

# Brexit: Where are we now?



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## The short answer is

- ❑ **Halfway:** Brexit is scheduled for **March 2019**
- ❑ A further 'Transition Period' until the end of December 2020 is agreed. (Considered too short by some.)
- ❑ Provisional agreement on
  - Solutions for EU and UK citizens abroad; and
  - UK exit bill
- ❑ But an 'invisible' Southern/Northern Ireland border solution is still a 'carry forward'
- ❑ **Next** the EU and the UK negotiate the principles of a Free Trade Agreement
- ❑ The key equation is:

Cooperation logic  
and business  
desires

**v.**

UK negotiating red  
lines and EU integrity  
principles



# Overview of presentation

## The Brexit process

### □ Phase I.

- Sufficient progress:
  - Citizens' rights
  - Financial settlement
  - Irish border issues

### □ Phase II.

- Draft Withdrawal Agreement
  - Still Irish border issues
- Transition Period
- Free Trade Agreement
  - Principles
  - Customs issues
  - EU Court role
  - Financial services (in or out?)
  - Timing issues
- Deal or no deal?



## Overview of presentation (2)

### □ Why does Brexit matter?

- Possible impacts
- Some business reactions
- Focus on
  - Financial services
  - Pharma and medical devices
  - Energy
  - Telecommunications (e.g. broadcasting, data protection, etc.)
  - Automobile industry

### □ For further information.

- We have slide presentations on all these focus areas
- We are happy to organise focused presentations on these areas to those concerned (and re. other areas, if client demand)

### □ Annexes

- Projected timeline
- Links to main EU negotiating documents
- Links to main UK negotiating documents



## The Brexit Process - Phase I

- ❑ EU27 (EU minus UK) Guidelines for Phase I stated that agreement had to be reached during the withdrawal phase on:
  - Rights of EU citizens living in the UK;
  - The so-called "divorce bill" or "Brexit bill"; and
  - The border between Northern Ireland and the Republic of Ireland.
- ❑ "Sufficient progress" on these matters was required to move to Phase II and unlock trade talks.
- ❑ In December 2017, the European Commission ("the EC") and EU Council declared that "sufficient progress" had been achieved and the EC and the UK published a Joint Report ("JR") to that effect.





## Sufficient progress: Citizens' rights

- ❑ JR: The Withdrawal Agreement (“WA”) to provide reciprocal protection for EU and UK citizens, who have exercised their EU right to freedom of movement by the time of the UK’s withdrawal.
  - Key issues: family reunification under EU law conditions; facilitation of partners’ entry and residence; conditions for acquiring residence as set out in EU law; social security and healthcare rules will continue to apply.
- ❑ Legal effects of citizens’ rights (JR):
  - In both the UK and the EU
  - Citizens may directly rely on these rights
  - In the UK, these rights to be in primary legislation and to prevail over inconsistent or incompatible legislation.
- ❑ However, the UK’s demand that UK citizens residing in the EU may exercise freedom of movement and establishment after withdrawal was not met. UK citizens in EU27 just to have rights in the Member State of residence.



## Sufficient progress: Citizens' rights (2)

- ❑ Court of Justice of European Union (“CJEU”) to ensure consistency of citizens’ rights.
- ❑ UK courts
  - To have *due regard* to relevant CJEU decisions after the UK’s withdrawal and
  - May ask for interpretation of EU law rights for **up to 8 years** from the date of application of the citizens' rights part of the JR. Later confirmed in the draft WA **as from end of Transition Period** (2028).
- ❑ EU and UK independent authority to monitor the application of these rights.





## Sufficient progress: Financial settlement

- ❑ No payment of a lump sum.
- ❑ The bill is made up of:
  - ✓ The UK's contribution to EU annual budgets up to 2020.
  - ✓ Payment of outstanding commitments – “*Reste à Liquider*”.
  - ✓ Financing liabilities up to the end of 2020.
- ❑ The UK has agreed upon the methodology and the schedule of the payments, the value of which will be calculated based on principles provided for in the JR.
- ❑ In total, the UK Brexit Bill should amount to €44 billion, “*fair for British taxpayers*” (Theresa May). Financial settlement will be drawn up and paid in euros (JR).





