

A close-up, textured view of the European Union flag, showing the blue field with white stars. The map of the United Kingdom is highlighted in a darker blue, textured pattern, positioned over the flag.

UK-EU WITHDRAWAL AGREEMENT KEY IMPLICATIONS





UK-EU Withdrawal Agreement: Key Implications

On 17 October 2019 the UK and EU approved a revised Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council, a legally binding document which includes provisions on the EU-UK “divorce settlement” and on the transition period (“**Agreement**”).

This is accompanied by a revised Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (“Political Declaration”).

The revised Agreement and the revised Political Declaration are broadly similar to those agreed between the EU and the UK in November 2018, but there are some differences, particularly in relation to the Northern Ireland

backstop. Although the revised Agreement has not yet been ratified by the UK and the EU, it is expected that after the outcome of the recent UK election, both the EU and the UK, will ratify the Agreement by 31 January 2020, if not earlier.

Below we set out the key implications for business stemming from these two documents on the assumption that they will eventually be ratified by the EU and the UK in their current form.

Trade/Customs



Based on these documents it appears that there will be at least two distinct periods in the trade relationship between the EU and the UK. We outline below how trade with the EU will broadly operate under these distinct periods (based on information available so far) and recommendations for what businesses should be doing now.

The Agreement provides a transition period which will last from 31 October 2019 until at least 31 December 2020. During that period the UK will remain within EU Customs Union and single market and the majority of EU law would continue to apply to the UK, but the UK will lose the ability to take part in EU law making and the benefits of Free Trade Agreements (FTAs) that the EU has with third countries. In order for the UK to ensure that it will continue to benefit from these FTAs during the transition period, the UK will need the agreement of the EU and all third countries. In practice, therefore, during the transition period trade in goods and services between the EU and the UK will remain largely unaffected.

Crucially, the transition period can be extended by mutual agreement between the EU and the UK. Note that as per the Agreement, the length of the transition period can only be extended once up to 31 December 2022, and the UK and the EU will

have to make a decision by 1 July 2020 on whether such an extension will materialise. In practice, if the UK asks for an extension, it is unlikely that the EU will object so the ball will be in the UK's court on that front.

If by the end of the transition period, the EU and the UK do not manage to come to an agreement regarding their future relationship that will ensure that there is no border between Ireland and Northern Ireland, then the so called 'Northern Ireland backstop' will kick in. If that happens, Northern Ireland will be part of the UK customs territory, but it will remain aligned to a limited set of EU rules, notably in relation to goods. Trade in goods will be affected. There will be regulatory checks on goods which will take place at the point of entry into Northern Ireland from the UK, and not across the land border between Northern Ireland and the Republic of Ireland. Additionally, the UK will apply UK tariffs on products coming from third countries, so long as those goods entering Northern Ireland are not at risk of entering the EU Single Market. This would be true for both goods entering Northern Ireland from Great Britain, or directly into Northern Ireland. However, the UK will apply the EU's tariffs on goods at risk of entering the Single Market. This is obviously a hugely complicated issue to work out, since at the

moment, we have only limited understanding on how the question of the risk of entering the Single Market will be determined, or what measures the UK will take to apply EU tariffs in that case, and what might happen if the goods in fact remain in Northern Ireland. As per the Agreement a Joint Committee between the EU and the UK will shed greater light on these issues at a later date. However, trade in services with the EU will have to operate under WTO rules. Under WTO rules, the specific impact for businesses will vary depending on which sector they operate in. Some sectors will see limited to no change whereas in other sectors (generally those which are heavily regulated) there will be additional requirements and standards and even a prohibition of the provision of certain services between the EU and the UK.

Four years after the entry into force of the Northern Ireland backstop, the elected representatives of Northern Ireland will be able to decide, by simple majority, whether to continue applying relevant Union rules in Northern Ireland or not. There is no indication as to what would happen if consent to continue is withheld.

It is important to emphasise that if the future trading arrangement is concluded within the transition period, the conten-

tious Northern Ireland backstop arrangement will never come into force. In fact, given that there can be an extension of the transition period, it is possible that the Northern Ireland backstop may never become a reality.

