

# Brexit: Deal or No Deal?

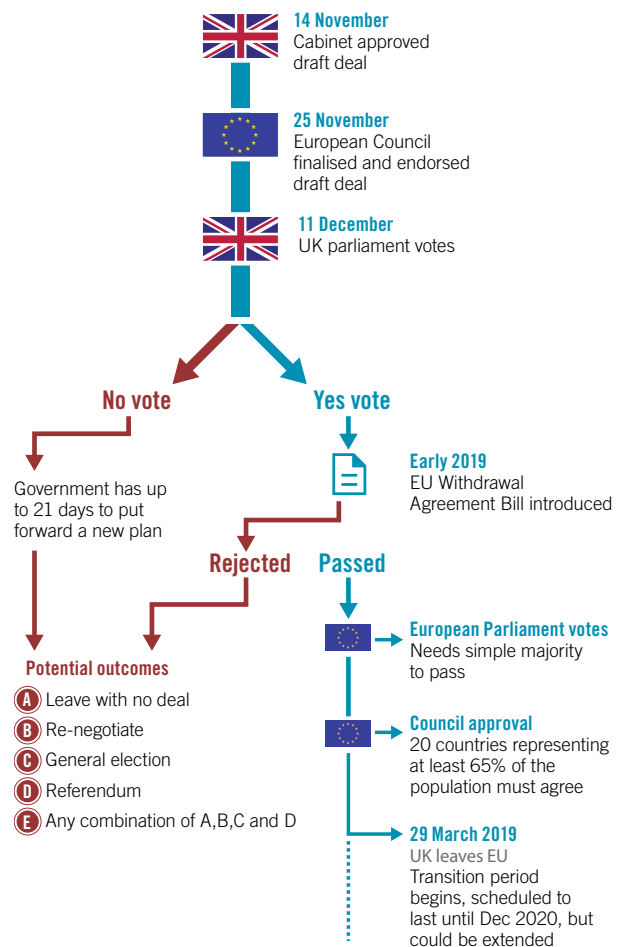
After 18 months of negotiations, the European Council has finalised and endorsed a withdrawal agreement for the UK and approved a political declaration on the EU-UK future relationship. The UK government and the EU negotiating teams previously reached a preliminary agreement on this deal on 14 November 2018.



On 11 December 2018, the UK Parliament will vote on the withdrawal agreement. An “aye” by the majority of MPs will mean that the deal passes to the Council and the European Parliament for their final approval and that it takes effect, as intended, on 30 March 2019. In the case of a “no”, a deal along the lines of the withdrawal agreement and political declaration becomes highly uncertain and a number of scenarios become possible. These include: no deal, renegotiation, a general election, a second referendum, or any combination.

This briefing provides a high-level outline of the deal reached and highlights the impact on relevant practice areas. As it is by no means certain whether the deal, let alone an agreement on the future relationship, will be ratified, we distinguish between three different scenarios for each practice area: (i) no deal is reached at all, (ii) a deal is reached on the withdrawal, but not - before the end of the transition period - on the future relationship and (iii) there is a deal on the withdrawal and - before the end of the transition period - on the future relationship.

## Brexit: next steps



## 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 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 30 April 2019 to 31 December 2020 but 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.

The withdrawal agreement also contains a number of provisions for the orderly winding down of existing arrangements in various areas. As a result, 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 ECJ to give a preliminary ruling. Under the political declaration the same dispute resolution arrangements are envisaged.

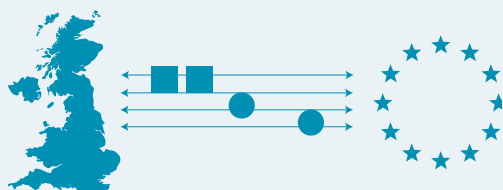
## FUTURE RELATIONSHIP

### Negotiations arrangements

The political declaration agreed by the European Council sets out the framework for the future EU-UK relationship and for the negotiation process. The declaration urges commencement of negotiations as soon as possible after the withdrawal agreement takes effect, to ensure that the future relationship is in place by the end of 2020. The intention is to develop a clear programme and timetable, and to have a high-level conference to take stock of progress at least every six months

### Contents

The political declaration provides little detail about the substance of the future relationship. This has been left to further negotiation. 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. As such, it builds on the UK's July 2018 "Chequers" plan and the European Council's March 2018 negotiating guidelines.