## Sufficient progress: Irish border issues

- ❑ JR: Northern Ireland Peace Agreement (“Good Friday Agreement”) must be protected. The UK guaranteed to avoid a hard border.
- ❑ The UK to propose technical solutions which would convince the EU (Ireland in particular) that the Irish border will remain invisible.
- ❑ If not, the UK committed to fully ‘align’ itself with the EU Single Market and customs rules (JR, para. 49)
  - Recently, in the draft WA the UK has agreed on a “backstop” guarantee to avoid a hard border, whereby Northern Ireland would remain within the EU Customs Union if no solution is found.
  - But very difficult for UK to accept politically.



## Sufficient progress: Irish border issues (2)

- ❑ JR: The UK will ensure (i) that no new regulatory barriers develop between Northern Ireland and the rest of the UK; and (ii) the same unfettered access for Northern Ireland businesses to the whole of the UK market.
- ❑ Confirmation that people born in Northern Ireland can choose Irish nationality.
- ❑ 'Common Travel Area' between the UK and Ireland can continue to operate without affecting Ireland's EU obligations (freedom of movement for EU citizens).
- ❑ In practice, the Irish border issue was carried forward into Phase II of the talks.





## Phase II

1. **Need to finalise WA by October 2018** for approval by both UK and EU Parliaments.
2. **Draft WA agreed in March 2018 with Transition Period after March 2019 until December 2020.**
3. **From March 2018 focus is on the principles of a 'bespoke', comprehensive trade deal.**

### Business concerns:

- Ambitious UK-EU ties.
- Short period now to negotiate a 'declaration of intent' on trade deal.



# 1. Withdrawal Agreement: Irish border issues

Three options are contemplated:

1. *UK remains in EU structures*: the hard border is avoided “through the overall EU-UK relationship”. Very unlikely.
  2. *High-tech solution*: UK proposes specific solutions. A high-tech solution or unique customs arrangement with the EU (whereby UK would be responsible for customs checks on the EU border). **UK Government’s preferred option**. Difficult for EU.
  3. *Backstop solution*: as a last resort to avoid a hard border, Northern Ireland would remain in the EU Customs Union and aligned to EU Single Market rules (JR and draft WA). Difficult for UK.
- The Protocol of the draft WA is based on this third scenario.



## 2. Transition Period: Duration

- ❑ The draft WA states that the Transition Period will end on **31 December 2020**.
- ❑ But many think that a 21 month Transition Period will be too short.
- ❑ **Business is worried that all this time will be an FTA negotiating period, with no Transition Period time left!**





## 2. Transition Period: Content

- ❑ All EU law continues to apply, save that the UK, as a third country, will no longer participate in the EU institutions including the European Parliament, EC, CJEU etc.
- ❑ The UK will have to accept its EU budgetary commitments.
- ❑ EU regulatory, supervisory, judicial and enforcement instruments and structures will also apply.
- ❑ The UK will be subject to the continued jurisdiction of the CJEU.





## 2. Transition Period: Content (2)

- ❑ All EU citizens arriving during the Transition Period will have the same rights as EU citizens who have arrived before the withdrawal (March 2019).
- ❑ EU quotas will apply and UK will remain part of the EU Fisheries Policy, but without a direct say in its rules, until the end of 2020
- ❑ The UK will be able to negotiate, sign and ratify its own trade deals during the Transition Period, but they can only come into force from 1 January 2021.
- Business and governments: Collective sigh of relief.
- Not easy, e.g. UK abides by EU law, but will have no legislative role.



## 3. Free Trade Agreement: Principles

- ❑ *“Canada plus, Norway minus”*: The UK would like an agreement going beyond existing models, such as CETA (the Canada-EU Trade Agreement), but which does not involve joining the European Economic Area (“EEA”, e.g. like Norway):
- ❑ David Davis (UK Brexit Secretary of State) said the UK wants the agreement to extend to services:
  - “an overarching trade deal which has no tariffs. An overarching trade deal, including services. Canada, plus, plus, plus would be one way of putting it”.*
- ❑ The EU appears willing to consider *some* services. But the UK is outside the EU, so with limits.
- ❑ EU had a **€96 billion** surplus in goods supply to the UK in 2016, while the UK had a **€14 billion** surplus in services supply to the EU27.
- ❑ UK also seeking a role in EU sectoral agencies. Controversial.