During the transition period, the UK and EU-27 will endeavour to finalise the agreement that will underpin their trading relationship after the end of the transition period. Based on the revised Political Declaration, it seems that the goal of the EU and the UK is to conclude a wide ranging but "classic" free trade agreement that will aim to cover goods, services and investment. The Political Declaration is thin on detail, but trade in goods will be based on an FTA which will ensure that there will at least be no tariffs or quotas, along with some degree of regulatory alignment with the EU. However, as a result of the FTA, customs controls will be needed which require each party to prove that goods originate in their respective customs territories in order to get duty-free treatment. This means that the UK and EU-27 will now have to agree detailed rules of origin. This is likely to be a complex and time-consuming process. At a minimum, businesses need to think about what rules of origin they would like to see on various goods and start lobbying for those once the UK and the EU start nego-

tiating the new FTA. It is encouraging that the scope of the future trading arrangement appears to cover services, including financial services and investment (although, again, the outline is thin on detail) and offers assurances that the agreement on the future relationship will offer a liberalisation of trade in services which will go well beyond the UK and the EU's WTO commitments.

Finally, if the UK and EU-27 do not agree on an FTA by the end of the transition period, Great Britain will fall into a "no deal" situation but with the possibility that Northern Ireland remains (and agrees to stay) under the Northern Ireland backstop. While a "no deal" for Great Britain would have a huge impact, the possibility of Northern Ireland staying within the backstop would produce an enormously complex outcome in trade between Great Britain and Northern Ireland.



People



Immigration

The Agreement covers Union & UK citizens who exercise their right of free movement under EU law (either as a worker, self-employed or self-sufficient person or student) to reside in the UK or a Member State at any point up to the end of the proposed transition period. The same rules will also apply to those exercising their right as “frontier workers” to work in either the UK or a Member State whilst continuing to reside in their home country.

It also covers family members of any Union and UK citizens, provided they have also resided in the host State in accordance with EU law before the end of the transition period or, where they haven’t resided in the host State, they are directly related to the Union or UK citizen to which the Agreement applies. Family members are defined as a spouse, civil partner, child up to the age of 21, dependant child over the age of 21 and as dependant relatives in the ascending line such as parents or grandparents of the Union or UK citizen. Other family members such as unmarried partners are also covered if they have obtained or applied for status prior to the end of the transition period.

Those covered by the Agreement will have an ongoing right of residence in their host State. They will also have a right to leave and enter the host State without a visa

by presenting a valid passport or national ID card. Family members who are neither Union nor UK citizens will have to present a valid passport, but if they haven’t entered before the end of the transition period they may be required to obtain a visa.

Those covered by the Agreement who have resided in the host State in accordance with EU law for a continuous period of five years or longer (excluding temporary absences of up to six months a year) will have a right to reside permanently in the host State. In this respect, once the right of permanent residence has been acquired, it can only be lost if the holder is absent or away from the host state for a period of five years or longer.

Those covered by the Agreement who already hold a valid permanent residence document issued under EU law or hold the same status conferred under the domestic law of the host state shall have the right to exchange it, subject to a criminal record and security check and confirmation of their ongoing residence, before the deadline set under the Agreement.

The UK Government has already implemented the provisions set out in the Agreement. A new “EU Settled Worker Scheme” has been fully operational since March

2019 and the provisions are more generous than those set out in the Agreement. Critically, applicants won’t have to provide any evidence to confirm in what capacity they are in the UK. The government has indicated that even if the Agreement is not approved, it will still honour the provisions in relation to protecting citizens’ rights to the extent that it can do this on a unilateral basis. Therefore, in the event of a “no deal” scenario, Union citizens in the UK should still be able to apply for status in line with the terms set out in the Agreement.

The future position regarding Union citizens travelling to the UK and British nationals to the EU after the end of the transition period is much more unclear. The Political Declaration, although not legally binding, makes it clear that the UK has decided free movement will end. In this respect, apart from visa free travel for short term visits, it leaves the question of what will be put in its place completely open. However, it does state that the new system will be based upon the principle of “non-discrimination between the Union’s Member States and reciprocity”, and that special arrangements for research, study, training and youth exchanges should be considered along with temporary entry for business purposes.