## Trade in goods

### IMPLICATIONS PER PRACTICE AREA

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#### 1. No deal

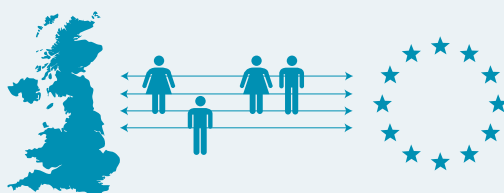
- The UK will crash out of the EU internal market; this will result in an immediate return of tariffs and other restrictions on imports and exports, such as licences and price controls. The UK will be treated as a “third country” for VAT purposes, which could significantly affect the VAT treatment of cross-border supplies of goods or services.

#### 2. Withdrawal-only deal

- 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.
- The absence of a future relationship agreement will trigger the “backstop” solution designed to avoid a hard border in Ireland. This means that a single EU-UK customs union will be established until any future relationship becomes applicable. Under this “single customs territory”, the UK will have to adhere to the EU's external tariffs and rules of origin, as well as to a limited set of internal market rules. This will avoid the need for tariffs, quotes or checks on rules of origin between the EU and UK.

#### 3. Future relationship deal

- 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 all goods sectors.
- The future arrangement should find inspiration in the single customs territory “backstop” solution. Contrary to the backstop, however, no full customs union is foreseen, nor are there references to “frictionless trade” or to the “facilitated customs arrangement” as proposed by the UK in the Chequers plan.



## Citizens' rights

### 1. No deal

- EU citizens already living in the UK 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 has indicated, however, that in the case of no deal, it intends to respect existing EU citizens' rights. The UK will thus unilaterally implement the provisions of the withdrawal agreement (see below). The EU may or may not reciprocate.
- The UK's new regime, as set out in the Chequers plan, will be "a system that works for all parts of the UK". The system will be based on skill rather than nationality. A government white paper with more detail is expected soon.

### 2. Withdrawal-only deal

- The withdrawal agreement contains extensive provisions on the protection of citizens' rights. In short, EU and UK citizens and their family members who lived in each other's territory at the end of the transition period can continue to rely on the right to reside in that territory indefinitely. 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.

### 3. Future relationship deal

- 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.



## Financial services

### 1. No deal

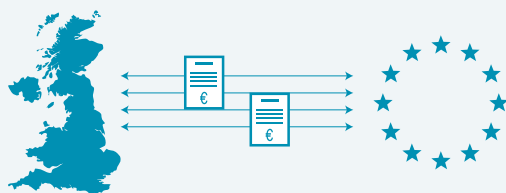
- Passporting rights will no longer cover the UK, resulting in UK-licensed financial institutions losing access to the EU market and vice versa. However, the UK government and regulators have prepared a “temporary permissions regime” which enables incoming EU firms to continue their activities after Brexit, while applying for UK authorisation. Reciprocal arrangements are only planned in a limited number of EU jurisdictions, including Germany.
- EU regulators did confirm their intention to allow the use of UK clearing houses by EU parties for a limited period of time.
- In the absence of an overarching deal, the UK may, at most, receive equivalence status for certain areas of financial services.

### 2. Withdrawal-only deal

- During the transition period, EU and UK firms can continue to rely on passporting rights. But after that, this situation ends. It is possible, but by no means certain, that the UK’s “temporary permissions regime” will also be available for incoming EU firms for a certain period if there is no future relationship deal after the transition period.

### 3. Future relationship deal

- 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 proposed in the Chequers plan. Therefore, equivalence may only cover those financial services areas where such regime currently exist and it is likely that no treaty-based institutional arrangements will be put in place governing the granting and revocation of equivalence.



