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December 21, 2017

## Keeping Track of the Moving Pieces as the Brexit Negotiations Move into the Second, and More Difficult, Phase

Recent headlines trumpeted a breakthrough on the Brexit discussions between the UK and the EU27 and, while it is correct that an important milestone has been achieved, many observers see the next phase as the hard part because resolution of the tougher issues appears to have been left for another day. Much remains to be negotiated, and the risk remains that no agreement will be reached, in which case the UK could “crash out of the EU.” To facilitate our updates on developments and to continue to set the context in which decisions will be taken – by negotiators, governments and businesses, we thought we would set out below the key concepts and players in a slightly different format.

The ultimate shape of Brexit will flow from negotiations that will continue for some time. The Brexit process is being undertaken in the full light of day, in the context of significant domestic political divisions in the UK. We bear in mind that any number of “red lines” have fallen by the wayside and that the myriad of public statements should be seen as much as opening gambits as they are statements of principle. We expect to hear many more statements of principle over the next three months as different constituencies continue to engage as much in Westminster, as across the Channel, on the many moving pieces that must align to effectively disentangle a relationship spanning more than 45 years.

### Brexit Lexicon

**Alignment:** the [Joint Report](#) states that “[i]n the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the [Internal Market](#) and the [Customs Union](#) which, now or in the future, support North-South cooperation, the all-island economy and the protection of the [Good Friday Agreement].” There is significant disagreement over what this means. It appears to be a unilateral commitment by the UK if there is no agreement on the future of the border between Ireland and Northern Ireland, either because any [withdrawal agreement](#) fails to address the issue or there is no agreement. The commitment appears to be consistent with some aspects of the single market, though it raises the prospect that the commitment would apply to the entire UK and not just to Northern Ireland; the agreement with the [DUP](#) is that in no case would alignment apply only to Northern Ireland. Ultimately, the ambiguity leads to the obvious question: how can the UK avoid a hard border and maintain alignment while exiting the single market and the customs union, and maintaining the integrity of the UK?

**Article 50:** Article 50 of the Treaty of the European Union, which sets forth the basis on which a member state of the EU can withdraw from the EU. The provision is short on details, though it does set

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out a two-year process triggered by notice. That notice was provided by the British on March 29, 2017, setting in motion a two-year clock, though in practice the deadline for reaching a deal is [October 2018](#).

**Canada plus:** an FTA based on the [CETA](#), but also addressing matters such as aviation and fisheries.

**Canada plus plus plus:** a phrase first used by David Davis following the release of the Joint Report that refers to an FTA based on key elements of CETA (as well as other FTAs already agreed with countries such as Japan and South Korea), but also addressing [services](#) (which incidentally represent close to 80% of Britain's economic activity). On December 19, Michel Barnier ruled out such a deal for financial services. He conceded that such an agreement could include judicial cooperation, defense and security, and aviation (so, perhaps Canada plus plus), but would exclude financial services. [David Davis](#) has responded that the European Commission cannot "cherry-pick some sectors" meaning that goods and services should not be treated differently. The British are reported to be pressing their case in various capitals on the continent, particularly those with significant trade in services with the UK.

**CETA:** the EU-Canada Comprehensive Economic and Trade Agreement, an FTA that took over seven years to negotiate and finally entered into force in September 2017.

**Crashing out of the EU:** failure to reach agreement by the Article 50 deadline. At this point, the UK will have left the EU, the single market and the customs union, and in respect of trade will have defaulted to the rules of the World Trade Organization. For the better part of the 12 months following the referendum, the PM's principal view on Brexit was that "no deal is better than a bad deal." That view has moderated significantly since the June 2017 election.

**Customs union:** members of the customs union abolish restrictions on trade in goods (but not services) within the union and apply the same tariffs to goods from outside the union, known as a common external tariff. A customs union is to be distinguished from a free trade area; the latter allows members to set their own tariffs on trade in goods with other countries. The EU is both a single market and a customs union, and it is possible to be a member of the EU customs union and not the EU single market.

