

Draft agreement on UK withdrawal from EU and transition

April 2018





Introduction

The ongoing Brexit negotiations between the UK and the EU reached a critical juncture at the March EU Council meeting at which political agreement was reached on what was called a Transition Deal.

The terms of the Transition Deal are encapsulated in what is referred to as the Withdrawal Agreement. With the important qualification that “nothing, including the Transition Deal, is agreed until everything is agreed”, this document summarises the key components of the draft Withdrawal Agreement that are likely to be of interest to businesses in both the Republic of Ireland and Northern Ireland.

Whilst agreement has been reached on a substantial range of issues in the Withdrawal Agreement, one of the key areas yet to be agreed is the arrangements in relation to the border between the Republic of Ireland and Northern Ireland.

Whilst it is tempting to adopt a “wait and see” attitude given all the possible permutations in terms of a final outcome on Brexit, we strongly advise against such an approach as scenario planning and a thorough understanding of the risks (and in some cases possible opportunities) makes good business sense.

I hope you find this document useful in understanding the issues and implications raised by the draft Withdrawal Agreement.

If you have any questions about Brexit and related matters please do get in touch with your usual KPMG contact or our subject matter experts listed at the back of this document.



Brian Daly
Head of Brexit
KPMG in Ireland

Overview: Draft withdrawal agreement and transition period

- The UK and EU have published on 19 March 2018 an updated [**Draft Withdrawal Agreement**](#) which sets out current progress on outstanding issues relating to the UK's withdrawal from the EU – including citizens' rights, data, customs and Northern Ireland.
- The two sides have also reached a **political agreement on the terms of a transition period at the EU Council Meeting on 23 March 2018** – this forms part of the wider Draft Withdrawal Agreement. While this is a significant political milestone, it does not in itself provide legal certainty for transition (see below).
- While negotiations are ongoing, the current proposals in the Draft Withdrawal Agreement have a number of implications for businesses and their Brexit preparations. The following slides aim to **set out the current state of negotiations on withdrawal and transition** to help with this.
- These issues are separate to the wider negotiations on the UK's future relationship with the EU post-transition. **Formal negotiations on the future relationship will begin shortly** – the EU has already set out its initial negotiation positions ahead of this.

'Nothing is agreed until everything is agreed'

While the UK and EU have reached **political** agreement on many aspects of withdrawal – including a transition period – these proposals will only be **legally** certain once ratified by the UK and European Parliaments and the European Council towards the end of 2018. This will require both sides to agree on a number of difficult – and as yet unresolved – issues in the coming months, including in relation to Northern Ireland.

What happens next:



*Estimated timing

Draft withdrawal agreement: Summary and implications

- The Draft Withdrawal Agreement aims to translate the agreement of 'sufficient progress' reached in December 2017 on withdrawal issues into a draft legal text. The tables below set out **current progress on these issues and KPMG's expert view on the implications for business**.
- The latest Draft Withdrawal Agreement is colour-coded to highlight the levels of progress made to date on various issues.
 - Green sections indicate areas of agreement by both sides;
 - Yellow sections indicate agreement on the policy objective but negotiations on specifics continue; and
 - White sections indicate areas of no agreement. Where there is no agreement, the table below outlines the EU's current position.
- While we would expect outstanding issues to move from **not agreed** to **agreed** in the coming weeks, movement in the other direction is possible.

| | Summary | Decision status | Business implications |
|---------------------------------|--|-----------------|--|
| TRANSITION (GENERAL PRINCIPLES) | | | |
| | The transition period will last until 31 December 2020 | Agreed | Brian Daly, Partner, Head of Brexit "Political agreement on transition to December 2020 alleviates some pressure on some companies, but it would be a mistake to think it solves the Brexit readiness problem. Firstly the transaction is not legally binding until the Withdrawal Agreement is agreed, which won't be until late 2018 at earliest. Unless the proverbial circle in relation to the Irish border can be squared, which is highly likely to require a change in thinking on customs arrangements, it may be difficult to conclude a Withdrawal Agreement. It is also worth noting that EU Regulators have not as yet indicated that regulated companies can assume the transition period will apply. |
| | If UK fails to fulfil transition obligations, EU may "suspend certain benefits" it enjoys from internal market participation | Not agreed | |
| | UK cannot participate in EU decision-making but may be invited to join meetings in non-voting capacity – and "may be consulted on a case-by-case basis" where there is a need for coordination | Agreed | |

Draft withdrawal agreement: Summary and implications

| | Summary | Decision status | Business implications |
|---------------------|--|-----------------|---|
| PEOPLE AND MOBILITY | EU citizens already in UK will retain existing rights and settled status | Agreed | <p>Aoife Newton, Director, Legal Services, Employment & Immigration Practice</p> <p>“Agreement has been reached over the status of citizens on both sides up to the end of transition. For EU nationals coming to the UK and UK nationals going to the EU, nothing changes between now and 31 Dec 2020 meaning businesses will be able to continue to recruit on the basis of current free movement rules.</p> |
| | EU citizens arriving “before the end of the transition period” will have the right to acquire settled status | Agreed | <p>The question around mobility from 2021 is less certain however and the UK system for EU nationals is still under consultation.</p> |
| | The recognition of certain professional qualifications will continue to apply in respective member states | Agreed | <p>One area that requires further clarity is how the eventual agreement will define what “resident” means – a crucial definition since it will unlock access to lifetime rights across immigration, social security and professional qualifications.</p> |
| | Freedom of movement – and therefore fly-in, fly-out travel – will continue until the end of transition | Agreed | <p>For now, employers are in a challenging situation when advising their employees on what to do to protect their positions. Should everyone get documentation by, and ensure physical presence on, 31 December 2020? Or is it enough that, in the case of EU nationals in the UK, that the UK is simply considered their home? We await further details.</p> |
| | Irish citizens in Northern Ireland who choose to assert their right to Irish citizenship have by virtue of the 1998 agreement Union citizenship and will continue to enjoy, exercise and have access to Union citizenship rights, opportunities and benefits | In progress | <p>What happens in a ‘no deal’ scenario? This document does not set out any fall-back provisions, however what has been agreed may be indicative of the unilateral positions the EU and UK might both take.</p> <p>For a full explanation of the implications, see Appendix 1.</p> |

Draft withdrawal agreement: Summary and implications

| | Summary | Decision status | Business implications (Bilateral trade with EU = £554 billion. With RoW = £527 billion) |
|------------------------|---|-----------------|--|
| TRADE, CUSTOMS AND TAX | The UK will remain a member of Single Market and Customs Union during transition | Agreed | <p>This provides an important level of certainty for business. Prioritising a free trade agreement with the EU and then rolling over those EU deals with third countries is the key task before seeking new FTAs with other parts of the world.</p> |
| | The UK can "negotiate, sign and ratify international agreements" during transition – but only implement them afterwards | Agreed | <p>Fionn Uibh Eachach, Director, Brexit Customs & Indirect Tax "While the announcement of a transitional period will bring much relief to businesses and clients, it would still be wise to proceed with an element of caution. An extension of only 21 months to the Customs Union and Single Market still may not be long enough to make necessary changes to systems, processes and supply chains without certainty of the final shape of the trading relationship between the EU and the UK post Brexit.</p> |
| | The UK will still be party to existing EU trade deals with other countries during transition | Agreed | <p>Furthermore, it will be interesting to see the value the new trade agreements negotiated during the transition period will bring to the UK compared to the value of the EU free trade agreements the UK are walking away from."</p> |
| | The movement of goods between the UK and EU (and vice versa) that starts before the end of transition and ends after it will be treated as "intra-EU trade" | Agreed | <p>Johnny Hanna, Partner, Brexit Tax and Location Lead "Businesses need to look at what is <i>not</i> in the draft as much as what is. The document makes no mention of whether the UK retains EEA membership during transition. That's important because a lot of European tax and regulatory legislation (and domestic legislation implementing same) refers to membership / establishment in an EEA State. The small print hasn't even started to be drafted yet."</p> |
| | The EU's directive on VAT will apply for goods dispatched or transported from UK to EU (and vice versa) before end of transition and ending thereafter | In progress | |

