

The Civil Society Brexit Project: *Information*

BREXIT AND TRANSITION

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: *Information* for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

What areas of rights does this Brexit Information briefing cover?

This briefing covers the entirety of rights derived from EU law as they apply during the transition period.

Why is there a need for a transition period?

- The UK is currently in the process of negotiating its withdrawal from the EU. The timeframe for this is two years from 29 March 2017, the day on which the UK Government officially notified the EU of the UK's intention to withdraw. This means that the UK is on course to leave the EU on 29 March 2019. There is the theoretical possibility of extending the negotiation period (if the UK and all EU Member States agree), but politically neither the UK nor the EU are keen on this.
- It now seems clear and it is widely accepted that a final agreement on the future relationship between the EU and the UK will not be ready by March 2019. There is now a focus on finalising a withdrawal agreement with the aim of ensuring an

orderly withdrawal of the UK from the EU. A draft agreement highlighting many areas of agreement between the EU and the UK was presented on 19 March 2018. The withdrawal agreement addresses in particular the future position of EU and UK citizens who have made use of their free movement rights and various technical issues, including future contributions of the UK to the EU budget.

- If no transitional arrangements were agreed, the UK would leave the EU without any agreement on future relations. Trade would be dealt with on the basis of WTO rules – which are far less favourable to free trade than membership of the EU's single market and customs union – and other forms of cooperation, e.g. on questions foreign policy and security or cooperation between police forces, would either not happen or they would be based on international agreements that are far less operational than current EU rules. It is feared that the UK would thus fall off a 'cliff edge', which would lead to serious economic damage.
- A transition period is therefore intended to build a bridge between EU membership and the future relationship by giving both sides more time to negotiate and conclude an agreement on the future relationship and by giving both sides more time to

BREXIT AND TRANSITION

prepare for the future. For instance, it may be necessary to build additional customs infrastructure or to put in place new policies on a broad range of issues, such as immigration, agriculture and fisheries.

- It should be noted that the UK Government tends to speak of an ‘implementation period’ rather than a transition period. The difference in terminology has its origin in the different expectations of both sides: the UK considers that there will be a broad agreement on the future relationship before March 2019 so that the focus will be on providing individuals, the private and the public sector time to implement necessary changes. By contrast, the EU’s formulation is broader. In practice, there does not seem to be a big difference between the two positions, however.
- The draft withdrawal agreement presented on 19 March 2018 features a part on transition. The entirety of that part has been agreed by both the EU and the UK.

What will transition mean?

- The aim of transition is to avoid a cliff edge. This means that during the transition period, EU rules will continue to apply in the UK as if the UK were still a Member State of the EU. Although the UK will be out of the EU, the effects of Brexit will be deferred.
- The transition period will not result in a ‘phasing out’ of certain policies or types of rights. Instead the full panoply of rights and obligations under EU law will continue as it does now.
- The transition period will last until 31 December 2020. The UK Government had originally suggested a slightly longer period of ‘about two years’, but has now agreed that it should end on 31 December 2020. There is a possibility, however, that there will be a last minute addition to the withdrawal treaty allowing for an extension. And even if such an extension is not agreed initially, the withdrawal treaty might be amended at a later point to allow for it.

When will transition be agreed?

- The transitional arrangement is part of the overall withdrawal agreement. The draft presented on 19 March 2018 suggests that all elements of transition are agreed in principle. However, there are some questions in the wider withdrawal agreement that will need further negotiations.
- From a purely legal perspective therefore, the transition period will not be agreed in a binding manner until the withdrawal agreement as a whole has been agreed. The withdrawal agreement as a whole will in all likelihood not be finalised (and legally binding) before the end of 2018.
- All going well, the transition period will commence at the exact moment when the UK leaves the EU.

What do we *know* will happen?

Caveat: there is a possibility that the part dealing with the transition period will still be changed though this possibility is slim. There also a possibility that negotiations will break down entirely and no withdrawal agreement will be agreed. Again the likelihood seems low at the moment. The following remarks should therefore be understood to mean that this is what will happen if transition is agreed.

