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Brexit Update: Brexit Lexicon

As the Brexit discussion between the UK and the EU27 (not to mention the internecine battles among factions in the government) continue, keeping track of the players and their positions, and where the process seems to be heading, is made more difficult by the sometimes arcane and ambiguous terminology that has evolved since the Brexit referendum. As an aid to those trying to keep track of the moving pieces, we set out below the key concepts and players in a slightly different format.

Acquis: the body of common rights and obligations that are binding on all EU member states based on EU treaties, EU legislation, ECJ case law, declarations and resolutions adopted by the EU; measures relating to the common foreign and security policy; measures relating to justice and home affairs and international agreements concluded by the EU and third countries.

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 continues to be 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 yet maintain 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 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](#). Underlying some of the potential scenarios as to how the Brexit process plays out is the question of whether the Article 50 notice is revocable. Ultimately a question, ironically, of EU law, the ability to revoke the notice has yet to be formally addressed by the British government. Incidentally, as part of the lawsuit brought to compel the government to provide Parliament with a formal vote on Brexit, both the plaintiffs and the government conceded for purposes of the action that the notice was irrevocable.

Backstop: the fall-back position on the Irish border question if no agreement has been reached to avoid the re-imposition of the [hard border](#) between Ireland and Northern Ireland. The backstop, in theory, was agreed in December 2017, but underscoring the risks presented when broad principles are enunciated with the details left for another day, both the British and the EU27 have different interpretations. For the British, the backstop means the entire UK would be aligned within a customs union. Brussels interprets the backstop to mean that Northern Ireland remains in the customs union (as opposed to the entire UK), with customs checks at Irish sea ports for goods moving between Northern Ireland and the UK. Brussels worries that alignment is a subterfuge to allow Britain to have access to the single market without accepting the [four freedoms](#), and is disinclined to be willing to consider any proposal that is not focused solely on Northern Ireland. The backstop is one of two proposals to deal with the border issue, the more hard-line being [maximum facilitation](#).

BRINO: Brexit in name only, an outcome the Brexiters are increasingly fearing.

Cambridge Econometrics Report: an assessment of Brexit across key indicators and sectors at a sub-national level assuming five different scenarios, ranging from a status quo outcome (where the UK remains in the single market and customs union) to an extreme no-deal outcome (and the UK defaults to World Trade Organization rules). The assessment, commissioned by the mayor of London and released on January 11, 2018, suggests that London will emerge relatively better than the rest of the UK following Brexit, due to its resilience to economic shocks. However, the results show that Brexit will not only reduce the size of the UK economy (compared to what may have happened if the UK remained in the single market and customs union), but will also put it on a slower long-term growth trajectory (the economy is still expected to grow, but at a slower rate than if Brexit did not occur). The worst case scenario projects 87,000 lost jobs in London and 482,000 lost jobs across the UK, and lost investment of close to £50 billion, by 2030. The mayor explained that he had commissioned and released the assessment because the government had failed to conduct its own assessment, or had but was keeping it a secret – a statement prompted presumably by the admission by [David Davis](#) regarding the [missing impact statements](#).

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

Canada plus plus plus (also known as Canada dry): 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, 2017, 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. Davis has responded that the European Commission cannot "cherry-pick some sectors," meaning that goods and services should not be treated differently. The British were reported to have pressed 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.

Cherry-picking: EU27 negotiators have consistently maintained that Britain cannot “cherry-pick” parts of the single market, while failing to honor the four freedoms. There is a growing public recognition that failure to reach agreement on access to the EU markets for aviation, chemicals and medicines, among others, could cause serious disruptions, including disruption to supply chains. Certain government officials, as well as industry representatives, have called for these sectors to continue to be regulated by EU agencies, such as the European Medicines Agency and the Chemicals Agency (and subjecting them to EU regulatory regimes and standards, as well as ECJ jurisdiction). Continued ECJ jurisdiction would cross one of the Prime Minister’s red lines. From an EU27 perspective, a hard line taken by EU negotiators and EU spokespersons against cherry-picking makes sense, as cherry-picking raises the prospect of separate deals among different member states, which is fundamentally inconsistent with EU principles and could create political dysfunction. As the EU27 member states continue to contemplate the potential benefits if business contingency plans are triggered, the unity of purpose among the EU27 could begin to fray.

