

The Brexit transition period – business as usual for mainstream debt capital market issuance for now

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The securing of a significant majority by the Conservatives in the December UK general election means that it is now likely that the UK will indeed leave the European Union (EU) on 31 January 2020. The EU-UK Withdrawal Agreement, which was agreed at a political level on 17 October 2019 and sets the terms of the UK's departure from the EU, must now be approved, ratified and implemented. From a UK perspective, the legislation giving legal effect to the EU-UK Withdrawal Agreement (the European Union (Withdrawal Agreement) Bill, the **WAB**) is proceeding through Parliament and, in light of the significant majority of the Conservative government, is expected to become law before 31 January 2020 (**exit day**) without significant amendment.

In this bulletin we briefly consider the implementation of the transition period in the EU-UK Withdrawal Agreement and the impact this will have on mainstream debt capital market issuance, before considering what the future might hold at the end of the transition period.

Is the length of the transition period set in stone?

Part Four of the EU-UK Withdrawal Agreement provides that the UK's exit from the EU will be followed by a transition period which will end on 31 December 2020. The EU-UK Withdrawal Agreement provides that, during the transition period, the UK will no longer be a Member State of the EU but will be treated as such under Union law, which shall be applicable to and in the UK, producing the same legal effects as those which it produces within the EU and its Member States. The UK will therefore continue to participate in the single market, with free movement of people, goods, services and capital, but as a result of the ratification of the EU-UK Withdrawal Agreement rather than as a Member State of the EU.¹

From the UK side, the transition period will be embedded in law by amendments that the WAB makes to the UK's key Brexit statute, the European Union (Withdrawal) Act 2018 (the **EUWA**). The EUWA will repeal the European Communities Act 1972 (which provides for EU law to have effect and supremacy in the UK) on exit day. The WAB therefore amends the EUWA to save the effect of the European Communities Act for the transition period (or, using WAB terms, the implementation period), thereby enabling the continued application of Union law during this time. Similarly, changes are made to the EUWA to ensure that existing EU-derived domestic legislation will continue to apply during this time. The saving provisions will be repealed at the end of the transition period.

¹ The rights and obligations under the EEA Agreement also continue to apply to the UK for the duration of the transitional period.

The EU-UK Withdrawal Agreement provides that the transition period can be extended for up to one or two years. However, in line with the UK government’s public announcements following the general election, the WAB introduces a new provision into the EUWA which prohibits any Minister of the Crown from agreeing any extension. This is considered in the “Looking to the future – a degree of uncertainty continues” paragraph below.

Business as usual during the transition period?

In the main, it will be business as usual for debt capital market issuance during the transition period.

During the transition period parties should consider clarifying in documentation that references to the European Union/EU and European Economic Area/EEA include the UK, or consider inserting references to the UK alongside references to the EU and EEA. This is because from exit day technically the UK will no longer be a member of either the EU or the EEA, but will simply be treated as such as a result of the EU-UK Withdrawal Agreement.

This is the approach taken in the Brexit transitional version of the ICMA selling restrictions and legends. We held the pen on Brexit-related revisions to the ICMA selling restrictions and legends, producing both no-deal exit and transitional versions of these. During the transition period, it will therefore be appropriate for parties to consider revisions to selling restrictions and legends in documentation in line with the ICMA transitional versions.

The continuing application of Union law and the treatment of the UK as if it were a Member State in effect means that English law will not be treated as a third country law during the transition period. As a result, in the mainstream debt securities space, language catering for Article 55 of the Bank Recovery and Resolution Directive does not technically need to be included in relevant liabilities governed by English law during the transition period (note that there may be additional considerations in the derivatives space which are outside the scope of this bulletin).

However, the transition period may well be a short one. The impact of this is briefly considered below.

