

Brexit: EU's draft transitional arrangements put UK in 'precarious position'

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Draft wording for the transitional arrangements to be included in the UK/EU withdrawal agreement published by the European Commission reveals that the EU expects to have the power to suspend certain benefits for the UK during the Brexit transition phase following UK's departure from the EU. This mechanism to suspend benefits, such as access to the single market, would only be invoked if the UK government changes its position after the transition has been agreed, and the agreed rules are deviated from. Senior associate at Lewis Silkin, Joanna Hunt, said that this leaves the UK and our economy in a precarious position'. Lawyers from Bird and Bird, Mishcon de Reya LLP, Lewis Silkin, Hogan Lovells, Dechert LLP and Bircham Dyson Bell think that although it does leave the UK in a weaker negotiating position, the sanction is the 'only feasible option' for Brussels to take should the UK fail to comply with the post-Brexit transition rules.

The 'first draft' of wording for the UK and EU's withdrawal agreement says that the agreement should 'provide for a mechanism allowing the Union to suspend certain benefits deriving for the UK from participation in the internal market', if the EU considers that referring a matter to the Court of Justice would take too long. Other benefits have yet to be clarified.

Professor Adam Cygan from the University of Leicester says that the document suggests that the EU is 'looking at how it can effectively use sanctions against the UK during the transition process in the event of the UK breaching any part of the transition agreement'.

The 'only feasible option'?

Disagreement within the Cabinet on how Brexit should proceed in the UK cabinet could be a reason for the EU's desire to impose sanctions on the UK. Partner at Dechert LLP Miriam Gonzalez suggests that the EU is finding it 'extremely difficult' to negotiate with a UK government that is divided.

'Since the EU is aware of the extreme volatility of the UK political situation, it is only natural that they consider a mechanism to envisage what happens if they enter into a transition arrangement and the position of the government—or the government as a whole—changes after such arrangement has been agreed.'

Furthermore, denying access to the single market seems to be the only feasible option in that it would be the most effective recourse for any potential deviation from the transition period rules. Gonzalez continues: 'It would be unfeasible to envisage a legal mechanism having recourse to a court (the ECJ) that could provide for a timely redress. Thus, a reciprocal withdrawal of the trade preferences is the only feasible option.'

Cygan adds: 'The information contained in this document is not altogether surprising—the UK having left the EU will not be directly within the jurisdiction of the Court of Justice making judicial enforcement and sanctions broadly redundant.'

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'Moreover, even if a judicial process could be used it would be likely to conclude after the end of the transition process, making enforcement against the UK very difficult. Thus, the EU is looking for an effective political process for sanctions and denying access to the single market is one such option.'

An expected 'right of retaliation'

Partner at Bird and Bird Richard Eccles also suggests that the mechanism to suspend single market benefits needs further clarification. He notes that although a right of retaliation is a feature of the World Trade Organisation and other free trade agreements, this power of suspension could be too 'generalised': 'This may imply the possibility of a disproportionate reaction to a perceived UK contravention. Moreover, it is out of line with the EU's own repeated assertions that the single market freedoms are indivisible and that there can be no "cherry-picking" of the four freedoms of movement.'

Despite the expected nature of the EU's sanction, Gonzalez suggests that perhaps the UK would be in a 'much better place' if the government had asked for an extension of Article 50, instead of calling for a transition, as the EU would have simply imposed the terms of the transition on the UK.

Nothing more than a 'threat of draconian sanctions'

Partner at Mishcon de Reya LLP Andriy Jurkiw says that the document is 'not remotely helpful' without any

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further clarification surrounding the sanctions: 'It talks about the threat of draconian sanctions without explaining in what circumstances such sanctions should even be considered by the EU.

'Talking in more detail about what should happen during any transition period seems, in any event to be somewhat premature, when we don't have the details of the proposed Brexit deal.'

Partner at Hogan Lovells Peter Watts agrees that much remains to be answered: 'The key question is whether the benefits which would be withdrawn would be those which are directly associated with the UK's divergence or would go beyond that.'

Lewis Silkin's Joanna Hunt notes that the leak is worrying 'considering that the UK and EU are at an impasse when it comes to deciding what the transition period will look like' and that it certainly leaves a 'threat' hanging over Theresa May.

The impact on negotiations

Senior associate at Bircham Dyson Bell and author of BDB's great repeal blog, Aaron Nelson, suggests that the danger is that the leak would 'further exacerbate the differences of opinion' in the Cabinet.

Jurkiw adds that it would be interesting to see whether the UK would have any right to veto these measures, and asks: 'If the UK is obliged to implement measures during the transition period over which it has had little or no input, how can such an arrangement be in the best interests of the UK?'

Source: Position paper: Transitional Arrangements in the Withdrawal Agreement *This article was first published on Lexis@PSL Corporate Crime on 12 May 2016. Click for a free trial of [Lexis@PSL](#).*

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