Council Supplementary Directives: on January 29, the Council released a supplement to its negotiating directives (first issued in May 2017). The supplement sets forth negotiating guidelines for the second phase of negotiations, including governance of the withdrawal agreement, intellectual property rights, ongoing public procurement procedures, customs-related matters needed for an orderly withdrawal from the EU, protection of personal data and use of information. The supplement also noted that the second phase must set out in unambiguous legal terms the results of the [first phase](#) of the negotiations. (This appears, in effect, to mean that there would be no [transition period](#) if the issues addressed in the first phase, particularly the thorny Irish border question, were not reflected in the withdrawal agreement.) The supplement laid out the following negotiating guidelines:

- the transitional arrangements should cover the full range of [acquis](#) and apply during the transition period as if the UK were still an EU member state;
- any changes to the [acquis](#) should apply to and in the UK during the transition period;
- EU law should continue to apply during the transition period;
- the UK remains a member of the single market and the customs union during the transition period;
- the UK may not become bound during the transition period by FTAs entered into in its own capacity;
- existing EU regulatory, budgetary, supervisory, judicial and enforcement instruments continue to apply and be subject to ECJ jurisdiction during the transition period; and
- the transition period should not extend beyond December 31, 2020.

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. Until earlier this year, the Prime Minister's principal view on Brexit, first articulated in her Lancaster House speech in January 2017, was that "no deal is better than a bad deal." While it is fair to say that that view has moderated significantly since the June 2017 election, "no deal" nonetheless remains a very real prospect, and the threat of "no deal" continues to figure prominently in the concerns voiced by those opposed to Brexit. No deal could occur if either the British walk away (including if there is a negative vote in Parliament) or the EU negotiators walk away, or if the clock runs out and there is no appetite or time to extend the Article 50 deadline.

In an odd twist, David Davis, in a December 2017 letter to the Prime Minister that was leaked in January, stated that he had evaluated legal action against the European Commission for preparing for a "no deal" outcome and for suggesting to British businesses that the UK would be treated as a "third country" notwithstanding the prospect that alternative arrangements might be negotiated. Davis made specific reference to the concern that the EU "has adopted a number of measures that put agreements or contracts at risk of being terminated in the event of a 'no deal' scenario and/or would require UK companies to relocate to another member state." The EU Commission reminded the British that it was the Prime Minister who, in her Lancaster House speech in early 2017, had first raised the prospect of "no deal."

Customs partnership: one of two temporary arrangements proposed in May 2018 by the British as a means of breaking the deadlock over the Irish border question. The other arrangement proposed by the British is the [maximum facilitation](#) (or "max fac") approach. The customs partnership would entail collection by the UK of customs duties, on behalf of the EU, on goods arriving in the UK and destined for the EU. In fact, all goods arriving in the UK would initially be subject to the same EU tariff, with goods remaining in the UK qualifying for rebates should the UK impose lower tariffs. The system would require the UK to track goods electronically to determine who would be entitled to rebates. The UK would be able to negotiate trade deals with third parties but could not enter into them so long as the customs partnership is in effect.

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. Were the UK to remain a member of the EU customs union, it would mitigate the impact on the Irish border; it would, however, absent special arrangements, also restrict the UK's ability to negotiate its own trade deals with third countries. At the end of January 2018, it was reported that supporters of soft Brexit were considering a customs union arrangement with the EU that would cover trade in goods only.

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. The European Court of Justice is one of two courts (the other being the General Court) that comprise the Court of Justice of the European Union (CJEU).

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 conceded in late 2017 that the cabinet was only then 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 Prime Minister, dubbed by some as the "war cabinet") on this matter took place on December 18, 2017. This topic is also tied to discussions over the transition period. 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 transition period.

