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# The Brexit Withdrawal Agreement

## The Effect on UK Businesses

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# Welcome to our Brexit report...

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In this issue we will look at the different ways the Brexit Withdrawal Agreement will affect UK Businesses:

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## How will the Brexit Withdrawal Agreement affect trading?

The Withdrawal Agreement was agreed between the United Kingdom's and European Commission's negotiators on 14 November 2018, potentially bringing to an end the withdrawal negotiations that had started with the UK government giving notice on 29 March 2017 to leave the European Union. Much has been made of the Withdrawal Agreement by politicians and the press since its contents were announced, but there has been little to explain what the Withdrawal Agreement will mean in practice to businesses. In this article we seek to explain the key parts of the Withdrawal Agreement and their practical relevance to UK businesses.

### OVERVIEW

#### Is the Withdrawal Agreement now final?

The Withdrawal Agreement still needs to be approved by the UK parliament and by the EU. An EU summit has been called for 25 November 2018 to approve the deal and it is also expected to be put before Parliament for UK approval in December 2018. If the Withdrawal Agreement is not approved by the UK Parliament and the EU then it may be possible for certain elements of it to be renegotiated. If the Withdrawal Agreement cannot be agreed and approved in any form before 29 March 2019 (the date the UK is to leave the EU) then it is possible the UK could leave the EU without a deal. This article focuses on the contents and effect of the Withdrawal Agreement, but unless and until it is agreed and approved it would be prudent for businesses to continue to plan for a no-deal scenario.

#### Transition Period

Assuming the Withdrawal Agreement is approved in its current form then on 29 March 2019 (the official date of the UK leaving the EU) a transition period will commence, which is scheduled to last until 31 December 2020 (although it may be extended – see “How does the transition period end?” below).

During the transition period the UK will, in general, be treated as an EU member state, except that it will not participate in the institutions and governance structures of the EU (e.g. the European Commission and European Parliament). The UK will continue to participate in the EU single market and customs union during the transition period and will consequently be subject to EU law during that time, together with the EU's supervisory, judiciary and enforcement mechanisms (including the European Court of Justice).

#### How will the transition period end?

The UK and the EU have agreed to work towards agreeing and ratifying an agreement on the future relationship between the UK and the EU by 1 July 2020. If they do so then the agreement should take effect at the end of the transition period. What this agreement will say is not currently known, although a non-binding political statement has been released which sets out some basic terms.

Alternatively, the UK may request an extension of the transition period, which must be submitted by 1 July 2020. If the extension is agreed then the transition period will

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continue for the extended period. If there is no agreement on the future relationship by the end of the transition period (whether extended or not) then the “backstop solution” will apply.

## What is the backstop solution?

The backstop solution has been developed to ensure that there is no hard border between Northern Ireland and the Republic of Ireland. It will be a single EU-UK customs territory, which will mean that there are no tariffs, quotas or checks on rules of origin between the UK and the EU (although there will be some compliance checks – see below). There will be rules to ensure a “level playing field” between the EU and UK and the UK will remain aligned with EU single market rules that are needed in order to prevent a hard border.

The most relevant of the level playing field rules to most businesses’ everyday affairs are likely to be the rules surrounding competition and labour and social protection. These will ensure that anti-competitive laws continue to apply to the EU and the UK and that the UK does not reduce the protection currently afforded to employees and workers (such as non-discrimination and equal pay).

In order to ensure there is no border between Northern Ireland and Ireland, Northern Ireland will also be subject to an additional layer of EU regulation over the rest of the UK – the EU’s Customs Code. As a result of this there will be checks on goods travelling from the rest of the UK to Northern Ireland (but not on goods travelling from Northern Ireland to the rest of the UK), to ensure compliance with EU standards to protect consumers and businesses in the single market.

## PRACTICAL EFFECTS

A summary of the effects of the transition period and backstop solution in the key areas of goods, VAT, personal data and intellectual property is set out below.

