

## International Trade Alert

March 27, 2018

### Key Points

- The U.K. and the EU have agreed on the substantive trade elements of the legal text set to govern the U.K.'s withdrawal from the EU (the "Withdrawal Agreement"). If the other outstanding elements of the Withdrawal Agreement are also agreed, then it will be scheduled to be in place from March 29, 2019 until December 31, 2020 (the "Transition Period").
- The parties have agreed that, during the Transition Period, the U.K. will be allowed to pursue an independent trade policy while remaining within the EU Customs Union. However, the U.K. will be required to adhere to obligations arising under the EU's existing free trade agreements (FTAs) with third countries.
- The EU has also formally approved Guidelines for the negotiation of the permanent future trading relationship with the U.K. after Brexit. For the moment, the Guidelines take the form of a declaration issued by the European Council. Both parties aim to have the framework of an ambitious FTA ready for parliamentary scrutiny by October 2018.



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## EU Trade Update

### The EU and the U.K. Agree Trade Aspects of the Brexit Withdrawal Agreement

In broad terms, the United Kingdom will continue to enjoy the benefits of participation in both the EU Single Market and Customs Union during the Transition Period. However, the U.K. will have to observe existing EU legislation, as well as implement new EU laws that come into force during the Transition Period (including decisions of the European Court of Justice). The U.K. will also be recused from all substantive EU decision-making fora from March 29, 2019. In short, the U.K. has agreed to be a "rule-taker" during the Transition Period to mitigate the risk of it leaving the EU without a permanent future trading relationship in place (a "cliff edge" Brexit as some have referred to it).

#### *(i) The U.K. Is to Be Permitted to Negotiate FTAs with Third Countries During the Transition Period*

The U.K. government has secured a key concession in that it can commence trade negotiations with third countries during the Transition Period, which it views as one of the main benefits of leaving the EU. That said, the EU has ensured that it has safeguards in place to ensure that the U.K. does not pursue an aggressive independent trade policy that could undermine the EU's existing arrangements and to keep

third countries from negotiating more favorable terms with the U.K. to pressure the EU for further concessions. The EU has achieved this by requiring the U.K. to (i) seek authorization before any agreement can enter into force and (ii) refrain from any action or initiative that is likely to be prejudicial to the EU's interests. The U.K. can also negotiate FTAs only in areas that are within the exclusive competence of the EU (as opposed to its Member States). This would therefore appear to rule out the U.K.'s ability to commence FTAs, the scope of which goes beyond "pure" trade measures (e.g., tariffs and quotas) to include certain regulatory and investment issues (such as those included, for example, in the EU-Canada Comprehensive Economic and Trade Agreement).

The U.K. government has expressed its intent to start negotiations with a number of third countries including some with which the EU is either in current negotiations or has negotiated with previously—notably the United States (through the failed Transatlantic Trade and Investment Partnership). As such, it remains to be seen to what extent the U.K. intends to deviate from previous EU negotiating "red lines," as well as how the EU seeks to influence the U.K.'s trade policy during this time. In reality, the U.K. government is unlikely to make sufficient progress on negotiations with third countries such that the agreements are ready to sign during the Transition Period. This is due to the fact that U.K. government capacity is likely to be focused on (i) the EU-U.K. FTA negotiations and (ii) maintaining existing relations with third countries with which it already enjoys preferential access. In addition, third countries may also want to await the outcome of the U.K.-EU negotiations before concluding any new FTA with the U.K.

*(ii) The U.K. Is to Be Bound by Existing EU FTA Obligations During the Transition Period*

As part of its EU membership, the U.K. is a signatory to a number of FTAs with third countries into which the EU has entered on its behalf (for example, the FTA between the EU and South Korea). During the Transition Period, the EU expects the U.K. to maintain the current tariffs and quotas agreed by the EU under its existing agreements. However, the third countries in question will be under no obligation to afford the U.K. the same access that it enjoys currently under existing FTAs. The U.K. therefore potentially faces the prospect of having to endure all of the obligations associated with the EU's existing third-country agreements during the Transition Period without any of the benefits.

In mitigation, both the U.K. and the EU are negotiating with third countries to continue access for the U.K. under the existing EU FTAs, with the EU proposing that the U.K. be treated as if it were still an EU Member State. However, there is no guarantee that current EU FTA partners will be willing to afford an independent U.K. the same concessions offered to the EU. In reverse, the EU is also unlikely to authorize the U.K. entering into FTAs with third countries on more favorable terms than it currently enjoys as part of its EU membership. Moreover, such countries may also use the loss of the U.K. as an opportunity to push for wider EU market access.

On balance, the best the U.K. can look at achieving during the Transition Period appears to be the status quo in terms of existing arrangements with third countries. However, uncertainty remains around both the third countries' willingness and the U.K.'s ability to do so. Companies that export under preference from

the U.K. should therefore ensure that they plan for the possibility of the U.K. losing preferential access to their overseas markets.

### **The EU Adopts Negotiating Guidelines for Future U.K. Trade Relations**

The EU has determined that sufficient progress has been made in the negotiations to adopt guidelines for the future permanent trading relationship between the EU and the U.K. The Guidelines give EU negotiators the mandate to talk directly to the U.K. about the future trading relationship, with a view to reaching a broad political agreement by October 2018 to allow for consideration by both the U.K. and European parliaments.

The EU states its desire to have **“as close as possible a partnership with the U.K. in the future.”** However, it stresses that the closeness of the relationship is limited by the U.K.’s negotiating red lines, and, therefore, any agreement is still likely to have **“negative economic consequences, in particular in the United Kingdom.”** That said, the EU hopes to achieve an ambitious and wide-ranging free trade agreement, which covers:

- trade in goods, with the aim of covering all sectors and seeking to maintain zero tariffs and no quantitative restrictions with appropriate accompanying rules of origin
- appropriate customs cooperation, preserving the regulatory and jurisdictional autonomy of the parties and the integrity of the EU Customs Union
- disciplines on technical barriers to trade and sanitary and phytosanitary measures
- trade in services, with the aim of allowing market access to provide services under host state rules, including with regard to right of establishment for providers
- access to public procurement markets, investments and protection of intellectual property rights, including geographical indications.

In other areas of cooperation, the EU would like to establish specific partnerships in relation to law enforcement, as well as foreign, security and defense policies. While the Guidelines set out in broad terms what the EU seeks to include in any future FTA, little remains by way of substantive detail upon which businesses can look to rely. The next few months will therefore be vital for companies in terms of identifying and understanding how the U.K. and EU relationship will diverge from the present arrangements.

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