EU approval thresholds: [Michel Barnier](#), on December 19, 2017, 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 May 2017 decision, 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 in September 2017 for FTAs with Australia and New Zealand, could avoid approval by national and regional parliaments.)

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 EU 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: the directly elected legislative body of the EU, comprised of 751 members. 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 out 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 EU, other than the UK.

Fearmongering: during the campaign leading up to the referendum, the Leave camp accused those citing potentially disastrous economic consequences of a vote to leave the EU (and the inevitable departure) of fearmongering. More recently, efforts to characterize a hard Brexit as leading to disastrous consequences in the medium- to long-term (Brexiters will concede short-term pain) have been labelled as part of **Project Fear**.

Following the referendum, while sterling did plummet relative to the dollar in particular (and remains well below pre-referendum levels to this day), the dire economic consequences have not been felt. In fact, the relative value of sterling, together with more positive global growth, has supported overall positive growth in Britain since the referendum. The *Financial Times* cites a range of estimates (as of June 2018) that growth has slowed between 1% and 2% of gross domestic product due to Brexit (representing a hit of between £20 and £40 billion). In terms of stock price movements, British businesses that generate significant revenues outside the UK have benefitted since the referendum, while companies with a substantial domestic focus have not. The disparity between the two is reported at an all-time high. Looking forward, however, prospects may be less certain, in that while sterling is expected to remain under pressure,

the companies benefitting most from the devaluation in sterling terms may be more exposed to threats to their supply chains, whether in the form of trade wars or from a hard Brexit.

First phase: the EU27 insisted that negotiations over any transition 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 the border between Ireland and Northern Ireland. On December 15, 2017, 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. As of June 2018, the Irish border issue remains very much in contention.

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 (referred to as “regaining sovereignty”), for many supporters of the Leave campaign it was all about immigration.

Forty-eight letters: the submission of 48 letters to the chairman of the backbench 1922 committee would trigger a vote of no confidence, which in turn would lead to a leadership contest in the Conservative Party, if the Prime Minister failed to win the confidence vote or won it by a narrow margin.

FTA: a free trade agreement. Free trade agreements determine the terms of trade between or among contracting parties, and in particular are intended to reduce barriers to free trade, such as tariffs and quotas. These agreements also cover topics such as intellectual property rights, competition policy and government procurement.

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 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 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. With the developments in May and June 2018, the hard Brexit camp may be splintering, between those willing to agree to any deal that delivers Brexit, with the expectation of ironing out details after the fact, and those wanting to nail down all the terms before departure.

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 requirements of the Canadian one.”

HMRC testimony: in the midst of the debate over options to address the Irish border issue, the chief executive of the UK’s tax authority advised the Commons Treasury Committee that the “max-fac” options preferred by Brexiters could cost UK businesses between £17-20 billion per year, the principal driver of which would be the cumulative cost of customs declarations. While HMRC views the alternative customs partnership approach as having a far lower cost, shortly after the HMRC testimony, the operator of the Channel Tunnel, Eurotunnel, weighed into the public debate by warning that either approach would result in severe disruptions for businesses and consumers that rely on timely delivery of goods. Others have followed suit and made similar arguments.

Joint Report: the 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 at the end of 2017 to the second phase of the negotiations.

June 2017 elections: the Prime Minister called a snap election, which was held in June 2017. The Prime Minister 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 Prime Minister lost her majority and was forced to enter into a “supply and confidence” arrangement with the DUP. Much of what has happened since June 2017 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 Prime Minister following the resignation of David Cameron, should have interpreted the outcome as a mandate to also leave the single market and the customs union.

Maximum facilitation or “**max-fac**”: an arrangement proposed by the Brexiters that envisions a streamlined customs arrangement and a frictionless border between Ireland and Northern Ireland that would operate based on as yet unspecified technology, whereby goods would be traced and pre-cleared with tax authorities electronically. The UK would remain in a customs union until the technology could be developed and deployed. Many are sceptical that this arrangement is feasible in the next five to ten years (in part because of the complexity of [rules of origin](#) that would need to be catered for), and there appears to be little appetite for this proposal among the EU27.