Draft withdrawal agreement: Summary and implications

| | Summary | Decision status | Business implications |
|--------------|---|-----------------|---|
| IRISH BORDER | A “common regulatory area” between NI and Ireland is established, with free North-South movement of goods [the EU ‘fall-back’ option] | Not agreed | <p>Brian Daly and Johnny Hanna, KPMG Ireland</p> <p>“Resolution of the Irish border issue is complicated by the UK’s stated plans to leave the Customs Union and Single Market.”</p> |
| | The above proposal will cease to apply in the Withdrawal Agreement if the UK and EU agree a separate solution to avoid a hard border | Agreed | <p>“It is currently difficult to see how the ‘fall-back’ option will work in practice.</p> |
| | The UK and Ireland may continue to make arrangements between themselves relating to the Common Travel Area | Agreed | <p>“One of or a combination of the other options (i.e. resolve through the future relationship or via UK specific solutions to the unique circumstances on the island of Ireland) may ultimately be the most realistic way to deliver on the guarantee to avoid a hard border.”</p> |
| | The provisions of Union law governing wholesale electricity markets shall apply to and in the United Kingdom in respect of Northern Ireland | In progress | |
| DATA | EU law on the protection of personal data will apply in the UK for data processed or obtained before the end of the transition period | Not agreed | <p>Gordon Wade, Associate Director, Legal Services</p> <p>“Whilst the issue of data transfers has been getting more attention lately, the fact there’s no agreement yet is a worry. Businesses have to be able to move data back and forth simply to function in the digital economy.</p> |
| | The GDPR (except Chapter VII (which deals with supervision by EU bodies)), the e-Privacy Directive and the Law Enforcement Directive will continue to apply in the UK in respect of the processing of personal data of individuals outside the UK, provided that the personal data (a) were processed in accordance with EU law in the UK before the end of the transition period or (b) are processed in the UK after the end of the transition period on the basis of the Draft Withdrawal Agreement. | Not agreed | <p>“Both the UK & the EU want the GDPR rulebook to apply in the UK, yet there’s no corresponding proposal as to how an equivalent UK law would apply in Europe.</p> <p>“For example, if this is not resolved (worst case) new clauses dealing with third country transfers would need to be added into every contract between an EU and UK entity where data is processed. That’s a potentially massive undertaking.”</p> |



Appendix

Appendix 1

Implications for employers of people provisions in the Draft Withdrawal Agreement

Aoife Newton

On 19 March 2018 the EU and UK published the latest version of the Draft Withdrawal Agreement (DWA). It indicates that agreement has been reached over the status of EU nationals in the UK and British citizens in the EU who reside in one or other before 31 December 2020, the end of the transition period between the UK leaving the EU and the new terms of our relationship coming into force.

This is a draft and would only come into force with any final Withdrawal agreement. However even if there is 'no deal' it is indicative of the position both the EU and the UK might take unilaterally.

This Appendix looks at the impact of the DWA from the point of view of current EU nationals in the UK, people travelling for business around the EU and future recruitment of EU Nationals in the UK.

1. Current EU nationals in the UK

Current EU nationals in the UK will not be asked to leave. There is now no change in rights for those who arrive after 29 March 2019 – the date of Brexit – and before 31 December 2020 – the end of the transition period. They will be in the same position as those who came before Brexit.

They will have the same legal rights as now (e.g. access to healthcare, benefits etc. for themselves and families).

They have the right to remain in the UK and apply for permanent residence (PR) (this will become an application for settled status) after five years. Periods before and after the transition period can be taken into account.

Once they have PR they can be outside the UK for up to five years (instead of the current two years) before they lose PR – a key change and helpful for employers sending EU nationals with PR on overseas secondment. (People wanting to apply for British Citizenship have to go through PR first).

2. People travelling for business

This group falls into two categories: a). Those who are currently frontier workers
b). Those who are not frontier workers but need to travel for business.

The DWA specifically addresses frontier workers. These are EU citizens or UK nationals who pursue an economic activity in one or more States in which they do not reside. For example, someone who lives in one EU Member State and works in another, returning home daily or weekly is a frontier worker.