**Divorce bill:** the EU27 have demanded that the UK honor a range of financial commitments as the price of leaving the EU. The obligations include contributions to the EU budget for 2019 and 2020 as well as the UK's share of projects the EU has undertaken to fund but has not yet paid for, known as *reste à liquider*. Pension obligations for EU officials and various other items are also included. While a range of figures have been posited by the media, the parties have yet to agree on an amount and it is expected that the figure will more likely be set in October 2018. The Joint Report outlines a methodology for negotiating the amount. Whatever the amount, payments will be spread over a number of years.

**ECJ:** the European Court of Justice.

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**EEA:** the European Economic Area, which was established by the EEA Agreement in 1994 and includes the EU member states plus Norway, Liechtenstein and Iceland. The EEA extends the EU single market to the three participating EFTA members.

**EFTA:** the European Free Trade Association, which is an intergovernmental organization of [Norway](#), Liechtenstein and Iceland as well as Switzerland. EFTA is tasked with managing the EFTA Convention (which regulates trade and economic relations among the four EFTA members), the EEA Agreement (which allows three EFTA states to participate in the EU's single market in exchange for financial contributions) and EFTA's network of FTAs with various non-EU countries. EFTA countries that are part of the EEA are exempt from the EU agriculture and fisheries regimes, and have control over their own trade policy.

**End state:** refers to the ultimate objective the UK government will seek to achieve in the second phase of talks and, in particular, the ultimate trading relationship between the UK and the EU. David Davis has conceded that the cabinet is only now beginning to formally discuss this topic; the first formal meeting of the cabinet (in fact, the so-called "inner cabinet" of nine ministers plus the PM, dubbed by some as the "war cabinet") on this matter took place on December 18. This topic is also tied to discussions over the [implementation period](#). The EU has given the cabinet three months to provide clarity on the outlines of a future trade deal. EU negotiators are reported to believe that by March 29, 2019 the parties will only be able to come to political agreement on the "end state," the myriad of details of which will be negotiated and agreed during the implementation period. Recent reports suggest that the PM will use a major speech early in the new year to set out her vision of the "end state."

**Enshrining March 29, 2019:** the government sought to enshrine in the [Withdrawal Bill](#) a fixed date of departure, thereby foreclosing any extension that may be agreed by the EU27. An increasing number of MPs oppose this, and the PM appears now to favor an amendment that leaves the March 29, 2019 end date in place, but allows MPs to extend the deadline if the EU27 agree.

**EU approval thresholds:** [Michel Barnier](#), on December 19, indicated that he expects the required threshold for approval of any future trade relationship will be more than 35 legislative bodies (including lower houses of parliament in each member state, regional assemblies and various upper chambers – 38 in total). Under EU law, certain treaties are subject to ratification only by national governments, acting through the European Council, and by the European Parliament, while those that affect national competences (so-called "mixed agreements") require the approval of national and regional parliaments. (In a decision last May, the ECJ ruled that the EU had exclusive competence in all but two aspects of an FTA with Singapore – portfolio investments (*i.e.*, non-direct foreign investment) and investor-state dispute settlement mechanisms in respect of investor protection. Bifurcating an FTA and leaving the investment provisions out, as was contemplated back in September for FTAs with Australia and New Zealand, could avoid approval by national and regional parliaments.)

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The withdrawal agreement will need to be “adopted” by the [European Council](#) by a qualified majority, which must represent 72% of the 27 remaining member states and 65% of the population, and will also need to be approved by the European Parliament, voting by simple majority.

**European Commission:** brings together 28 member states-appointed commissioners who formally initiate legislation for the EU.

**European Council:** the EU institution comprised of the heads of state or government of the EU member states, together with the President of the Council (currently Donald Tusk) and the President of the European Commission (currently Jean-Claude Juncker).