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 EU27), 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. See [Withdrawal Bill](#), below. The amendment was approved by a vote of 309-305, which represented the Prime Minister’s first defeat in the House of Commons.

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.

MP: member of Parliament.

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 Prime Minister indicated that she wished to reduce net migration to the tens of thousands. In early December 2017, 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.

No deal: see [Crashing out of the EU](#).

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 Prime Minister'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 Prime Minister's principal slogan was "Brexit means Brexit"), policy positions have been set forth as immutable and non-negotiable, many of which now appear to have been crossed. The Prime Minister set forth her red lines in her acceptance speech in 2016 and with greater precision 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 2017, "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 transition 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 transition period.

Reshuffle: in early January 2018, the Prime Minister reshuffled her cabinet. While some expected more drastic changes, the Brexiteers retained their portfolios. Many viewed the reshuffle as underscoring the Prime Minister's difficult political position, and some lamented the missed opportunity for the Prime Minister to use cabinet changes as a means of communicating her preferred Brexit outcome. Essentially the balance between those in favor of Brexit and those against remained unchanged, and the failure to enhance one side or the other has raised questions about whether the Prime Minister had decided, even at

this late date, on the preferred outcome or, if she had, whether she feels she has the authority to push it through. The political calculus has been further complicated by various resignations of senior ministers.

Rules of origin: in order to benefit from preferential trade terms in an FTA, exporters must establish that the goods being exported originate in the exporting country or had a substantial work done to assemble them in the exporting country. In short, if the UK and the EU were to enter into an FTA, to obtain preferential access to the EU UK exporters would have to show their goods were made in the UK (unless the goods are exempt). With global supply chains being what they are, rules of origin are tremendously complex, reflecting how products are assembled (and where). It is estimated (by the Society of Motor Manufacturers and Traders), for example, that approximately 44% of the components in a car assembled in the UK are sourced from UK suppliers; however, only between 20-25% of these components actually are manufactured in the UK. Approximately at least 50-55% by value of the goods must be locally sourced for preferential treatment. These rules create various challenges: the need to meet local content requirements and also the costs associated with obtaining certificates of origin and related administrative and audit costs. The UK can avoid these rules if it remains in a customs union with the EU (since there would be no tariffs imposed on goods traded between the UK and the EU and, in fact such goods would be deemed “EU content” relative to third countries; tariffs are imposed only once goods cross the common external border).

Second phase: negotiations over the transition period and the future (*i.e.*, trade) relationship with the EU, as well as any unresolved issues from the first phase. The Prime Minister expected these would start “straight away” (as in mid-December 2017) following confirmation by the European Council that sufficient progress had been made on the three phase one issues, but the European Council negotiating guidelines issued December 15, 2017 envisioned the following sequence:

- January: the European Commission issues 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: the European Commission develops guidelines for the future relationship to be agreed at the next summit of the European Council, in mid-March; and
- after the March summit: negotiations begin on the future relationship, principally trade but also addressing the transition 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 transition period. There are European Council summits scheduled for June 28, October 18 and December 13.

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 transition 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 favor 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.

In mid-January 2018, former UKIP leader Nigel Farage, in a surprise move, said he was coming round to the view that a second referendum may be necessary to put the issue of Brexit firmly behind the country. Shortly thereafter, he announced that he was concerned that the Leave camp might lose that second referendum, reversing his earlier view that the Leave camp would win the second referendum by an even larger margin than the 52-48 win in 2016.

Beginning in May 2018, a coordinated effort among the disparate Remain groups appears to be coalescing around the idea of a People's Vote – one form of which contemplates the vote of Parliament on the withdrawal agreement as an advisory one, to be followed by a referendum on the withdrawal agreement.

Services: the UK is reported to be the second largest exporter of services, after the United States. 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 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). As possible solutions for trade move in the direction of a single market for goods, commentators note that many goods also have service components.

