the internal energy market. Therefore, the UK may not adopt substantial differences in legislation.
- The UK will fall back on the WTO regime for electricity and gas imports and exports, and accordingly, it will in theory be free to set import tariffs (provided they are the same towards all WTO parties). UK governmental papers suggest, however, that neither side is likely to set tariffs on energy supplies.
- Both the EU and the UK have reaffirmed their existing commitments to multilateral environmental agreements they are already party to (including those on climate change).
- The UK has committed to implementing a system equivalent to the EU’s emissions trading system.