**European Parliament:** Article 50 provides that the European Council must obtain the consent of the European Parliament, voting by a simple majority, with respect to any withdrawal agreement. The European Parliament appointed Guy Verhofstadt as its lead representative on Brexit matters. The European Parliament has acted on various aspects of the Brexit negotiations, most recently demanding, following what it perceived was backpedalling by the British following the release of the Joint Report, that negotiations be carried on in good faith by the UK and stating that progress will depend on the UK fully respecting its commitments in the Joint Report and translating them into the withdrawal agreement.

**EU27:** the member states of the European Union, other than the UK.

**First phase:** the EU27 insisted that negotiations over any implementation period and the trade relationship (the second phase) would only begin once “substantial progress” had been made on three issues: the rights of EU citizens in the UK and the rights of British citizens in the EU27, the divorce bill and addressing the border between Ireland and Northern Ireland. On December 15, EU27 leaders determined, based on the Joint Report, that substantial progress had been made to move the Brexit negotiations on to trade and the post-Brexit relationship.

**Four freedoms:** free movement of goods, services, capital and people, which is the cornerstone of the single market. Of these, the target of the Leave campaign was the freedom of movement of people – unrestricted entry by EU citizens into the UK. While early proponents of what ultimately became the Leave campaign focused more on taking back control over laws and regulations, for many supporters of the Leave campaign it was all about immigration.

**FTA:** a free trade agreement.

**Hard border:** the Republic of Ireland is a member of the EU and transporting goods across its border with Northern Ireland currently requires no customs checks. Brexit raises the spectre of border checks on the frontier between the Republic of Ireland and Northern Ireland. Doing so, however, raises a range of highly charged issues that harken back to the violence between republicans and unionists that ultimately

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abated following the signature of the Good Friday Agreement. The establishment of a hard border is viewed by many as potentially imperilling the peace process.

**Hard Brexit:** there is no clear definition of a hard Brexit or a soft Brexit, and the context in which the terms are used matters. It is best to think of these two terms as the extreme ends of a continuum on which can be plotted varying degrees of closeness of the relationship between the UK and the EU following Brexit. The more doctrinaire of the supporters of the Leave campaign (led in the cabinet by the Foreign Secretary Boris Johnson and the Environment Secretary Michael Gove – the [Brexiters](#)) call for a complete break from the EU in terms of regulation and governance. For them “take back control” means control over borders and full sovereignty over legal and regulatory matters. A hard Brexit at the very least means leaving the single market (to avoid freedom of movement into Britain) and can also mean leaving the customs union (to allow Britain to negotiate its own FTAs). A hard Brexit also excludes committing to any form of alignment with the EU. A hard Brexit could also result in the UK leaving the EU without any deal at all.

In the words of Boris Johnson, “What we need to do is something new and ambitious, which allows zero tariffs and frictionless trade, but still gives us that important freedom to decide our own regulatory framework, our own laws ... .” This at the moment flies in the face of the EU27 position, in the words of Michel Barnier, that “there won’t be any cherry-picking. We won’t mix up the various scenarios to create a specific one and accommodate [the wishes of the British], mixing for instance the advantages of the Norwegian model, member of the single market, with the simple requirement of the Canadian one.”

**Implementation period or transition period:** A concept supported by the proponents of a soft Brexit to allow time to prepare for withdrawal. In fact, most believe this period will also be needed to complete negotiations over the trade relationship. The EU27 have stated that during this period the status quo (what Michel Barnier calls the “complete architecture” of the EU) should be maintained as a practical matter, with one critical exception. During this period, the UK technically would have ceased being a member state of the EU, would have left the customs union and the single market and would have no input into EU decision-making. However, all existing rules and regulations, as well as any new rules and regulations adopted in the EU, would continue to apply, as would ECJ jurisdiction. The period could end in 2020 or in 2021.