Employment

Under the terms of the Agreement, nothing will change from an employment law perspective on 31 October 2019. EU employment laws will continue to apply to the UK, in the same way as they do at present, until the end of the transition period. This includes any new laws introduced and any new judgments of the European Court of Justice which are handed down during the transition period.

Once the transition period has ended, there is scope in theory for the UK government to amend our domestic laws in order to remove some of the protections that derive from EU employment law. However, we are unlikely to see any major changes in the short to medium term. The government’s message in relation to workers’ rights to date has been that it is firmly committed to protecting workers’ rights after Brexit, and will seek opportunities to enhance (rather than reduce) those rights where appropriate. Furthermore, it is clear from the Political Declaration that the parties envisage the final Brexit deal containing some form of continuing commitment to shared employment standards, as well as a commitment to the European Convention of Human Rights and a high level of data protection.

If a deal on Northern Ireland is not secured prior to the end of the transition period, and the controversial Northern Ireland Protocol is applied, the UK is likely to be

even further restricted in its ability to make any changes. Under the protocol, Northern Ireland would remain aligned to a limited set of Single Market rules to avoid a hard border with the Republic of Ireland, but would leave the EU customs union with the rest of the UK. The protocol will continue as long as it has the democratic support of the Northern Ireland Assembly, which would be asked to vote on the continuation of the protocol at the end of the transition period, and every four years thereafter. In the revised Political Declaration, the EU and the UK agree that they will uphold the common high standards applicable at the end of the transition period in specified areas that include labour and social protection, fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at Company level and restructuring. The protocol also states that EU anti-discrimination directives must continue to be observed.

Despite the terms of the Political Declaration, the Withdrawal Agreement Bill states only that the employment rights that are currently derived from EU law will continue to have effect in the UK and sets out a requirement for statements to be made to confirm (or not) that the same standards are to be applied in future legislation.

A minister introducing any new workers’ rights bill in either House of Parliament

must make a statement in writing that in the minister’s view, the provisions of that bill will not result in the law, in the relevant part or parts of the UK, failing to confer any workers’ retained EU right. If the minister is unable to make such a statement of non-regression, the minister must make a statement that the government nevertheless wishes the House to proceed with the bill. Before making a statement, the minister must have consulted worker and employer representatives and any other appropriate consultees.

When the EU publishes new workers’ rights, the Withdrawal Agreement Bill requires the relevant UK Secretary of State to publish a report stating those rights, and stating either that the law of England, Wales and Scotland confers the same kind of right upon workers (“a statement of non-divergence”) or a statement that the Secretary of State is unable to make a statement of non-divergence.

One area in which we may see changes at the end of the transition period (whether the Northern Ireland Protocol comes into play or not) is in relation to European Works Councils (EWCs), as the current EWC regime will only be able to continue with the EU’s co-operation. However, the Agreement is silent as to what will happen in relation to EWCs, so we still await details of what is proposed in this regard.

Tax

During the transition period, the UK will continue to have access to existing tax directives such as the Parent-Subsidiary and Interest and Royalties Directives, and will continue to abide by the terms of other directives such as the Directive on Administrative Co-operation and the Anti-Tax Avoidance Directive (ATAD).

VAT: The UK will continue to apply EU VAT law, as currently implemented in UK legislation, during the transition period.

The revised Agreement contains fewer commitments on tax than the previous version did. It states that the Parties commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices. However, there is no reference to the Code of Conduct for Business Taxation (which appeared in the previous version). The Political Declaration states that the Parties “intend to consider” mutual recognition of trusted traders’ programmes, administrative cooperation in customs and VAT matters and mutual assistance, including for the recovery of claims related to taxes and duties, and through the exchange of information to combat customs and VAT fraud and other illegal activity. The “level playing field” provisions in the Political Declaration which state that the future relationship must ensure open and fair competition include a requirement for the Parties to uphold, at the end of the transition period, the common high standards applicable in the Union and the UK in areas that include “relevant tax matters”, among other things.