## Tax

### 1. No deal

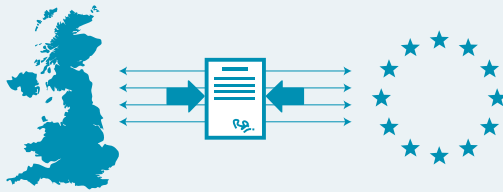
- The key tax consequences that are likely to have an immediate and major impact on cross-border business are related to customs and VAT matters (see “Trade in goods” above).
- A no deal scenario may also have significant consequences for corporate taxation.
- EU directives removing taxes on cross-border cash flows and corporate transactions within the EU will cease to apply between the EU and the UK. As a result, withholding tax leakage 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.

### 2. Withdrawal-only deal

- During the transition period, the existing EU rules – in particular, the EU’s fundamental freedoms and the EU directives – that are relevant for both direct and indirect taxes, will continue to apply (see “Trade in goods” above).
- The “backstop” solution will provide for certain arrangements on taxation that are clearly aimed at preventing the UK from becoming the “Singapore” of Europe. These arrangements include commitments to continue implementing anti-base erosion and profit shifting (BEPS) measures – which are aimed at corporate tax avoidance practices – and reaffirmation of the EU Code of Conduct for business taxation.

### 3. Future relationship deal

- The political declaration does not contain specific references to corporate taxation. But references to both state aid and tax are included in the context of building on the level playing field set out in the withdrawal agreement. We expect the EU will strongly push for measures preventing the UK from unfair competition in the field of corporate taxation.



## Competition law

### 1. No deal

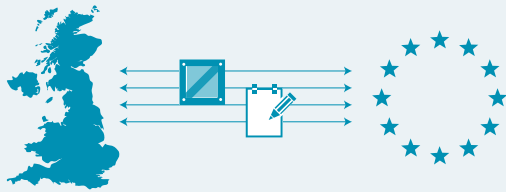
- EU companies doing business in the UK may find themselves subject to parallel EU and UK merger assessments. Mergers that need to be notified to the EU may also need to be notified in the UK if no clearance decision has been obtained before 30 March 2019. In the UK, the advice of the Competition and Markets Authority's (CMA) is to engage with it at an early stage if the merger review period will run beyond Brexit.
- Similarly, the CMA has indicated that in cases where the European Commission has not made a decision prior to Brexit, it 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.
- 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 Brexit "if necessary".

### 2. Withdrawal-only deal

- 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.
- 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.

### 3. Future relationship deal

- 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.



## Export controls and trade sanctions

### 1. No deal

- 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 29 March 2019. 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.

### 2. Withdrawal-only deal

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

### 3. Future relationship deal

- 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.





## Dispute resolution

### 1. No deal

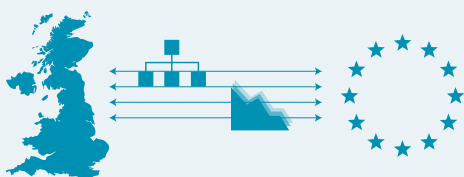
- The extensive EU regulations on conflict of laws, jurisdiction and enforcement of judgments will no longer apply to the UK, making UK judgments less effective in the EU and vice versa.
- The Brussels I regulation will no longer be applicable and consequently the EU and the UK will have to fall back on their general principles of private international law, unless the UK accedes to the Lugano convention.
- The UK has indicated it intends to incorporate the Rome I and II regulations into domestic law. This means that clauses specifying the law governing contractual obligations will continue to be recognised by UK courts. The same is true for the recognition of UK law in the EU.

### 2. Withdrawal-only deal

- UK courts will apply EU conflict of law regulations to contracts concluded before the end of the transition period (Rome I), or in respect of events giving rise to damage (Rome II), 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 after the end of the transitional period as these regulations provide for universal application.
- The EU regulations on jurisdiction and enforcements of judgments will be applicable to proceedings instituted before the transition period.

### 3. Future relationship deal

- There is no agreement yet on the EU's proposal that the provisions of the Brussels I regulation continue to apply after the transition period in respect of legal proceedings instituted before the end of the transition period.
- The UK Prime Minister declared in July 2018 that the UK 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 will likely replicate the existing regulations. However, this requires reciprocity and is dependent on the EU's agreement.



