

Brexit Day Marks a Beginning, Not an End

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Regulatory and Public Policy

This evening, at 11:00 p.m. GMT, the UK will leave the European Union.

Brexit day marks a beginning, not an end. The UK today embarks on a complex process of negotiating new arrangements for trade and cooperation with the EU and partners around the world. Regulatory divergence seems inevitable, given that the UK will want to make its own decisions on existing and future regulation. It has pledged to set its own standards, while seeking compatibility with its major markets, both in Europe and beyond, to the extent possible. The shape of the UK's formal future relationship with the EU will only become clear over the coming eleven months. In that time, the two sides will seek to negotiate a future trade agreement. The UK will also begin to lay out its vision for its own future regulatory framework for everything from immigration rules to the regulation of medical devices.

The Withdrawal Agreement

To enable an orderly withdrawal, the UK and EU have negotiated a Withdrawal Agreement. This applies certain obligations on each party by treaty. It includes provisions, for example, to govern the treatment of goods placed on the market, customs procedures, and public procurement exercises before the UK leaves the single market. It provides for citizens' rights to maintain residency in each other's territories after the UK leaves the EU.

It also provides for transitional arrangements, an "Implementation Period", to run to December 31, 2020. During this time, the UK will remain within the UK single market and customs union, but will no longer participate in the EU institutions. This transition can be extended once, before July 2020, by mutual agreement, for up to two years longer, although the UK has made clear its intention not to extend the Implementation Period.

Finally, it provides for Northern Ireland in practice to remain broadly within the EU's customs union and regulatory ambit beyond the end of the Implementation Period, through a "backstop." This is intended to safeguard the Good Friday Agreements that enabled peace on the island of Ireland.

However, the Withdrawal Agreement says little concrete on the future EU-UK relationship. This will need to be negotiated over the coming eleven months, and possibly thereafter.

Negotiations on a Future Relationship

The Commission has been preparing the ground to be able to publish a proposed negotiating mandate on February 2, to be confirmed by the Council of the EU within the month. In preparation for this, they have published a number of slide decks (available [here](#)) that lay out their starting position. The UK government has also said that it will publish its objectives in the coming few weeks.

The negotiations are likely to kick off with significant disagreements on process – such as the pace and format of the negotiations, and which aspects should be prioritized. There will also be major sticking points in the early negotiations on the substance – e.g., the extent to which the UK will be willing to preserve a level playing field with the EU in certain regulatory domains, access to UK and EU waters for fisheries, and the role of the Court of Justice of the EU in any future disputes between the EU and the UK.

Impact on Industry

Trade and investment will only continue seamlessly if companies can adapt to the practical and legal implications of the new reality. There are significant risks and opportunities in a number of regulatory domains that we are helping clients address – for example:

- **Supply chain integrity:** The UK and EU are in principle agreed that the future trade relationship should offer tariff- and quota-free access to each other's markets. However, rules of origin and customs declarations may create issues for complex, integrated supply chains. Operators with significant exposure should be engaging with the UK and EU negotiating teams now to prevent problems from arising later.
- **Data Protection / Privacy:**
 - The Withdrawal Agreement foresees that EU-UK data flows would be maintained through an adequacy decision. However, there is a risk of disruption to such flows, should the UK's data collection practices be found incompatible with EU data protection rules, or should the UK wish to secure data flows through some novel mechanism. Businesses may need to put in place alternative mechanisms to transfer data into the UK.
 - The [UK GDPR will apply from end 2020](#), raising several questions around the application of both the UK and EU regimes.
 - Clients may be required to obtain authorizations from UK authorities other than the ICO, which may cause an administrative burden.
- **Life Sciences:**
 - We have been helping life sciences sector clients review logistics, supply chain and infrastructure, and regulatory arrangements to minimize the risks that the future EU-UK trade deal may present.
 - There may be opportunities to benefit from the UK's new regimes, for example, on clinical trials.
 - We have supported leading trade associations in pressing for an agreement between the EU and UK for mutual recognition of marketing authorizations.
- **Competition / Antitrust:**
 - At the earliest from 2021, the UK will no longer fall under the EU's one stop shop for merger clearance, and many transactions are therefore likely to be subject to parallel review by EU and UK authorities.
 - During the Implementation Period, the Commission will continue to investigate potential anti-competitive conduct. Thereafter, the UK Competition and Markets Authority will be responsible for investigating UK conduct and the Commission will cease to do so, unless it forms part of an EU-wide cartel.

- **Litigation:** The UK will continue to be an important forum for the resolution of international commercial disputes. Its exit from the EU may, in due course, mean that a different (and as yet unknown) regime will apply to civil judicial co-operation in disputes with UK and EU27 elements.
 - During the Implementation Period, there will be almost no change to the regime in place between the UK and the EU, as the UK will effectively be treated as a Member State.
 - At the end of the Implementation Period, there will be a run off period where the pre-Brexit regime will apply to some aspects of UK-EU litigation and not others. The regime that will come into effect after the end of the Implementation Period is not yet known, and subject to negotiation as part of future trade arrangements.
 - Regardless of the regime brought into effect at that stage, it is anticipated that a contractual choice of English law will be unaffected by Brexit, and that an exclusive choice of the English court will continue to be respected across the EU.
- **Export Controls and Economic Sanctions:** There will be changes in the scope of the UK and EU export controls and economic sanctions laws, and associated UK and EU export controls and sanctions licensing processes.

Covington's Brexit Task Force of senior lawyers and advisors keep clients apprised of relevant legal, regulatory, and policy developments.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Brexit Task Force:

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