There is a specific protocol concerning Gibraltar, with an agreement between the UK and Spain to cooperate in achieving full transparency in tax matters in order to fight against fraud, smuggling and money

laundering, and to resolve tax residence conflicts. The UK also commits Gibraltar to comply with G20 and OECD standards on good fiscal governance, transparency, information exchange and in particular the economic substance criteria established by the OECD’s Forum on Harmful Tax Practices. These provisions will expire at the end of the transition period.

At the end of the transition period, the UK will lose the benefit of access to the tax directives and will be reliant on its network of double tax treaties to determine whether withholding taxes are likely to apply to inbound dividends, interest and royalties. The UK has already begun renegotiating certain treaties and in cases where there is likely to be a withholding tax issue, this will be a priority.

VAT Transition

The EU VAT Directive will continue to apply to goods supplied by the UK to an EU Member State, and vice versa, if the dispatch or transport began before the end of the transition period and ended after it. Rights and obligations under the EU VAT Directive will continue to apply until five years after the end of the transition period for any transactions that begun before the end of the transition period. Refund applications for VAT paid in a Member State by a UK taxable person (or by an EU person in the UK) must be submitted by 31 March 2021 at the latest. Amendments to VAT returns in respect of cross-border transactions must be submitted by 31 December 2021. The Council Regulation on Administrative Co-operation and Combat-

ing VAT Fraud will continue to apply for four years to the tax authorities of Member States and the UK in relation to transactions that took place before the end of the transition period. Subject to these transitional rules, the UK will almost certainly retain a VAT system, possibly in the form of a sales or goods and services tax. The proposed arrangements concerning Northern Ireland mean that while Northern Ireland will form part of the UK’s VAT and customs territory, the EU VAT rules on goods will continue to apply in Northern Ireland (rather than those applied in the rest of the UK) in order for Northern Ireland to remain part of the single market and so that no hard border will be required with the Republic. As such, the UK will apply the EU VAT Directives for goods in Northern Ireland, collect the VAT and remit to the EU. For services, the UK VAT system will apply (to the extent that it diverges from the EU).

The Agreement permits separate rates to apply in Northern Ireland and this may be required if the UK reduces the VAT rate on certain goods (e.g., fuel) and if this is not permitted under EU law. In addition, Northern Ireland will be permitted to apply harmonised rates on certain goods that are applied in the Republic, to avoid distortions between the two.

Mutual assistance for the recovery of tax claims

The directive on mutual assistance will continue to apply for five years after the end of the transition period for claims relating to transactions that took place before the end of the transition period.

State Aid

The commission will be able to bring state aid proceedings for up to four years after the transition period for events that occurred before the end of the transition period.

Court of Justice of the European Union

Cases pending before the CJEU at the end of the transition period, brought by or against the UK, including appeals and references back to the General Court, will continue until a decision is given. Proceedings will be regarded as having been “brought” and preliminary referrals will be regarded as having been made at the moment at which the document initiating the proceedings has been registered by the CJEU’s (or the General Court’s) registry. Judgments and orders of the CJEU handed down before the end of the transition period, as well as judgments in relation to infraction proceedings brought in the four year period after the end of the transition, shall be binding on the UK. The CJEU will have jurisdiction to give preliminary rulings on requests from UK courts and tribunals made before the end of the transition period.

Product Regulatory

During the transition period the UK will remain within the single market and continue to operate under EU law governing product quality, performance, safety and composition as well as related testing, packaging, marking, labelling and conformity assessment procedures. This applies to all goods that fall within the scope of the single market’s free movement rules, including consumer products, pharmaceuticals, medical devices, agricultural products, industrial products and chemicals.

As anticipated, once the transition period ends the Agreement provides for the continued circulation of goods lawfully placed on the single market prior to its end, so that a product can continue moving through EU or UK supply chains – or indeed between them – until it reaches its end-user. There will be no need for new or additional labelling or conformity assessments for these goods. The same applies to products that have an additional “when put into service” compliance point. Provided they were placed on the market before the end of the transition period, they can be put into service any time afterwards without the need for new conformity assessments. Tied-in with this continuing free circulation is an obligation on economic operators to be able to prove that a good was placed on the market in the EU or the UK before the end of the transition period. This could be in the form of a sales invoice, for example, or clear evidence of the good being offered for sale in a trade catalogue.

If the ‘Northern Ireland backstop’ period happens, the UK in respect of Northern Ireland must stay aligned to EU single market goods rules. This allows Northern Ireland businesses to place products on the EU’s in-

ternal market without restriction. For goods subject to approvals or certificates from an EU regulatory authority, Northern Irish businesses will need to use those EU bodies if they wish to export to the EU-27. Where EU law requires physical premises checks, however, Northern Irish businesses can use UK authorities for that purpose. This would apply to, for example, manufacturing site inspections required for pharmaceuticals. UK authorities would need to apply EU law when undertaking these inspections.

As the rest of the UK could begin to diverge from EU rules, there will be increased compliance checks (based on risk) on goods moving from the rest of the UK to Northern Ireland. The intention is for UK authorities to carry out these checks in the least intrusive way possible, such as at traders’ premises. Agricultural products will continue as now to be checked at ports and airports, but at a heightened level to ensure the protection of EU consumers and animal health.

Northern Ireland products moving to the rest of the UK will have unrestricted access with both EU and UK approvals being recognised. This avoids Northern Ireland businesses having to go through two separate approval processes to supply goods to both the EU and the rest of the UK. Where a product’s origin must be indicated, Northern Irish goods for Northern Ireland or the EU would be labelled as originating from Northern Ireland – “UK(NI)”. For the rest of the UK, the products could be labelled as either being from Northern Ireland or the UK.

Intellectual property

The Agreement provides welcome clarifications with respect to EU-law based IP rights and allows for both a smooth transition and an end-point that is as close to the status quo as could be hoped for. Most notably, it means that there should be no significant loss of protection for rights owners.

Trade marks, designs and plant variety rights

The UK government will grant owners of **European trade marks (EUTMs), Registered Community Design Rights (RCDs) and Community Plant Variety Rights (CPVR)**, which were registered or granted before the end of the transition period, a new UK equivalent right. In effect, this is a “clone” of the EUTM, RCD, CPVR with no action necessary or cost incurred on the part of the holder. These “cloned” rights will not be re-examined by the UK IPO, and they will enjoy the date of priority of the EU registration, including any UK seniority claim for trademarks. Existing EUTMs, RCDs and CPVRs will continue to be valid in the EU-27 after the end of the transition period.

For international trade mark registrations under the Madrid system, which designate the EU and which have been registered prior to the end of the transition period, the UK Government agrees to take measures to ensure continued protection in the UK.

There will be a nine-month period after the expiry of the transition period for owners of pending EUTM/RCD applications to apply in the UK for the equivalent protection; for CPVRs, however, the period is six months. These refiled applications will retain the priority dates (including UK seniority for trademarks) from the corresponding EU application. No automatic notifications of this fact will be issued by the UK IPO and any refiled applications will attract the same fees as UK national applications.

IP rights will remain exhausted for all

goods that have been put on the market anywhere in the EEA before the end of the transition period.

Authorised representatives in all ongoing proceedings before EUIPO commenced at the end of the transition period may continue to represent the relevant party for all stages in that procedure, including appeals.

Unregistered Community Design rights that exist at the end of transition period will continue to be protected and enforceable in the UK for a term of protection at least equal to the remaining period of protection of the equivalent community right. While there is a separate unregistered UK design right under the Copyright Design and Patents Act 1988, this is a different type of right to the unregistered Community Design right and currently the UK has no equivalent unregistered design right. The UK Government will therefore have to implement new legislation to allow for this. In case of a no-deal Brexit, a new UK “supplementary unregistered design right” which mirrors the characteristics of the unregistered Community Design will be created. Such supplementary unregistered design rights disclosed in the UK after exit day would be protected in the UK (not the EU).

GIs, databases, SPCs and patents

Holders of **geographical indications**, which will be protected in the EU at the end of the transition period, are entitled to use the geographical indication in the UK

without re-examination and will be granted “at least the same level of protection” as provided under the existing EU regime. However, this will apply only “unless and until” a future agreement between the EU and the UK enters into force and becomes applicable.

Where a **database** qualified for protection in the UK before the end of the transition period, it will continue to be protected in the UK after its end, and rights owned by UK nationals that qualified for protection in EU Member States before the exit will also continue to be protected after the end of the transition period.

Supplementary protection certificates (SPC) are governed by EU legislation, but are applied for and granted as individual national rights. The withdrawal agreement confirms that applications for SPCs that are pending at the end of the transition period will be granted and conferred the same level of protection as existing SPCs.

UK national patents and European patents (via the European Patent Office (EPO)) are unaffected by Brexit and the Agreement as they are independent from EU membership. The Agreement confirms that the UK will be considered a member of the new Unified Patent Court during the transition period.

UK national patents and European patents (via the European Patent Office (EPO)) are unaffected by Brexit and the Agreement as they are independent from EU membership. The Agreement confirms that, during the transition period, the UK will be considered a member of the European Union for the purposes of international agreements, which would include the agreement relating to the **Unified Patent Court**.

Data Protection

The Agreement provides that during the transition period the General Data Protection Regulation (GDPR) will continue to apply.

The Political Declaration that sets out the future relationship states that in view of the importance of personal data flows between the EU and UK, the parties are committed to ensuring a high level of data protection to facilitate such data flows.

When the UK leaves the EU it will become a ‘third country’ for data protection purposes (a country not recognised as offering an adequate level of data protection), which means that, after the transition period, any transfer of personal data from the EU to the UK would need to be covered by appropriate contractual safeguards such as the commission-approved model clauses, unless the EU has granted the UK adequacy status.

The Political Declaration contemplates that adequacy status will be granted to the UK before the end of the transition period by December 2020 and confirms that the European Commission will start the adequacy assessment as soon as possible after the UK’s withdrawal.



Financial Services



If the Agreement is adopted, businesses will have the benefit of a transition period at least until the end of 2020 (with a possible extension) to prepare for the future relationship. During this period, access to the Single Market will in essence continue as present.

The Political Declaration is a short document and with respect to financial services, it contains little detail. On a positive note, regarding services (including financial services), it does stipulate the objective of delivering a level of liberalisation in trade in services “well beyond” the WTO commitments, and of building upon recent Free Trade Agreements. These would include provisions on market access and non-discrimination under host state rules for service providers and investors.

The UK has proposed a system of “enhanced equivalence” in place of passporting, which would strengthen and broaden the existing EU concept of equivalence contained in some legislation, although it will provide inferior market access to that which is available now. The Political Declaration refers to each bloc’s regulatory and decision-making autonomy, and their ability to make

equivalence decisions in their own interest. This latter reference to autonomy is less welcome from a UK perspective in terms of achieving significant market access under equivalence. Unless read with respect to the ambition to go beyond WTO commitments, there is no explicit reference to expanding equivalence beyond the existing patch work. In this regard, however, Steven Maijor, the Chair of the European Securities and Markets Authority (ESMA), has already called for a comprehensive and harmonised EU regime for third country trading venues.

The Political Declaration additionally refers to both sides starting to assess equivalence with respect to each other as soon as possible after the withdrawal, with a view to finishing before the end of Q2 2020. In this respect, to address UK concerns that equivalence might be suddenly withdrawn, the documents promise “transparency and appropriate consultation in the process of adoption, suspension and withdrawal of equivalence decisions.” We can also expect “close and structured cooperation” on regulatory and supervisory matters, as well as information exchange and consultation on regulatory initiatives of mutual interest, at both political and technical levels. It is

likely that the FCA may in some areas still contribute in some way to the European Supervisory Authorities and their development of policy post-Brexit.

Pending the approval of the Agreement financial services, businesses must be ready for a no-deal Brexit. This should be on a worst case basis, if only by undertaking the minimum steps. Businesses should monitor announcements from relevant authorities and maintain dialogue with supervisors over Brexit planning and contingency measures. For EU-27 businesses that rely on “passports” to access the UK, in a no-deal Brexit, the UK authorities have announced temporary permission regimes and measures around contractual continuity. These would last for up to three years while the businesses in question sought authorisation. For UK-based businesses accessing the EU-27, the commission has not announced any transitional measures to date, although it is expected to do so. Individual Member States may also put in place grandfathering provisions, for example, Germany is currently consulting on empowering the Federal Financial Supervisory Authority (better known as BaFin) in this manner.

Healthcare



Medical Devices

The Agreement provides that EU legislation regulating medical and in vitro medical devices (existing Directives 93/42/EEC 98/79/EC, and 90/385/EEC and Regulations (EU) 2017/745, (EC) No 178/2002, (EC) No 1223/2009 and (EU) 2017/746, which will replace the directives) will continue to apply in the UK during the transition period (subject to the repeal of the directives across the EU in due course), thereby ensuring that the UK will remain fully aligned to the EU regulatory regime for medical devices and in vitro medical devices.

However, given the overriding provisions of the Agreement, the UK will be unable to participate in any of the decision making bodies or agencies of the EU in relation to medical devices, such as the European Commission’s decisions or day to day regulation. UK based notified bodies, and the certificates they issue, will continue to be recognised across the EU for the transition period but only up until the end of this period. What happens beyond that point will need to be addressed in a future trading relationship but the Agreement requires UK notified bodies to transfer information relating to a conformity assessment to a notified body established in the EU upon request of the certificate holder, prior to the end of the transition period.

Medicines

The Withdrawal Agreement provides that key EU legislation regulating medicinal products shall continue to apply in the UK during the transition period, including in relation to the authorisation and supervision of medicinal products for human and veterinary use, clinical trials (including the ongoing replacement of Directive 2001/20/EC by Regulation No 536/2014), paediatric, orphan and advanced therapy medicinal products.

However, given the overriding provisions of the Agreement, the UK will be unable to participate in any of the decision making bodies or agencies of the EU in relation to medicinal products, such as the European Medicines Agency. This will mean a striking loss of ability for the UK to influence medicine regulation in the EU as it enters the transition period.

The Agreement provides for both the UK’s Medicines and Healthcare products Regulatory Agency (MHRA) and EU competent authorities to make available, upon request to each other, the marketing authorisation dossier of a medicinal product authorised by a competent authority of that Member State before the end of the transition period.

As commensurate with the entire new Agreement, the sections relating to medicines also make clear that many

of the provisions shall not be read as including Northern Ireland in the United Kingdom (for instance, a medicinal product authorised in the UK in respect of Northern Ireland shall not be considered as a reference medicinal product in the EU). EU law in relation to medicines will remain in effect in Northern Ireland.

The political declaration on the future trading relationship between the UK and EU states merely that the parties will “explore the possibility of cooperation of United Kingdom authorities with Union agencies such as the European Medicines Agency (EMA).”

Competition



During the transition period, the EU competition, merger control and state aid rules will continue to apply in the UK in the same way as they do now. At present, there are mechanisms to ensure that either the European Commission or the UK Competition & Markets Authority ("CMA") takes jurisdiction over an EU antitrust investigation. In relation to mergers, if a transaction is notified to the European Commission, the CMA does not have jurisdiction to also review that transaction (unless the European Commission refers it to the CMA). As for state aid, the European Commission has sole competence to investigate illegal aid granted by the governments of EU Member States to businesses. These mechanisms will remain in place throughout the transition period.