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 fall-back position for the proponents of a soft Brexit in the cabinet (the Chancellor, Philip Hammond, and the Business Secretary, Greg Clark) is an arrangement that could include remaining in the customs union and the single market, or perhaps only in the customs union. A soft Brexit envisions providing some accommodation on free movement into the UK. The soft Brexit faction worries that further intransience on the part of the EU negotiators could result in no deal. At Davos

earlier this year, in an effort to assuage the fears of the business community in Britain that the country would lose frictionless access to the EU, as well as the fears of the EU27 that Brexit would prompt Britain to become a loosely regulated, low-tax jurisdiction, the Chancellor stated that Britain wished to stay closely aligned with the EU and that material differences in regulation between the UK and the EU would be “modest.” This produced outrage on the part of the Brexiteers and earned a rebuke from the Prime Minister.

Special Relationship: the longstanding geopolitical relationship between the US and the UK has in diplomatic and academic circles been referred to as the “special relationship.” Eager to curry favor with the then new US President, the Prime Minister was the first foreign leader to visit Washington. A key objective of that meeting was to ensure that Britain would stand, not last in line (as former President Obama had threatened during the referendum campaign), but first in line for a new FTA. The deterioration in the public relationship between the two countries, as well as the prospect of a looming trade war, calls into question whether one of the proffered benefits of a hard Brexit (namely the ability to negotiate favorable trade agreements with key trading partners around the world) might in fact still be on the table. Uncertainty in respect of the ability to negotiate an arrangement that benefits the UK could prompt more ministers to favor remaining in the EU customs union.

Third country status: when the UK leaves the EU, regardless of the nature of the trading relationship, the UK will be, and will be treated as, a third country, and there is little flexibility under in the EU ecosystem to be more accommodative. As the former chief UK diplomat to the EU [Sir Ivan Rogers](#) has noted,

There is no legal status of ‘being a third country which used to be a member and therefore can be treated radically better than other third countries.’ There is no legal ‘half way in, half way out’ option for either the Single Market or the Customs Union. There is therefore an asymmetry. If you are in, you can, within constraints, negotiate bespoke arrangements, carve outs, opt-outs, opt back-ins, and so forth. But once you are out of the legal architecture of the EU, the scope for bespoke arrangements is massively diminished. ... You simply cannot, with any honesty or coherence, make an argument for taking back control and full autonomy of decision-making on the UK side of the Channel, and simultaneously argue for the EU27 to restrict to a certain extent its own autonomous decision-making precisely in order to give you, a non-member of the club, a real say in the direction of its policy.

Top down/bottom up approaches: as businesses focus on the post-Brexit trade relationship with the EU, ministers are offering different solutions. The hard Brexit camp envisions a bottom up approach that starts with a clean slate of total regulatory divergence and adds sectors (via an opt in) as to which regulatory alignment with the single market would be acceptable, while the soft Brexit camp has the opposite view, favoring maximum regulatory alignment with the EU, with opt outs kept to a minimum. A variation on the theme has been attributed to [Olly Robbins](#), namely a three-pronged approach: some sectors being fully converged, some sectors being fully exempt from EU regulation and a third group being aligned as to

objective, achieved through divergent means. These all need to be viewed for the moment in light of the EU27 position against any [cherry-picking](#).

Transition period or implementation 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 at the end of 2020 or in 2021.

Underscoring the view of the EU27, the European Commission published additional negotiating directives on December 20, 2017 (supplementing European Council directives issued in May 2017), recommending that for purposes of arrangements during the transition 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. See also [Council Supplementary Directives](#).

As a reminder of the complexities ahead, Michel Barnier has reiterated that, while a trade agreement could be agreed during the transition 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 transition period. As for EU FTAs with other countries, Barnier has noted that, during the transition period, the UK would not automatically be covered by approximately 750 bilateral agreements currently in place with the EU.

Pro-EU camps in London view a two-year transition period (or a shorter period if the EU27 position prevails) as providing too little time to untangle all the relationships that would necessarily be required to give effect to most forms of Brexit.