## 3. FTA: Goods

- ❑ Both parties want zero tariffs and no quotas.



- ❑ The UK wants a ‘**frictionless**’ deal, but the draft EU Council guidelines on the future relationship state that exiting the EU Single Market and EU Customs Union “*will inevitably lead to frictions*”.

- ❑ The UK suggests that products should only have to undergo one set of approvals, in one country.



- ❑ The EU would like the FTA to provide “*disciplines on technical barriers to trade and sanitary and phytosanitary measures*”, as well as a framework for voluntary regulatory cooperation.

- ❑ Business concerns:

- Not enough infrastructure for customs checks.
- Fear of long delays and queues in Dover, Calais etc.



## 3. FTA: Services



□ The UK has stated that:

- The FTA is an opportunity to break new ground with a broader agreement.
- New barriers should be introduced only if absolutely necessary.
- Labour mobility framework should be provided to enable UK businesses and self-employed to travel to EU and *vice-versa*.



□ The EU stated in its guidelines that:

- The FTA should address trade in services.
- However, **allowing market access to provide services under host state rules will be consistent with the fact that the UK will become a third country and will no longer share a common regulatory, supervisory, enforcement and judiciary framework** (i.e. third country access rules).
- Both parties agree on the mutual recognition of professional qualifications.

(Financial services considered later)



## 3. FTA: Customs solutions? (1)



- ❑ The UK is leaving the EU Customs Union.
- ❑ Theresa May presented two options in March 2018, without giving any preference:

### **Option 1. Customs ‘partnership’ between the UK and the EU**

- At the border the UK would mirror the EU’s requirements for imports from the rest of the world, applying the same tariffs and the same rules of origin as the EU *for the goods arriving in the UK and intended for the EU.*
- Parties would know that the goods entering the EU via the UK pay the right EU duties, removing the need for customs processes at the UK-EU border.
- UK would also be able to apply its own tariffs and trade policy *for goods intended for the UK market.*
- **Unprecedented: The UK would act on the EU’s behalf when handling goods from the rest of the world. Would this system be reciprocal?**



## 3. FTA: Customs solutions? (2)



### **Option 2. Highly streamlined customs agreement between the UK and the EU**

- Waive the requirements for entry and exit declarations for goods moving between the UK and the EU.
  - Allow goods moving between the UK and the rest of the world to travel through the EU without paying EU duties and *vice-versa*.
  - Recognise each other's 'trusted traders' at ports and airports to avoid the need to stop at the border.
- **Make the customs border invisible and cut the waiting time.**
  - **High-tech system required.**



## 3. FTA: Customs solutions? (3)



- ❑ In general, the EU wants customs cooperation which preserves the regulatory and jurisdictional autonomy of the parties and the integrity of the EU Customs Union.
  - Do the UK proposals threaten the EU Customs Union?
- ❑ Re Option 1, EU officials:
  - Described this idea as “*magical thinking*”; and
  - Emphasised the risk of loopholes for customs fraud, unless detailed border checks are carried out.
- ❑ Re Option 2, EU officials:
  - Stated that Theresa May “*is pushing too far*”.
  - Explained that it is not all about collecting duties, but also verifying VAT and compliance with EU regulations.
  - Doubt that favorable treatment granted to ‘trusted traders’ would be fair.



### 3. FTA: Role of the CJEU?



- ❑ Long standing UK position is that the jurisdiction of the CJEU should not apply after Brexit.
- ❑ Theresa May has recognised that:
  - *“Even after we have left the jurisdiction of the ECJ, EU law and the decisions of the ECJ will continue to affect us.”*
  - *“UK courts will continue to use ECJ judgments as a reference in some cases.”*
  - *“If we agree that the UK should continue to participate in an EU agency the UK would have to respect the remit of the ECJ in that regard.”*
  - *But “the ultimate arbiter of disputes about our future partnership cannot be the court of either party.”*



- ❑ For the EU, the only way for the UK to have the benefits of the EU Single Market is to accept the CJEU’s jurisdiction.