After the transition period, unless agreed otherwise, if conduct has an effect on trade within the UK and also between EU Member States, it may be investigated by both the CMA/UK sectoral regulators and the European Commission at the same time (the CMA and UK sectoral regulators will no longer have the power to enforce EU competition law). There will likely be more cases where both the EU and the UK could in parallel open an investigation and impose fines and other remedies for anti-competi-

tive conduct affecting both the EU and the UK. The UK will no longer be part of the EU "one stop shop" for merger control. After the transition period, the EU and UK merger control regimes will run in parallel so that a transaction that meets the EU Merger Regulation notification thresholds may also be notifiable to the UK authority if the relevant UK filing thresholds are met.

The Agreement provides some clarity about what will happen to EU antitrust investigations and EU mergers that are still undergoing EU review at the end of the transition period, and whether the CMA would be able to open a parallel investigation into the UK aspects of such cases. According to the Agreement, where the European Commission has opened an antitrust, merger or state aid investigation before the end of the transition period, it will be able to continue and complete that investigation. This means that the CMA would not need to open its own parallel investigation under UK competition law into the UK aspects of that arrangement or merger. Regarding state aid, it has been agreed that the European Commission will be able to investigate potential breaches of EU state aid rules relating to the UK that took place before the end of the transition period for up to four years after the end of that period.

However, the Agreement is silent on which authority would have jurisdiction to investigate infringements of EU competition law that occurred before the end of the transition period, but in respect of which an investigation has not yet been initiated before the end of that period. This suggests that in a case with both EU and UK aspects, it would be open to both the CMA and the European Commission to open parallel investigations, with the CMA reviewing the UK aspects only.

If the Northern Ireland backstop takes effect, the EU's state aid rules will apply to Northern Ireland only, rather than the whole UK, and will be enforced by the European Commission.

Regarding the future relationship between the UK and EU, the previous version of the Agreement contained references to EU laws and international conventions that would apply to the whole of the UK in what were called 'level playing field' commitments and included state aid and competition. These have now been replaced by less specific and non-binding commitments in the Political Declaration to uphold such principles in any future trade agreement between the EU and the UK.

Dispute Resolution



The Agreement provides that EU law will apply during the transition period in a number of areas.

Courts in the UK and courts in the EU (in respect of the UK) will apply Rome I and Rome II in order to determine the law that will apply to contractual and non-contractual obligations respectively. Rome I will apply to contracts concluded before the end of the transition period and Rome II will apply in respect of events giving rise to damage, where such events occurred before the end of the transition period.

The jurisdiction provisions of the Recast Brussels Regulation (together with certain other relevant EU regulations relating to matters of jurisdiction) will apply to any proceedings instituted before the end of the transition period and to certain proceedings related to these legal proceedings, for example subsequent proceedings involving the same cause of action between the same parties or otherwise related proceedings that are brought in the court of another Member State and which may therefore be stayed under the Recast Brussels Regulation in order to avoid parallel proceedings.

The recognition and enforcement provisions of the Recast Brussels Regulation (together with certain other relevant EU

regulations relating to recognition and enforcement) will apply to judgments given in legal proceedings instituted before the end of the transition period (and to instruments drawn up and court settlements approved or concluded before the end of the transition period).

In respect of ongoing judicial cooperation, the Service Regulation will apply to judicial and extra-judicial documents and the Taking of Evidence Regulation will apply to requests received by the relevant designated bodies before the end of the transition period.

Neither the Agreement nor the Political Declaration give any indication as to the future relationship in respect of matters of choice of law, jurisdiction and the recognition and enforcement of judgments. The UK has previously indicated that it hopes to agree on a wide ranging agreement that broadly mirrors the current position.

Pensions



For employers with defined benefit (DB) schemes, the implications of the Agreement will be heavily dependent on its effect on the employer's business, including any consequential restructuring during any of the periods mentioned above, and the impact on the industry sector in which the employer operates.

If the employer has concerns about meeting funding obligations during the transition period, they should seek advice on the nature and extent of those obligations. Employers should be prepared to engage with trustees of DB schemes, who will wish to understand how the employer's ability to support the scheme may be affected and what contingency plans they have in place.

Brexit

How We Can Help

Baker McKenzie's dedicated team can help you assess the impact of Brexit on your business. We have identified the key challenges that you should be considering as part of your Brexit strategy. Please contact one of our specialists for further information.

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