A status quo transition will mean that:

- All EU law-derived rights will continue beyond March 2019. This is in particular true for citizens’ rights (EU and UK), i.e. free movement of people. It would also mean that the UK will remain bound by the EU Charter of Fundamental Rights until then.
 - The only exception relates to the right of EU citizens in the UK and UK citizens in the EU to participate in municipal (including Scottish Parliament) and European Parliament elections.
- In addition, the UK will not be able to amend EU-derived rights legislation, such as the Equality Act or workers’ rights laid down UK secondary legislation, in a way that would be incompatible with EU law. This means there could be no deregulation in this regard during transition.

- EU rights will remain enforceable as they are now: this means that they will come with the full effects of EU law (primacy over domestic law in particular) and that disputes can be referred to the European Court of Justice for a decision.
- EU funding is likely to continue to be available in the UK during transition.
- During transition, the UK will no longer be represented in the EU's institutions, i.e. it will have no say in the making of new rules, which includes the setting of fishing quotas.
- All EU rules will retain their specific legal features. In particular, EU law will continue to take primacy over conflicting domestic law.
- EU and UK citizens who have made use of their free movement rights during transition will be treated as if they had moved while the UK was still an EU member. This means that they will be allowed to stay after the transition period is over and be able to qualify for permanent residency, i.e. they will have the right to continue to live and work in the host state until they qualify after a total of five years.
- During transition the UK will be able to negotiate free trade agreements with non-EU countries, but these must not enter into force before the end of the transition period.
- During transition, it is very likely that the European Union (Withdrawal) Bill (or the Scottish Parliament's Continuity Bill) will not yet unfold its full effects. In particular, it would be incompatible with the aim of transition if changes to existing EU legislation could be made unilaterally.
- It is likely that there will be an additional Act of Parliament dealing with transition.
- During transition the UK will have to adopt and implement EU legislation passed during the transition period. The EU-side would like this to be agreed. If it is agreed, then we do not know what new EU rules might enter into force during transition and whether they will be retained after Brexit.
- After the transition period has expired, the expectation is that the EU-UK relationship will be governed by one or several new international

agreements. This will in all likelihood lead to the substantive changes outlined in other briefings available at www.hrcscotland.org/brexit.

What do we not *know* yet?

- We do not yet know whether transition will happen at all, even though this is very likely at the moment.
- We also do not know what will happen if at the end of the transition period no new relationship has been agreed.
- In particular, we do not know whether the transition period will be extendable. The current draft of the withdrawal agreement suggests this may not be the case, but a last minute extension cannot be excluded.

What about in Scotland?

- A status quo transition will in all likelihood mean that the Scottish Parliament will remain unable to legislate contrary to the UK's EU obligations during that period. The Scotland Act 1998 will probably need to be amended to achieve this. The Scottish Parliament's Continuity Bill will not be able to unfold its full effects during transition.

What happens now in the Brexit process?

- On 19 March 2018 the UK Government and the EU Commission presented a draft withdrawal agreement, which the European Council endorsed at its meeting on 23 March 2018.
- The agreement in principle on a withdrawal agreement means that the second phase of the Brexit negotiations can now focus on the future relationship between the EU and the UK. This future relationship will not be finalised before 29 March 2019, but it is expected that the withdrawal agreement will be accompanied by a political declaration setting out the key features of that relationship, in particular with regard to trade and with regard to security cooperation.
- The final agreement(s) on the future relationship should be agreed before the transition period comes to an end on 31 December 2020.

BREXIT AND TRANSITION

- In terms of rights it will remain to be seen whether the EU will ask the UK to remain committed to protecting current standards, in particular in the field of employment rights, and to remain signed up to the ECHR.
- Internally, the EU (Withdrawal) Bill received its third reading in the House of Commons and is currently being debated in the House of Lords. If there are no amendments voted through in the House of Lords, it can probably receive its Royal Assent before the summer. If there are, this may be delayed.
- The Scottish Parliament passed its own version of the Withdrawal Bill, the so-called Continuity Bill, on 21 March 2018. It is yet unclear whether the Scottish Parliament was competent to do so and it is likely that the Bill will be referred to the Supreme Court for a decision on competence. The Welsh Assembly passed an (almost) identical continuity bill on the same day.

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WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit