

On 29 March 2017, the UK notified the European Union (EU) of its intention to leave the EU. Pursuant to Article 50 (3) of the Treaty on European Union (TEU), the UK will cease to be a member state of the EU on 29 March 2019. As of 30 March 2019, the UK will be a Third Country like any other country that is not a member state of the EU. This means that all UK residents, persons, entities, companies, products and services that benefit from the EU membership will cease to benefit from the rights of free movement and mutual recognition of goods, services, capital, establishment and persons (for further details, visit our [Brexit Legal](#) blog).

On 7 February 2018, the EU Commission provided a first draft of the Transition Period provisions. On 28 February 2018, the EU Commission provided a first EU internal draft of a Withdrawal Agreement (including provisions on the Transition Period) to the other EU27 member states. On 15 March 2018, the EU Commission provided the draft Withdrawal Agreement to the UK. On 19 March 2018, the EU Commission published a “Coloured” Version of the Draft Withdrawal Agreement, which highlights in green (agreed on negotiators’ level), yellow (drafting is still required) and white (no agreement yet) the progress made in the negotiation round with the UK from 16 to 19 March 2018.

Articles 121 and 122 of the draft Withdrawal Agreement contain provisions on a Transition Period that shall run from the entering into force of the Withdrawal Agreement until 31 December 2020. These provisions provide (subject to carve outs) that during the Transition Period, EU law shall continue to apply to the UK and shall create rights and obligations for the UK and all UK residents, companies and other entities as if the UK was still a member state of the EU.

The Withdrawal Agreement defines “Union law” to mean, in particular, the Treaties that establish the EU (including the TEU, the Treaty on the Functioning of the European Union [TFEU] and the Euratom Treaty, as well as the protocols thereto [the Treaties]); the Charter of Fundamental Rights; the general principles of EU law; the acts adopted by the institutions, bodies, offices or agencies of the EU; all international agreements the EU has entered into; and certain other instruments.

The meaning of Union law is wider than the meaning of the term “EU legislation” referred to in the draft European Union (Withdrawal) Bill of the UK, which is currently in the legislative process in the House of Commons and the House of Lords in the UK. It, therefore, remains to be seen how such conflict of meanings of terms is resolved in the ongoing legislative process in the UK.

This article, together with a series of subsequent articles, addresses a number of issues that may arise during the proposed Transition Period: Is the Transition Period lawful? Does the Transition Period apply in the domestic jurisdictions of the other EU27 member states? Are there gaps in the Union law during the Transition Period (banking and other areas)? Can the European Court of Justice decide on the lawfulness of the Transition Period and other aspects of the Withdrawal Agreement?

The first question – “Is the Transition Period lawful?” – arises because Article 50 (2) of the TEU does not state that any transition period should be regulated in the Withdrawal Agreement. The EU is a supranational entity based on and subject to a constitution created by the Treaties. Therefore, the EU can only act within the constitutional constraints set out by the Treaties. In this context, it must be noted that Article 50 (2) of the TEU provides that the Withdrawal Agreement can be adopted at EU level by a qualified majority (not unanimity) in the Council.

There is an argument regarding Article 50 (3) of the TEU, which provides that the extension of the so-called two-year sunset period (i.e. the period during which the UK continues to be a member state of the EU) requires a unanimous decision in the EU Council for any extension thereof and would therefore be avoided and circumvented by providing an additional “transition period” in the Withdrawal Agreement in addition to such two years under Article 50 (3) of the TEU.

Further, Article 218 (8) of the TFEU provides that any international agreement the EU enters into requires unanimity in the Council if such agreement relates to issues that require unanimity when the EU is legislating in relation to them. The draft Withdrawal Agreement provides in principle that the entire Union law shall apply to the UK during the Transition Period and the Union law for such purposes also includes Union law that had been adopted pursuant to Article 352 of the TFEU (and its predecessors) by unanimous vote – for example the company law rules on which European Companies (*Societas Europaea* [SE]), European Economic Interest Groupings (EEIGs) and European Cooperatives (*Societas Cooperativa Europaea* [SCE]) are based in the UK and the other EU27 member states. There is an argument that adopting the Transition Period contained in the Withdrawal Agreement with qualified majority pursuant to Article 50 (2) of the TEU would circumvent the unanimity requirement pursuant to Article 218 (8) and Article 352 of the TFEU.

However, we believe that the words “the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal”, contained in Article 50 (2) of the TEU, are wide enough to hold that a strictly time-limited transition period, during which the *acquis communautaire* continues to apply to the UK, is a natural part of any arrangements for a withdrawal and that the currently proposed time period for the Transition Period of less than two years is not abusive in the light of the original sunset period of two years. Accordingly, we believe that the current draft of the Transition Period provisions is constitutional and within the framework of the Treaties.

---

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.