Looking to the future – a degree of uncertainty continues

Onshoring of EU law

One of the key purposes of the EUWA is to ensure there is a functioning statute book outside of the UK’s membership of the EU. This was designed to be effective on exit day in the event of the UK departing the EU without a deal, but will be revised by the WAB to ensure a functioning statute book at the end of the transition period. In broad terms, the EUWA ensures a functioning statute book by onshoring relevant provisions of EU law. Amendments made by the WAB will see this onshoring occurring at the end of the transition (or, using WAB terms, implementation) period, rather than on exit day. The EUWA will therefore onshore direct EU legislation that applies during the transition period by virtue of Part Four of the EU-UK Withdrawal Agreement. Government departments have – in preparation for a no-deal exit – put in place a great many statutory instruments to fix “deficiencies” (for example, removing references to EU concepts, such as passporting) in the onshored EU law. These were due to take effect on, or prior to, exit day, but will be deferred *en masse* by the WAB such that they come into force at, or prior to, the end of the transition (implementation) period (unless provided otherwise).

Could negotiations on the future relationship impact the length of the transition period?

During the transition period, the UK government will negotiate the terms of the future relationship with the EU. As mentioned above, changes that the WAB will introduce to the EUWA will prohibit any Minister of the Crown from agreeing any extension to the transition period. While it therefore seems unlikely that the transition period will be extended, as negotiations progress it may be that the policy of the UK government towards any extension may change before the beginning of July 2020 (the time when any extension must be approved under the terms of the EU-UK

Withdrawal Agreement). To give effect to any policy change on extension, however, Parliament would need to pass legislation to override the prohibition in the WAB.

Could negotiations on the future relationship impact the onshoring of EU law relevant to mainstream debt capital markets?

Under the political declaration setting out the framework for the future relationship (the **Political Declaration**), the EU and UK state that they should “aim to deliver a level of liberalisation in trade in services well beyond the Parties’ World Trade Organization (WTO) Commitments and building on recent Union Free Trade Agreements (FTAs)”. They also agree to start assessing equivalence with regard to each other after exit day (equivalence being the framework allowing each to declare a third country’s regulatory regime equivalent for relevant purposes), concluding the assessment before the end of June 2020.

Whilst the Political Declaration sets the direction of travel for the future relationship, it is not yet clear whether the UK government can agree an FTA with the EU during the course of a short transition period, what exactly it will look like and whether it will make any provision at all with regard to financial services.

If the UK reaches the end of the transition period without an FTA covering financial services in place, then the onshoring of financial services-related EU laws will take place (based around the statutory instruments originally prepared for a no-deal exit) and the points that have been considered previously in respect of a no-deal exit will again become relevant. The same will be true if there is an FTA that covers financial services in some respects, but on terms that are of limited use in the context of deals and documentation for mainstream debt capital market issuance.

At this stage, it is not possible to say with certainty that relevant aspects of financial services will be outside the scope of any FTA that the UK and EU reach. The exact body of law onshored at the end of the transition period will be dependent on (1) the nature of any future relationship agreed between the EU and UK, (2) any further EU legislation, or changes to EU legislation/regimes, becoming applicable during the transition period, and (3) any changes in policy of the UK government which affects any exit legislation. As a result of these points (and the fact that we have not yet reached the July 2020 date by which the transition period can no longer be extended), it would be very difficult to future-proof documentation etc. reliably at this stage for the post-transition period position.

Things are likely to become clearer over the coming year, particularly once the July 2020 date for extension of the transition period passes and negotiations between the EU and UK progress.

Further information

If you would like further information on the points relating to preparing for a no-deal Brexit, which may once again become relevant considerations at the end of the transition period should there not be an FTA covering all aspects of financial services, please refer to our Brexit publication entitled “Preparing for a no-deal Brexit – ten points relevant to mainstream debt capital markets”. For further information on the WAB (including implementation of the transition period), please refer to our Brexit publication entitled “Paving the way to the UK’s departure from the EU – an overview of the key provisions of the European Union (Withdrawal Agreement) Bill”. These publications are available on our [website](#).

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If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.

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