Underscoring the view of the EU27, the European Commission published additional negotiating directives on December 20 (supplementing European Council directives issued in May), recommending that for purposes of arrangements during the implementation period (which in its view should end December 31, 2020) there should be no “cherry-picking” by the UK; the UK should be subject to all existing, and any new, EU laws and rules (including the four freedoms); ECJ jurisdiction should continue; and the UK should have no voice in EU institutions. These directives on transitional arrangements are to be adopted in January 2018.

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As a reminder of the complexities ahead, Michel Barnier has reiterated that, while a trade agreement could be agreed during the implementation period with the EU, it would still need to go through the full ratification process. According to Barnier, any FTAs agreed, during this period, by the UK with other countries could only enter into force at the end of the implementation period. As for EU FTAs with other countries, Barnier has noted that, during the implementation period, the UK would not automatically be covered by the approximately 750 bilateral agreements currently in place with the EU.

**Joint Report:** Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union. The issuance of the Joint Report was the basis on which the parties moved to the second phase of the negotiations.

**June 2017 elections:** the PM called for a snap election, which was held in June 2017. The PM had expected to augment her slim majority to 100 to compel pro-European Conservatives to vote in line with the Conservative Party manifesto and deliver a hard Brexit. Instead, the PM lost her majority and was forced to enter into a "support" arrangement with the DUP. Much of what has happened since June has been affected by the unexpected outcome of the election.

**Leaving the EU:** the choice presented in the June 2016 referendum was between remaining in the EU, or leaving the EU. There was very little appreciation of the implications of leaving the EU and very little discussion of the details of any such exit. The referendum was not legally binding, and those opposed to leaving have long maintained that there was no reason why Theresa May, who was named PM following the resignation of David Cameron, should have interpreted the outcome as a mandate to also leave the single market and the customs union.

**Meaningful vote:** an amendment to the Withdrawal Bill to give Parliament a "meaningful vote" on the terms of the exit, which in practice gives MPs the ability to approve the final Brexit deal before it becomes effective. The amendment specifically provides that the government cannot issue new regulations to implement Brexit without Parliament passing a new law to authorize them. The amendment does not give MPs the right to change the deal (as the deal can only be changed by negotiation between the UK and the EU<sup>27</sup>), to force the government to change the deal or to veto Brexit. The amendment does not eliminate the prospect of the UK crashing out of the EU and, in fact, may slightly increase the likelihood since a negative vote in effect means "no deal," as it is likely that there will be insufficient time for negotiators and the European Parliament to accept any changes prior to the Article 50 deadline.

The amendment was approved by a vote of 309-305, which represented the PM's first defeat in the House of Commons, and some commentators believe that the defeat will embolden the leaders of the soft Brexit effort as it demonstrates that there is no majority in Parliament for a hard Brexit.

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**Missing impact statements:** following statements made to the House of Commons by David Davis that the government had prepared 58 detailed impact statements of Brexit on various sectors of the British economy, a motion in Parliament was passed to compel the government to turn over these impact statements to the House of Commons Brexit select committee. After a lengthy delay, the government ultimately turned over a fraction of the impact statements, with heavy redactions, and conceded that the rest did not exist. The lack of what appears to be a meaningful assessment of the impact of Brexit on Britain has been severely criticised by supporters of a soft Brexit or no Brexit.

**Net migration:** the difference between the number of immigrants to a country and the number of citizens emigrating from that country. In May 2017, the PM indicated that she wished to reduce net migration to the tens of thousands. In early December, figures released show that net migration from the EU fell by the largest amount (from 336,000 to 230,000 during the 12 months ended June 2017, with three quarters represented by EU citizens returning to the continent) since records were first compiled.