### Transition Period

#### Goods:

There should, in practice, be little disruption to the manufacture or movement of goods. Goods will continue to move freely between the UK and the EU because the UK will continue to be part of the single market and customs union.

Goods manufactured within the UK will continue to have to conform to European standards (where applicable).

The EU’s common external tariff will continue to apply to imports from outside the EU or UK.

Any goods that were placed on the EU or UK market before the end of the transition period may be put into service in the EU or the UK or continue to travel on the EU and/or UK market until they reach their end-users. This is intended to minimise supply-chain disruption at the end of the transition period.

### Backstop Solution

#### Goods:

The UK is to align its tariffs with the EU’s common external tariff. This will apply to goods imported from third countries.

There will be no tariffs, quotas or checks on rules of origin on goods moving between the EU and the UK.

However, there will be checks to ensure compliance with EU standards on goods going from the UK (other than Northern Ireland) into Northern Ireland or the EU.

These checks will be carried out at the place of production for industrial products and at ports and airports for agricultural products.

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## **VAT:**

The current VAT arrangements will continue to apply during the transition period. The rules that are in place at the end of the transition period will continue to apply to movements of goods that have started before the end of the transition period.

## **Personal Data:**

During the transition period the UK will continue to be bound by EU data protection laws (predominantly the General Data Protection Regulation). This means that the current regulatory framework will continue to apply and personal data will be able to continue to flow between the UK and the EU.

## **Intellectual Property:**

Copyright (which is a national right) and patents (both UK and through the European Patent Office, which is independent of the EU) are, in the main, unlikely to be greatly affected.

Existing EU unitary intellectual property rights (e.g. trademarks, registered design rights) on the territory of the UK will be maintained and will be protected by the UK as national intellectual property rights.

Existing EU-approved geographical indications (such as "Welsh lamb", "Champagne") will be legally protected in the EU and the UK by the Withdrawal Agreement unless and until a new agreement applying to the stock of geographical indications is concluded in the context of the future relationship.

## **VAT:**

Northern Ireland will remain part of the UK's VAT area and operated and collected by HMRC. Businesses will not be required to pay VAT upfront on goods going between Northern Ireland and the rest of the UK (and vice versa).

Northern Ireland (but not the rest of the UK) will be required to remain aligned to EU VAT rules with respect to goods and will continue to operate the EU's VAT Information Exchange System.

## **Personal Data:**

UK business will have to continue to apply the EU data protection rules to personal data acquired before or during the transition period, until the EU makes a formal "adequacy decision" that the personal data protection regime of the UK provides data protection safeguards which are "essentially equivalent" to those in the EU.

Until an adequacy decision has been made, the flow of personal data from the EU to the UK will also be restricted. EU businesses will need to establish that the recipient has provided appropriate safeguards and that there are enforceable data subject rights and effective legal remedies. This is the current regime applying to personal data transfers from EU member states to states outside of the European

## **Intellectual Property:**

The rules governing the transition period will continue to apply unless and until they are replaced by an agreement governing the future relationship of the EU and the UK.

## What does the Withdrawal Agreement mean for employers?

In all the drama following the publication of the draft Withdrawal Agreement, some pertinent and practical questions have gone unanswered regarding what the Withdrawal Agreement means for employers.

### Transition Period

Whilst a large proportion of UK employment law derives from the EU, existing employment rights and laws will not immediately fall away after exit day. The transition period that runs from 29 March 2019 to 31 December 2020 (but can be extended beyond this date), enables the UK to exit the EU while simultaneously maintaining some – but not all – of the advantages of EU membership.

The UK will have no role in governing the EU, but EU laws, rules and custom arrangements will still apply during the transition period. This includes employment laws and rights that derive from the EU, such as Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the Working Time Regulations 1998 and the General Data Protection Regulation.

Existing immigration laws will continue during the transition period. EU citizens will continue to have the freedom to move, live and work freely in the UK until the end of the transition period on 31 December 2020. EU citizens who already reside in the UK or move to the UK before the end of the transition period will be allowed to remain beyond the transition period. Anyone who remains in the UK for five years will be allowed to apply for permanent residence. The same rules apply to UK citizens moving to, living and working in the rest of the EU.

Those who wish to remain after the transition period must complete residence application forms. The UK has already announced details of its settlement scheme application process, due to open on 30 March 2019. Employers that rely on EU workers may wish to familiarise themselves with this application process, so that they can assist their workers that intend to apply.

In summary, for as long as the transition period lasts, the right to freedom of movement, the rulings of the European Court of Justice, and existing employment laws will continue to apply in the UK. Once the transition period ends, and assuming

the backstop solution is not activated, the UK will be able to divert from EU employment and immigration laws as it sees fit, unless it agrees otherwise under an agreement governing the future relationship of the UK and the EU.

Despite the impact of the transition period on immigration and employment laws and rights being likely to be limited, some businesses have reported difficulties in filling positions that they might otherwise have recruited from EU applicants. Official figures back this up and indicate a slowdown in net EU migration since the start of the withdrawal process. It seems that the uncertainty surrounding the withdrawal process has already had an impact on migration, causing recruitment issues for some businesses. Whether this remains the case or whether there will be an increase in net migration if the Withdrawal Agreement is approved remains to be seen. In any event, it would be prudent for employers who rely on workers from the EU to take steps to ensure that they will not be left with a skills gap.

### Backstop

In the event that a trade deal cannot be struck by the end of the transition period, the backstop solution within the Withdrawal Agreement would see the UK enter into a “single customs territory” with the EU. While this prevents a hard border between Northern Ireland and the Republic of Ireland, the UK would remain tied to EU laws around competition, environment, labour and social protection to ensure a “level playing field” between the UK and the EU while trade negotiations are ongoing.

Freedom of movement would still end with the transition period, but the UK’s ability to diverge from the EU employment laws would be restricted. Non-regression clauses in the Withdrawal Agreement ensure that certain employment rights and rules cannot fall below current EU standards, including “fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring”. This only applies to laws and protections in place upon the expiry of the transition period. Any new EU laws or rights introduced after the transition period will not apply to UK employees and workers.

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In short, if the backstop solution is activated, the UK will be restricted in its ability to diverge from existing EU employment laws until the backstop arrangement is ended.

## Beyond Brexit

As mentioned above, the Withdrawal Agreement will allow EU citizens to take up residence in the UK during the transition period and remain there even after the UK leaves the EU. Beyond this, employers know little about what UK immigration and employment laws will ultimately look like once the transition period and the backstop solution have ended.

However, post-Brexit, and subject to any future agreement between the UK and the EU governing their relationship, the UK Government will have the freedom to propose changes to immigration and employment laws as it sees fit.

At this point, the Government may seek to amend employment laws to make life easier for employers. Commentators have suggested that potential changes could, amongst other things, include introducing a cap on compensation for discrimination claims (currently uncapped) or making it easier for employers to harmonise employees' terms and conditions after a TUPE transfer. However, whether UK employees and workers will be happy to part with rights that they have become accustomed to as EU citizens is another question.

In respect of changes to immigration laws, Theresa May has recently commented that migration will become skills-based, with EU citizens no longer prioritised over "engineers from Sydney or software developers from Delhi". This could involve quotas or restrictions on certain skill-sets, which may concern UK employers that rely on recruitment from the continent.



## Litigation during the transition period and beyond

If the Withdrawal Agreement is approved it will provide welcome certainty regarding the application of EU law and the law governing contractual and non-contractual obligations during the transition period.

### Effect of the Withdrawal Agreement

Assuming the Withdrawal Agreement is ratified, we now know the following:

- EU law will continue to apply during the transition period, which includes any new EU law enacted during that period.
- UK courts will be required to interpret English law consistently with case law handed down by the European Court of Justice (ECJ) until the end of the transition period. In practice this means there will be no impact on the interpretation of contracts during the transition period.
- In the case of a contract concluded before the end of the transition period, the question of which jurisdiction's laws will apply to that contract will continue to be determined by the current EU regime (the Rome I Regulation).
- Which jurisdiction's laws will apply to non-contractual obligations will continue to be determined by the current EU regime (the Rome II Regulation).
- For court proceedings which are ongoing, or which are issued in the English courts during the transition period, jurisdiction will continue to be determined by the current EU regime (the Recast Brussels Regulation).
- The current EU regime on the recognition and enforcement of judgments (the Recast Brussels Regulation) will continue to apply to any judgment of the English courts which is given before the end of the transition period, even where steps to enforce may only be taken after the end of the transition period.

### Litigating post Brexit

Despite now having clarification of the position during the transition period, there remains uncertainty about what the

position will be period after the end of the transition period or in the event of a "no-deal" Brexit.

The very nature of disputes means that businesses are unlikely to be planning for future litigation, but many will be wondering how future claims and the enforcement of judgments will be affected after Brexit.

If the Withdrawal Agreement is approved, the Withdrawal Agreement provides that the UK will be required to "pay due regard" to the law of the ECJ after the end of the transition period. Exactly what that will entail is not yet fully known.

We know that the position on the applicable law relating to contractual and non-contractual obligations will remain unchanged. The current rules which determine the law applicable to contractual and non-contractual obligations will remain unaffected as they do not rely on reciprocity.

The position on jurisdiction and enforcement is less clear. Currently, an English judgment is recognised and can be enforced in another member state with ease.

In the event of a no-deal Brexit or if the Withdrawal Agreement is approved but no agreement is entered into on the future relationship of the UK and the EU during the transition period (meaning the "backstop solution" will apply), the current EU regime on jurisdiction and enforcement would cease to apply in the UK from the date of the UK leaving the EU (in a no-deal scenario) or the end of the transition period. In the absence of an alternative solution the UK would have to rely on domestic law for enforcement. Whilst in most cases judgments of the English courts would continue to be enforced in member states, there would undoubtedly be new procedural hurdles and greater time and expense involved. However, it looks likely that the UK government would participate in a number of conventions which would ensure the continued recognition and enforcement of English judgments in member states.

In the event of an agreement being entered into on the future relationship of the UK and the EU during the transition period, it seems likely that the UK government and the EU will agree on a solution to ensure there is cross-border recognition



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and enforcement of judgments after the transition period. Whether such an agreement can be reached and exactly what that agreement will entail remains to be seen.

## Practical steps for businesses

There are some practical steps which businesses can consider taking now to help reduce the risks in relation to cross-border disputes which arise in the event of a decision to leave the EU:

- Businesses involved in negotiating new contracts should think carefully about their dispute resolution and governing law clauses, and ensure those clauses are drafted so that they make clear which law is to govern the contract and which courts are to have jurisdiction in the event of a dispute.
- Arbitration is not affected by Brexit. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the UK already is and will remain a party, provides a framework for the enforcement of arbitral awards to 156 contracting parties, including all the EU member states. With the uncertainty ahead, businesses may wish to consider including an arbitration clause in any new contracts. Such a clause may provide greater certainty as a method of dispute resolution.
- A business which has obtained a judgment of the English courts should take steps to enforce it as soon as practicable to ensure they are able to take advantage of the current EU regime on the mutual recognition and enforcement of judgments. In the event of a no-deal Brexit this enforcement mechanism will be repealed, and this could affect the way future judgments of the English courts are enforced in EU member states.
- Businesses which are likely to be involved in litigation commenced after 29 March 2019 should seek legal advice on how a no-deal Brexit may affect them, given that the current EU regime on jurisdiction and enforcement of judgments will be repealed, and it is yet unknown exactly what alternative arrangements might be put in place
- Parties could consider including a clause in a new contract allowing the parties to review their jurisdiction agreement after 29 March 2019.

Our dedicated Brexit team has analysed the potential impact of Brexit on UK businesses. For more information visit [www.myerson.co.uk/brexit](http://www.myerson.co.uk/brexit) or call **0161 941 4000**.