## 3. FTA: Time constraints

- ❑ The EU cannot sign an FTA with an EU Member State, which means any arrangements agreed in 2018 (or before December 2020) would have to wait until the UK's formal exit from the EU to be signed.
- ❑ EU Council, UK and EU Parliaments ratifications required. Ratifications by national or regional Parliaments could also be required depending on the content of the FTA (*i.e.* if Member State national competences concerned).





## Deal or no deal?

- ❑ So far, the UK and the EU have managed two steps towards a deal on Brexit: (i) agreeing on sufficient progress; and (ii) agreeing on the Transition Period.
- ❑ But if the draft WA is finalised and a declaration on an FTA is added, **what if the EP or UK Parliament disagree? No deal?** No Brexit? Back to negotiating table? New UK elections?
- ❑ The Irish border question as well as the FTA and services are delicate negotiations.





## Why does all this matter?

- ❑ All U.S. and Japanese companies using the UK as a gateway to the EU are worried whether they can continue.
- ❑ Any supplier, or component supplier is affected, facing future duties on trade (or other trade barriers) between the UK and the EU and *vice-versa*.
- ❑ Free movement of personnel within corporate groups between the UK and the rest of the EU will be affected.

Unless specific agreement in the FTA.

- ❑ Meg Hillier (UK MP): *“Failure to have a viable customs system in place before the UK’s planned exit from the EU would wreak havoc for UK business, trade and our international reputation. Confidence would collapse amid the potentially catastrophic effects.”*
- ❑ The UK Customs is planning to hire up to **8,000** civil servants!



## Some business reactions – Many are acting already

- ❑ L. Blankfein (Goldman Sachs, Chief Executive): *"Every month, incremental steps are taken and at some point we do things that are not going to be undone."*
- ❑ I. Beale (Lloyd's of London, Chief Executive) *"Lloyd's has taken its future in its own hands. **We are moving ahead with our own plan. We are opening up a subsidiary in Brussels in Belgium. [...]** Other businesses will be doing the same. **We can't live with this uncertainty."***
- ❑ I. Wright (Food and Drink Federation, Director General): *"What I'm very concerned about is that where we are now is that we would expect to have answers for everything and I fear we aren't going to get them."*
- ❑ J. Dimon (JP Morgan, CEO): *"If they determine you can't have reciprocal trade practices, reciprocal regulations ... It would be more than 4,000 [jobs moved out of the UK]."*
- ❑ B. Moynihan (BofA, Chief Executive) *"We will move roles not only to Dublin but to other EU locations ... **While we await further clarity around the Brexit negotiations, we are making all necessary preparations to serve our clients however those discussions conclude."***



## Focus on financial services (1)

- ❑ For EU clients, the City of London:
  - manages EUR 1.5 trillion in assets;
  - facilitates 2/3 of debt and equity capital raised by corporates;
  - handles 78% of forex trading and 74% of interest rate derivatives;
  - is significant insurer.
- ❑ After Brexit, no more “passporting” or “single rulebook” as basis for activity.
- ❑ EU is offering an “equivalence” regime.
  - Unilateral EU decision **on case-by-case basis** whether third country rules and supervision are equivalent, with possibility of withdrawal at short notice.
  - **Available only in certain situations** – generally prudential and supervisory requirements, but not conduct of business rules (e.g., payment services).





## Focus on financial services (2)



- ❑ UK seeking FTA providing for mutual recognition of home country rules and structured dialogue where rules diverge.
- ❑ But models mentioned to date (CETA; TTIP proposals) are insufficient in terms of scope and depth of market access.
- ❑ WTO MFN issue: EU would have to extend access provided by EU-UK FTA to third countries unless substantial sectoral coverage.
- ❑ Current outlook: Relocation of some financial services plus equivalence in limited areas of activity?
- ❑ Each financial service will have to be analyzed independently.



