



The draft agreement on UK withdrawal

A Brexit analysis for client-facing teams

26 March 2018

Overview: Draft Withdrawal Agreement

- The UK and EU have published 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** – 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. This will require both sides to agree on a number of difficult – and as yet unresolved – issues in the coming year, including the complex issue of the Irish border.

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 the **view of KPMG’s experts 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 indicates agreement on the policy objective but where negotiations on specifics continue
 - White indicates no UK agreement of the EU’s draft proposal.
- 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	James Stewart Head of Brexit (taken from our press statement on Monday 19 March)
	If UK fails to fulfil transition obligations, EU may “suspend certain benefits” it enjoys from internal market participation	Not agreed	“Political agreement on transition alleviates some pressure on some companies, but it would be a mistake to think it solves the Brexit readiness problem.
	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	“The kind of thing I hear from clients is that just as no lawyer would allow you to complete a major deal without a legally binding contract, so it would be equally reckless for businesses to scrap their contingency plans until they have a similar level of assurance.”

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>Punam Birly, Partner, 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 20 Dec 2020 meaning businesses will be able to continue to recruit on the basis of current free movement rules.</p> <p>“The question around mobility from 2021 is less certain however and the UK system for EU nationals is still under consultation.</p> <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> <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> <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>
	EU citizens arriving “before the end of the transition period” will have the right to acquire settled status	Agreed	
	The recognition of certain professional qualifications will continue to apply in respective member states	Agreed	
	Freedom of movement – and therefore fly-in, fly-out travel – will continue until the end of transition	Agreed	

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	David Slater, Head of Trade “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.”
	The UK can "negotiate, sign and ratify international agreements" during transition – but only implement them afterwards	Agreed	Bob Jones, Brexit Customs & Indirect Tax Lead “Clients will welcome the status quo the transition period will bring. However, 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 end state.
	The UK will still be party to existing EU trade deals with other countries during transition	Agreed	“It will be interesting to see the value to the UK of new trade deals being proposed during the transition compared to the value of those being lost through the exiting of existing arrangements.”
	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	Tim Sarson, Brexit Tax and Location Lead “Businesses need to look at what is <i>not</i> in the draft as much as what is. For example the document makes no mention of whether the UK retains EEA or EFTA membership during transition. That’s important because a lot of European tax and regulatory directives refer to “establishment in an EEA member state”. The small print hasn’t even started to be drafted yet.”
	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	

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	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, Head of Brexit in 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> <p>“It is currently difficult to see how the ‘fall-back’ option will work in practice.</p> <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 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	
	The UK and Ireland may continue to make arrangements between themselves relating to the Common Travel Area	Agreed	
DATA	EU law on the protection of personal data will apply in the UK for data processed or obtained before the end of transition	Not agreed	<p>Mark Thompson, Global Privacy Advisory Lead, KPMG</p> <p>“The issue of data transfer isn’t being given the attention it deserves and 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> <p>“The EU seems to want its 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) a new clause would need to be added into every contract between an EU and UK entity where data is processed. That’s a massive undertaking.”</p>



Appendix

Appendix 1

Implications for employers of people provisions in the Draft Withdrawal Agreement

Punam Birly

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.

In keeping with our previous updates, below we look 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 recruits.

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) 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.

(Implications for employers continued).

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, bankers living in France and working in the UK 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

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

“Businesses 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.”

(Implications for employers continued).

What does residence mean?

The people who will benefit from the provisions of the withdrawal agreement 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 the NHS 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 it 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 punam.birly@kpmg.co.uk.



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