Some existing business travellers or commuters will be frontier workers and will therefore gain protection under the DWA to continue their current travel pattern. For example, individuals living in Ireland and working in NI Monday to Friday would be covered.

However, this doesn't fit the pattern of all business travellers. In an EU document issued earlier this year on mobility, it was clear that if there is no agreement to the contrary, UK nationals would be subject to the same immigration rules applied by the EU to citizens of 'third countries'. This would mean British travellers being subject to Schengen rules for business travel and domestic rules in each State for work restrictions. Work and visa requirements are all to be determined.

The UK had also wanted British citizens in the EU to be able to move freely between States if already protected under the DWA. For example, a British citizen living in Germany now could move to Poland after Brexit. This appears not to have been addressed and some have referred to UK nationals being 'landlocked' in one EU country as a result.

3. Recruitment of future EU nationals in the UK

Anyone arriving in the UK before 31 December 2020 will have the same rights to apply for permanent residence and to settle as above. The post 2020 immigration system for EU nationals is still unknown although an interim report from the Migration Advisory Committee is expected.

KPMG Comment

"UK business will continue to be able to recruit on the basis of current free movement rules from the EU, until 31 December 2020. However the system for mobility from 2021 remains uncertain. There is no news on business travel throughout the EU and whether a visa will be required after 2020."

"For EU nationals coming to the UK and UK nationals going to the EU, nothing changes between now and 31 December 2020. We do not know exactly when we might find out about the new UK system for EU nationals and whether it will be partially or completely aligned with the system for non-EU nationals because the future immigration system is under consultation and preferential treatment of EU nationals may be required for a future trade agreement with the EU."

"In the absence of EU countries applying special rules to UK nationals there after transition, the patchwork of work permit requirements relating to third country nationals will apply across the EU."

What does residence mean?

The people who will benefit from the provisions of the DWA are those EU citizens, UK nationals, frontier workers (and families) and third country nationals (for social security) who “exercised their right to reside in the United Kingdom” in accordance with Union law before the end of the transition period and “continue to reside” there subsequently.

This raises the question of what it means to “reside” in the UK. The definition of residence differs depending on purpose. For example, residency for income tax, social security, use of healthcare and qualifying for citizenship are different. Under EU free movement rules, all EU citizens can have “residence” in another EU State for up to three months, but “residence” beyond three months is only permitted if someone is in a specific category (e.g. worker or student). Free movement is entirely framed around physical presence. On the other hand, habitual residence for social security is akin to centre of economic interest, location where a person has most family links.

We do not know what kind of residence is needed to qualify for the valuable rights in the DWA and what this means for these rights to continue after transition. The UK Government in a message to EU nationals on Friday 23rd March simply referred to those ‘living in’ the UK. Is this enough? If not, will we have to look to existing definitions and/or case law? Therefore, we need clarity on what residence means in this context because right now as the draft agreement stands, how “residence” is defined is the key that unlocks access to lifetime rights across immigration, social security and professional qualifications.

For now, employers are in a challenging situation when advising their employees on what to do to protect their positions. Should everyone get documentation by, and ensure physical presence on, 31 December 2020? Or is it enough that, in the case of EU nationals in the UK, that the UK is simply considered their home? We await further details.

KPMG is helping businesses plan for the impact of Brexit on their staff. This includes technology tools to help your staff assess the impact of Brexit on them depending on their personal situation and guidance on making applications. If you would like to talk to our immigration team about insights and services we can offer contact Aoife.Newton@kpmg.ie



Meet our Brexit Team

Our Brexit Team

Don't delay. Planning for Brexit means understanding the implications and opportunities for your business today. Our team of Brexit experts are already working with businesses North and South to make sure they are Brexit ready.

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Brian Daly leads our Brexit Team – working with clients, government and representative bodies to develop solutions to Brexit threats and opportunities.

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Your usual KPMG contact can also work with you to plan for Brexit and introduce you to other members of the KPMG Brexit Team with the experience and expertise needed to support your business.



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