## Focus on pharma and medical devices

- ❑ The European Medicines Agency is moving from London to Amsterdam.
- ❑ Pharmaceutical products
  - EU law requires that marketing authorisation (“MA”) holders are established in the EEA ➡ MAs currently held by UK entities (**around 37% of all the central MAs held in the EU**) have to be transferred to EEA entities.
  - A number of activities related to pharmacovigilance/batch release can no longer be performed in the UK ➡ so being transferred to entities in the EEA.
- ❑ Medical devices
  - Authorized Representative (“AR”): Third country manufacturers with an AR in the UK and UK manufacturers should appoint an AR in an EU27 Member State and, very likely, *vice-versa*.
  - CE Certificates/Notified bodies: **UK notified bodies perform 50% of all conformity assessment for medical devices placed on the EU market.** Companies working with UK notified bodies should (i) transfer their certificates to an EU27 notified body and (ii) apply for a second certification in the UK after the UK leaves the EU.



## Focus on energy

- ❑ Main facts:
  - Growing UK dependency on imports, much via gas and electricity ‘connectors’ with Norway and the EU 27.
  - Southern and Northern Ireland in ‘All Irish Single Electricity Market’.
  - UK gas is a significant part of Southern Ireland’s supply.
- ❑ Expect reciprocal supply to continue, but query limits if UK not in EU Internal Energy Market (e.g. re. electrical energy ‘market coupling’).
- ❑ As regards trading:
  - Physical/ancillary derivatives trading should be unaffected.
  - Energy futures trading may be part of the wider EU-UK financial services debate.
- ❑ May be double regulation re. REMIT energy market manipulation rules: UK *and* EU rules, with some cooperation between agencies, unless UK role in ACER?
- ❑ ‘Recalibration’ of Climate Change commitments.



## Focus on automotive industry

- ❑ *UK's annual car production: 170,000 units. 80% for export. 56% to EU.*
- ❑ **If no UK-EU trade deal**, UK will rely on WTO rights to access the EU market:
  - UK exports subject to EU standard tariff (e.g. 10% on passenger cars produced in a third country; different levels on components); and potentially *vice-versa* EU to UK.
- ❑ Concerns about “Rules of Origin”: Will UK made cars qualify for EU origin, because of high EU content, where last substantial transformation is outside the EU?
- ❑ Type-approval: EU-wide technical harmonization will no longer apply to UK.
  - Under EU law, any manufacturer can obtain certification for a vehicle type in one EU country and then sell the same type of vehicle EU-wide without additional testing.
  - Non-EU manufacturers must appoint an AR in the EU and the UK approval authority will cease to be an EU type-approval authority.



## Focus on telecommunications

- ❑ **Broadcasting:** EU-established media service providers can broadcast in all Member States, without additional requirements.
- ❑ UK is the EU's biggest broadcasting hub, but many media providers already considering moving to other EU Member States, so as to retain rights to broadcast across EU.
- ❑ **Data protection:** The UK aims to secure an unhindered flow of data from and to the EU after Brexit. It will be seeking “adequacy plus”:
  - an adequacy finding by the Commission, i.e. a decision recognising that the level of personal data protection in the UK is on par with EU standards; and
  - an ongoing role for the UK Data Protection Authority in the EU regulatory fora.
- ❑ **Cybersecurity:** Both the EU and the UK willing to continue their cooperation on cybersecurity and security issues. However, no detailed proposals so far.
- ❑ **Roaming:** EU legislation that abolishes telecoms roaming charges will no longer apply to and in the UK as of the withdrawal date. FTA a possible solution.





## For further information

These slides were prepared by Geoffroy Barthet and John Ratliff, with thanks to Christian Duvernoy, Georgia Tzifa, Lukas Šimas, Álvaro Mateo Alonso and Yujin Suga.