**Norway option:** refers to a trading relationship along the lines of that enjoyed by Norway, which would entail membership in both the EEA and EFTA. Norway is one of four members of EFTA. The UK, which left EFTA in 1972, could become part of the EEA as a member of EFTA, though becoming a member of EFTA would require the approval of the other states of EFTA (triggering approval of the parliaments of each of these states). Were the UK to join EFTA and rejoin the EEA (leaving the EU means the UK also leaves the EEA), it would not automatically become part of the various FTAs EFTA has with other countries. Non-EU members of the EEA, such as Norway, have nearly full access (without having a vote or a role in setting any of the rules) to the single market (only EU member states are members of the single market), but are not members of the customs union. Norway makes financial contributions to the EU and accepts a significant proportion of EU laws and regulations as well as free movement of people. By being outside the customs union, Norway can enter into trade deals with other countries. The Norway model does not sit well with the PM's commitment to take the UK out of the single market and the customs union.

**October deadline:** October 2018, which the EU27 has set out as the deadline for the withdrawal agreement to be submitted to the European Council in order to provide sufficient time for the approvals to be obtained in each of the member states.

**Passporting rights:** the basis on which services today are provided across the EU. These so-called passporting rights are enshrined in a series of agreements that allow service providers licensed, and complying with rules, in one (the home) member state to be able to provide services throughout the EU without complying with further obligations that might otherwise be imposed by the host member state.

**Red lines:** from the early days of the Brexit process (when the PM's principal slogan was "Brexit means Brexit"), policy positions have been set forth as immutable, non-negotiable, many of which appear to have been crossed. The PM set forth her red lines in her acceptance speech in 2016 and with greater precision

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in her Lancaster House speech (in January 2017) in which she committed the UK to a hard Brexit in order to achieve her view of the mandate of the 52% of the voters who voted to leave the EU – to “take back control” of borders and the law: this would mean leaving the single market and the customs union, and leaving the jurisdiction of the ECJ. There was also an implied threat to turn the UK into a low tax, lightly regulated jurisdiction.

In early December, “Brexiters” set out new red lines, including that the ECJ have no jurisdiction in the UK after March 29, 2019, that the UK be free to sign *and implement* FTAs during the implementation period, that free movement of people into the UK end on March 29, 2019, and that the UK be exempt from *new* EU regulations during the implementation period.

**Second phase:** negotiation over the implementation period and the trade relationship. The PM expected these would start “straight away” (as in mid-December), but the European Council negotiating guidelines issued December 15 envision the following sequence:

- January 2018: the European Commission is to issue recommendations as to the transition arrangements, and, to the extent the future relationship is addressed, it will be set out in terms of the vision rather than the specific details;
- January - March 2018: the European Commission is to develop guidelines for the future relationship to be agreed at the next summit of the European Council, in mid-March 2018; and
- after the March summit: negotiations begin on the future relationship, principally trade but also addressing the implementation period as well as security, defense and justice, reflecting the terms set out in the Joint Report. During this period, the parties may agree to extend the two-year implementation period.

While the Brexiteers believe it is feasible to negotiate and sign a trade agreement by March 29, 2019, many others merely expect agreement on principles by that date. The Brexiteers also have called for the right to negotiate their own FTAs with other countries during the implementation period, but that has met strong resistance from the EU27.

**Second referendum:** some critics of the entire Brexit project have called for a second referendum as the only realistic means of preventing Brexit. The government has steadfastly rejected the idea of a second referendum. Supporters point to recent polling data that show a growing margin of the electorate in favour of remaining in the EU, when undecided voters are excluded. The increase in the numbers of those opposing Brexit is attributable to those who did not vote in the 2016 referendum (particularly younger voters), many of whom voted for Labour in the 2017 snap election. At present, there is no clear choice available to British voters as between Labour and Conservatives on the question of Brexit.



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**Services:** the UK is reported to be the second largest exporter of services, after the US. Services account for 45% of total exports from the UK, the largest component of which is financial services (though by no means even the majority). The UK maintains a trade surplus in services. The challenge is that, in contrast to goods, there is no single regime for services, and the FTA models being considered do not adequately address the services that matter most to the UK. Frictionless trade in services depends on accommodations in respect of non-tariff barriers, including licensing and regulation. The House of Lords Europe Committee has called the EU single market the “most integrated regime for services trade in the world.” The UK had a surplus in financial service exports in excess of £20 billion last year, though digital services are also becoming more significant. See generally, “Services: the ‘dark matter that matters’ in trade with the EU,” *Financial Times* (December 18, 2017).