White paper: originally expected before the June 2018 European Council summit, the government’s blue print for the future relationship with the EU will be published after the summit. Commentators believe it will be released on July 9. The rumored 130-plus page policy paper – advertised (in the words of David Davis) as including “detailed, ambitious and precise explanations of [the UK’s] positions” – is expected to cover the customs relationship as well as security, financial services, fisheries and aviation. The delay is generally attributed to the failure of the cabinet to agree on a common approach on customs arrangements (as between the customs partnership and maximum facilitation).

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 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 transition period; it will be separate from the Withdrawal Bill.

Withdrawal Bill: colloquial reference to the European Union (Withdrawal) Bill 2017-19, formerly known as the Repeal Bill or Great Repeal Bill. The legislation repeals the 1972 European Communities Act and transposes into domestic UK law existing EU law. The Withdrawal Bill, which is one of eight pieces of legislation identified in the Queen’s Speech in June 2017 as necessary to implement Brexit, was approved on June 20, 2018. On the key question of the meaningful vote, both houses accepted the government’s amendment in lieu which sets out how Parliament will approve the withdrawal agreement and that, if it does not approve, a minister will make a statement setting out how the government “proposes to proceed” within 28 days. In addition, the government accepted that the House of Commons would have a vote on a motion “in neutral terms” (meaning it would not be subject to amendment) to consider this ministerial statement. It would also have a vote on a motion “in neutral terms” to consider a ministerial statement if no deal is reached with the EU by January 21, 2019.

The Players

Barnier, Michel: the lead negotiator for the EU27.

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, 2017) have drawn additional [red lines](#).

Corbyn, Jeremy: leader of the Labour Party.

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 is opposed to any arrangement that applies only to Northern Ireland and not the entire country (that is, an agreement that, when the UK

leaves 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.

European Research Group or ERG: a single issue research group for the Conservative Party, led by Jacob Rees-Mogg. That single issue is the withdrawal of the UK from the EU.

Farage, Nigel: the former leader of UKIP.

Gove, Michael: the Environment Secretary and one of the Brexiteers.

Grieve, Dominic: a Conservative MP and the former Attorney General, who led the rebellion over the meaningful vote amendment, which saw 11 Conservatives defect to pass the amendment providing for the vote. However, as part of the final vote on the Withdrawal Bill, Grieve failed to support his own second amendment, which would have given Parliament the right to decide what happens if the House of Commons rejects the eventual Brexit deal.

Fox, Liam: the Secretary of International Trade and one of the Brexiteers.

Hammond, Philip: the Chancellor of the Exchequer and part of the soft Brexit faction.

Johnson, Boris: the Foreign Secretary and one of the Brexiteers.

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

Prime Minister: Theresa May.

Rees-Mogg, Jacob: Conservative backbencher aligned with the Brexiteers and rumoured to be part of a dream team with Boris Johnson and Michael Gove to challenge the Prime Minister. Rees-Mogg, who also heads the Conservative's pro-hard Brexit European Reform Group, has accused the Treasury of "fiddling the figures" in its Brexit forecasts in the reported hope of pushing the government to accept a customs union arrangement with the EU. The forecasts were included in a report leaked to the media that showed that growth would be lower in each of three possible Brexit scenarios than if the UK remained in the EU.

Robbins, Oliver (Olly): formerly David Davis' principal deputy, reports directly to the Prime Minister as her Brexit advisor and is credited with taking the lead on the Joint Report and on subsequent key initiatives.

Rogers, Sir Ivan: formerly the UK Permanent Representative to the European Union who resigned in January 2017.

Rudd, Amber: a former Home Secretary and part of the soft Brexit faction. She was forced to resign over an immigration scandal.

Starmer, Sir Keir: a Labour MP, the shadow Brexit secretary and a leading voice in the Labour Party in support of a soft Brexit.

Tusk, Donald: the President of the European Council.

UKIP: the UK Independence Party, which currently has no members in the Commons.

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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