## Restructuring and cross-border insolvencies

### 1. No deal

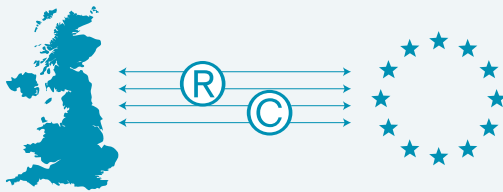
- The EU Insolvency Regulation will cease to apply. In EU-UK cross-border situations, the national law of each EU member state and the UK will consequently govern (i) the recognition of restructuring and insolvency proceedings and (ii) the appointment and powers of bankruptcy trustees or other insolvency 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 I 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”).

### 2. Withdrawal-only deal

- 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.

### 3. Future relationship deal

- 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.



## IP

### 1. No deal

- Holders of EU trade mark and community design right registrations and holders of EU plant variety rights will automatically obtain equivalent rights for the UK. Applicants for EU trademarks and community design rights not yet granted before Brexit may file a similar application in the UK, claiming priority of the earlier EU application, within a certain time frame.
- No significant changes in UK patent law are foreseen. The framework for the granting of supplementary protection certificates will continue to apply.
- The future of the unitary patent system and the Unified Patent Court is unclear, also because ratification by Germany is uncertain. The UK government has indicated it will explore the option of staying in the unitary patent system if it comes into effect before Brexit.
- As the EU Trade Secrets Directive has been implemented into domestic law, no significant changes are foreseen in this regard.
- The UK has announced that – for now - the EU rules on exhaustion of IP rights will continue to apply in the UK, but that it is not certain if this will be reciprocal.
- Existing database rights will remain in force in the UK after Brexit. UK legislation will provide a database right for UK citizens, residents and businesses. EU residents holding newly created database rights will no longer enjoy similar protection in the UK, and vice versa, unless the EU and UK agree on reciprocal protection.

### 2. Withdrawal-only deal

- The points under “no deal” also apply here, except for those on exhaustion of IP rights and database rights.
- EU law governing exhaustion of IP rights will continue to apply without limitation during the transition period, in both the UK and the EU.
- During the transition period, database right holders will continue to enjoy protection in the UK.

### 3. Future relationship deal

- The EU and the UK will 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 will 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 will be established.



## Data protection

### 1. No deal

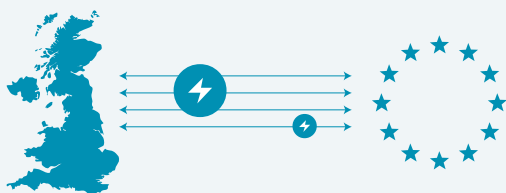
- The free flow of data between the EU and the UK will be impacted, unless the UK takes measures to ensure it becomes a “third country with an adequate level of data protection” in the eyes of the EU or unless companies arrange for alternative data transfer mechanisms, such as binding corporate rules.

### 2. Withdrawal-only deal

- EU data protection law will continue to apply in the UK to data processed before the end of the transition period or on the basis of the withdrawal agreement.

### 3. Future relationship deal

- There is a commitment to a high level of personal data protection and cooperation between regulators in this field. The UK has committed to take steps to ensure the comparable facilitation of personal data flows to the EU. Both the EU and the UK have committed to facilitate cross-border online data flows, while not affecting either the EU or the UK’s data protection rules.
- After the end of the transition period, the UK will continue to apply EU data protection rules to personal data received during its EU membership, until the EU has established – by way of an “adequacy decision” - that the UK’s personal data protection regime is essentially equivalent to that of the EU.



## Energy / Environment

### 1. No deal

- The EU's "third energy package" legislation, facilitating the internal energy market and other energy directives has already been incorporated in UK domestic legislation. In the event of a no-deal Brexit, 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. .

### 2. Withdrawal-only deal

- 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 not reduced below the level of the common standards already in existence in the EU and the UK.
- 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.

### 3. Future relationship deal

- 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

**> If you have any questions about Brexit, please get in touch with our dedicated team at [brexit@debrauw.com](mailto:brexit@debrauw.com) or your usual De Brauw contact.**