WH Brussels has slide presentations on these focus areas and can advise accordingly. Happy to field other questions if client demand. For further information, please contact us or another member of WilmerHale's Brexit group ([WHBrexitGroup@wilmerhale.com](mailto:WHBrexitGroup@wilmerhale.com))

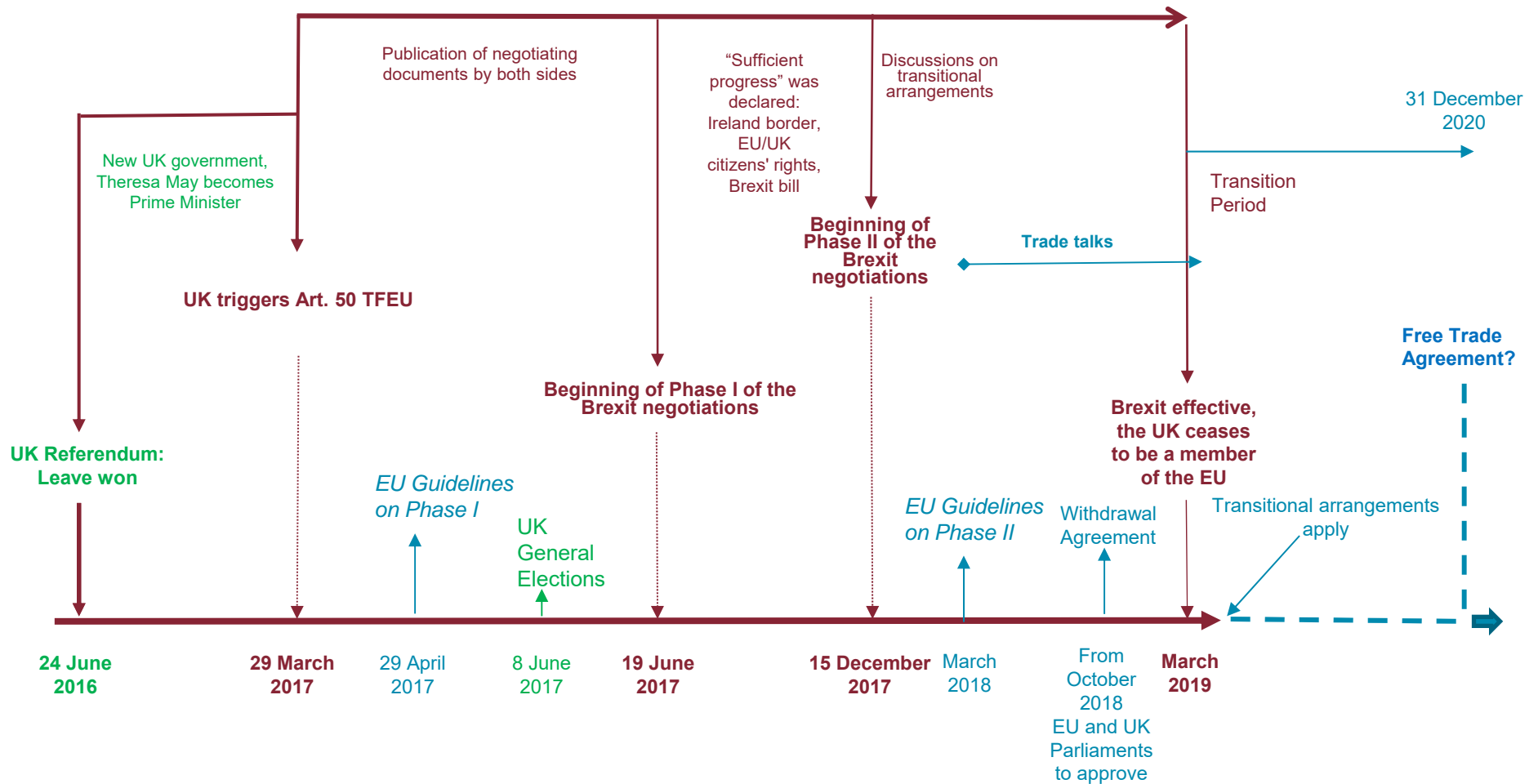
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# Annex 1. Projected Timeline