**Single market:** also known as the internal market, and formerly known as the common market, stands at the centre of the EU. Membership in the single market implies accepting the four freedoms. The single market removes barriers to trade (both goods and services) and harmonizes national laws at the EU level. The single market should not be confused with the customs union.

**Soft Brexit:** if Brexit cannot be avoided, the fallback position for the proponents of a soft Brexit in the cabinet (the Chancellor, Philip Hammond, the Home Secretary, Amber Rudd, and the Business Secretary, Greg Clark) is an arrangement that could include remaining in the customs union and the single market, or perhaps only the customs union. A soft Brexit envisions providing some accommodation on free movement into the UK.

**Withdrawal agreement:** Article 50 calls for the negotiation of an agreement “setting out the arrangements for [the UK’s] withdrawal, taking account of the framework for its future relationship with the [EU].” This agreement will be the subject of future negotiations between the EU and UK, and is not expected to be finalized until all negotiations are complete.

**Withdrawal Agreement and Implementation Bill:** enshrines the withdrawal agreement into domestic English law through primary legislation and will cover both the withdrawal arrangement and the implementation period; it will be separate from the Withdrawal Bill.

**Withdrawal Bill:** colloquial reference to the EU (Withdrawal) Bill, formerly known as the Repeal Bill or Great Repeal Bill, which is now being debated in Parliament. The legislation will repeal the 1972 European Communities Act and transpose into domestic UK law existing EU law.

### The Players

**Barnier, Michel:** the lead negotiator for the EU27.

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**Brexiters:** leaders in the cabinet of the Leave Campaign and now associated with what has become the hard Brexit position. They include Michael Gove and Boris Johnson, as well as David Davis, Liam Fox and Garvin Williamson. The Brexiters and the more hard-line “Brexiters” in the Conservative Party (MPs) recently (December 19) have drawn additional [red lines](#).

**Davis, David:** the head of the Department for Exiting the European Union and the formal lead negotiator for the British on Brexit.

**DUP:** the Democratic Unionist Party in Northern Ireland. The DUP has a support agreement with the Conservatives to provide the government with the votes necessary to achieve a narrow majority if all Conservatives vote with the government. The DUP supports Brexit but is steadfast against the imposition of a hard border between Northern Ireland and Ireland. Moreover, the DUP was opposed to any arrangement that applied only to Northern Ireland and not the entire country (that is, an agreement that, when the UK left the EU, Northern Ireland would have a separate, aligned set of arrangements). An eleventh hour deal with the DUP and Ireland rescued the first phase of the negotiations.

**Juncker, Jean-Claude:** the President of the European Commission.

**Gove, Michael:** the Environment Secretary and one of the leading Brexiters.

**Grieve, Dominic:** a Conservative MP and the former Attorney General, who led the rebellion over the meaningful vote amendment and which saw 11 Conservatives defect to pass the amendment.

**Fox, Liam:** the Secretary of International Trade and one of the leading Brexiters.

**Hammond, Philip:** the Chancellor of the Exchequer, associated with the soft Brexit faction.

**Johnson, Boris:** the Foreign Secretary and one of the leading Brexiters.

**PM:** the Prime Minister, Theresa May.

**Robbins, Oliver:** formerly David Davis’ principal deputy, now reports directly to the PM as her Brexit advisor and is credited with taking the lead on the Joint Report.

**Rudd, Amber:** the Home Secretary, associated with the soft Brexit faction.

**Starmer, Keith:** a Labour MP and a leading voice in the Labour Party in support of a soft Brexit.

**Tusk, Donald:** the President of the European Council.

**Verhofstadt, Guy:** the lead Brexit representative for the European Parliament.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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