## Annex 2. Main EU negotiating documents

### A. Position papers sent to the UK

1. [Position paper on Governance](#) -- 13 July 2017
2. [Position paper on Issues relating to the Functioning of the Union Institutions, Agencies and Bodies](#) -- 13 July 2017
3. [Position paper on Goods placed on the Market under Union law before the withdrawal date](#) -- 13 July 2017
4. [Position paper on nuclear materials and safeguard equipment \(Euratom\)](#) -- 13 July 2017
5. [Position paper on Ongoing Police and Judicial Cooperation in Criminal matters](#) -- 13 July 2017
6. [Position paper on Judicial Cooperation in Civil and Commercial matters](#) -- 13 July 2017
7. [Position paper on Ongoing Union Judicial and Administrative Procedures](#) -- 13 July 2017
8. [Position paper on "Essential Principles on Citizens' Rights"](#) -- 12 June 2017; See also [technical note](#) -- 31 Aug 2017
9. [Position paper "Essential Principles on Financial Settlement"](#) -- 12 June 2017
10. [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) – 15 March 2018

### B. Position papers sent to the EU 27 (non-exhaustive list)

1. [Position paper on Public Procurement](#) -- 7 Sept 2017
2. [Guiding principles for the Dialogue on Ireland/Northern Ireland](#) -- 7 Sept 2017
3. [Position paper on Customs related matters needed for an orderly withdrawal of the UK from the Union](#) -- 7 Sept 2017
4. [Position paper on the Use of Data and Protection of Information Obtained or Processed before the Withdrawal Date](#) -- 7 Sept 2017
5. [Position paper on Intellectual property rights \(including geographical indications\)](#) -- 7 Sept 2017
6. [Commission's recommendations on supplementary negotiating guidelines](#) – 20 December 2017
7. [Council negotiating directives on transition period](#) – 15 January 2018
8. [Position paper "Transitional Arrangements in the Withdrawal Agreement"](#) - 7 February 2018
9. [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) – 19 March 2018
10. [European Council Guidelines for the future relationship EU-UK](#) – 23 March 2018



## Annex 3. Main UK negotiating documents

1. [Customs Bill: legislating for the UK's future customs, VAT and excise regimes White Paper](#) – 9 October 2017
2. [Preparing for our future UK trade policy, White Paper](#) – 9 October 2017
3. [Security, law enforcement and criminal justice - a future partnership paper](#) – 18 September 2017
4. [Foreign policy, defence and development: a future partnership paper](#) – 12 September 2017
5. [Collaboration on science and innovation: a future partnership paper](#) – 6 September 2017
6. [The exchange and protection of personal data - a future partnership paper](#) – 24 August 2017
7. [Enforcement and dispute resolution - a future partnership paper](#) – 23 August 2017
8. [Providing a cross-border civil judicial cooperation framework - a future partnership paper](#) – 22 August 2017
9. [Confidentiality and access to documents - position paper](#) – 21 August 2017
10. [Continuity in the availability of goods for the EU and the UK - position paper](#) – 21 August 2017
11. [Northern Ireland and Ireland - position paper](#) – 16 August 2017
12. [Future customs arrangements - a future partnership paper](#) – 15 August 2017
13. [Privileges and immunities - position paper](#) – 13 July 2017; See also [Technical note on functionality and Protocol 7](#) (issued on 28 August 2017)
14. [Nuclear materials and safeguards issues - position paper](#) – 13 July 2017; See also [Technical note on spent fuel and radioactive waste](#) and [Technical note on existing contracts for the supply of nuclear material](#) (both dated 28 August)
15. [Ongoing Union judicial and administrative proceedings - position paper](#) – 13 July 2017
16. [Safeguarding the position of EU citizens in the UK and UK nationals in the EU](#) – 26 June 2017 You can find the latest information about the status of EU citizens, and their families, in the UK as the EU negotiations progress here: [Status of EU citizens in the UK: what you need to know](#) and in the latest [Joint technical note on the comparison of EU-UK positions on citizens' rights](#) (31 August)
17. [The Repeal Bill: White Paper](#) – 15 May 2017
18. [The United Kingdom's exit from and new partnership with the European Union White Paper](#) – 15 May 2017 and the [Prime Minister set out the 12 principles](#) for Brexit