ALERT MEMORANDUM

Towards Brexit: The Trade Implications

March 2017

The UK Government intends to trigger Article 50 TEU by the end of March. This effectively means that the UK will therefore exit the EU by March 2019, unless there is an extension.

In a speech delivered on January 17, Prime Minister ("PM") May explained that the UK would not seek to be part of the EU's customs union, but would instead look to establish a "*comprehensive*" trade agreement with the EU. In tandem, she noted that the UK would no longer accept the jurisdiction of the European Court of Justice.

This memorandum highlights the main implications of these developments on EU–UK trade relations and endeavors to answer the following questions:

I. *How will a post-Brexit future relationship be achieved?*

II. *What will the scope of the Exit Agreement and Trade Agreement include?*

III. *What are the key procedural issues in a potential UK–EU Trade Agreement?*

IV. *What are the potential effects of Brexit on core trade matters?*

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I. How Will a Post-Brexit Future Relationship be Achieved?

1. The Current Situation

Timeframe

In order to officially exit the EU, the UK must formally notify its intention to do so under Article 50 of the Treaty on European Union ("TEU"). Upon notification, the UK has two years to complete negotiations for an Exit Agreement. Once that period has expired, the UK will automatically cease to be a member of the EU, unless the time period is extended, irrespective of whether an Exit Agreement has been negotiated.

PM May has stated that Article 50 will be invoked "*no later than the end of March*". Assuming the two-year period starts then, the UK will have a strong incentive to conclude an Exit Agreement with the EU by March 2019.

UK Internal Requirement: Leaving "in accordance with its own constitutional requirements"

The act of notification has raised important questions on whether the UK Government may trigger Article 50 without parliamentary approval. The UK Government believed it possessed this authority pursuant to the royal prerogative, without requiring any prior consent from Parliament. This view was essentially premised on the argument that the royal prerogative allows the government to conduct foreign affairs.

Detractors, however, challenged this position, arguing that triggering Article 50 can only be done with Parliamentary approval. This view is based, among other things, on the argument that Article 50 would override the European Communities Act 1972 (enacted by Parliament), and only Parliament can modify its own legislation. On January 24, 2017, the UK Supreme Court confirmed that the UK Government would require an Act of Parliament to trigger Article 50. Since then, both Houses of Parliament have approved the Brexit bill, which subsequently received royal assent on March 16, granting PM May the power to notify under Article 50.

2. Sequencing: The Exit Agreement versus the Trade Agreement

Pursuant to Article 50, the UK may negotiate an Exit Agreement, "*setting out the arrangements for its withdrawal taking account of the framework for its future relationship with its Union*". The primary purpose of this agreement would therefore be to address the immediate or transitional consequences of exit. The Exit Agreement could also "*take into account*" the future relationship between both parties. In light of the wording of Article 50 and the two-year time constraint, it is unlikely that the Exit Agreement could assess in detail all aspects of a future trading relationship.

To do so would require the UK and the EU to negotiate a Trade Agreement,[1] probably timed differently, and in any event under different procedural rules as far as the EU is concerned. It is unclear at present how the timing of this second set of negotiations will be structured. Although the EU and the UK could commence informal trade negotiations before the UK's withdrawal is complete, EU decision-makers have said they do not intend to negotiate a Trade Agreement with the UK prior to agreeing the principles that would govern an Exit Agreement.[2]

3. Overview of Internal Processes for an Exit Agreement and a Trade Agreement

An overview of the legal requirements to achieve both agreements is set out below.

[1] "Trade Agreement" in this memo subsumes all types of potential agreements setting out the future long-term trade relationship between the EU and the UK.

[2] *See*: "EU Trade Commissioner: No trade talks until full Brexit", June 30, 2016 at http://www.bbc.com/news/uk-politics-eu-referendum-36678222. Note however, that the European Parliament resolution of June 28, 2016 states, "*[…] any new relationship between the EU and the EU may not be agreed before the conclusion of the withdrawal agreement*". This arguably does not preclude *negotiations* on the new relationship.

Exit Agreement (First Set of Negotiations)	Trade Agreement (Second Set of Negotiations)
Commencement. The UK must first notify the European Council of its intention to leave the EU.	**Commencement.** The start of negotiations must be authorized by the Council through qualified majority voting ("QMV") (55% of, or 15 out of 27, Member States representing 65% of the EU population). However, a unanimous vote is required for a detailed agreement; including the negotiation and conclusion of agreements in: — Trade in services (where provisions require unanimity); — Commercial aspects of intellectual property (where provisions require unanimity); — Foreign direct investment (where provisions require unanimity); — Trade in cultural/audiovisual services, which risk prejudicing cultural/linguistic diversity; and — Trade in social, education and health services, which risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them.
Guidelines. The European Council agrees by consensus "guidelines" for the negotiation.	
Negotiations. The Council (under QMV) appoints a negotiator (likely to be the Commission's Task Force on Brexit, with the involvement of the Council and the Parliament) and may provide a more detailed negotiating mandate. The UK and EU negotiate and conclude the Exit Agreement setting out the arrangements for the UK's withdrawal "*taking account of the framework for the UK's future relationship with the EU*". ***Expiry of two-year period:*** After two years, the UK is automatically out of the EU, regardless of whether negotiations have concluded, unless extended by agreement between the Council (unanimously) and the UK.	**Negotiations.** The Council issues negotiating mandates (directives) to the Commission as negotiator. The Commission negotiates a trade/relationship agreement with the UK. In practice, this could potentially overlap with some elements of the Exit Agreement (see *Scope*, Section II).
	Consent of the European Parliament. The Parliament must consent, by simple majority, if the agreement constitutes, among others, an "*association agreement"*, or an "*agreement with important budgetary implications for the Union*". The Parliament may also be consulted in other cases. Its opinion must be delivered within a time limit set by the Council.

Exit Agreement (First Set of Negotiations)	Trade Agreement (Second Set of Negotiations)
	Signature. Following a proposal by the Commission, the Council adopts a decision to sign the treaty (by QMV). The Council may also authorize the provisional application of the treaty before its entry into force. This is normally limited to matters of EU competence.
Approval. The Exit Agreement must be approved by the Council through a "super" QMV (72% of, or 20 out of 27, Member States representing 65% of the total EU population), and by the European Parliament, acting by a simple majority. In addition, any Member State, the Parliament, the Council, or the Commission may obtain the opinion of the Court of Justice on whether the Exit Agreement is compatible with the EU Treaties. If the Court issues an adverse ruling, the agreement may not enter into force unless it is amended or the Treaties are revised.	**Conclusion / Approval / Member State Ratification**. Following a proposal by the Commission, the Council adopts a decision to conclude the agreement. This is done by QMV unless the agreement falls within areas requiring unanimity, as detailed above (see *Commencement*). In agreements where competence is "mixed" (shared between the EU and Member States), ratification by each Member State will be required. This may involve additional delays and political complexities at the national level. Parliamentary approval before entering into a treaty is usually required by all Member States, with the possible exception of Malta. Referendums may also be requested or required in certain Member States. In addition, any Member State, the Parliament, the Council, or the Commission may obtain the opinion of the Court of Justice on whether the Trade Agreement is compatible with the EU Treaties. If the Court issues an adverse ruling, the agreement may not enter into force unless it is amended or the Treaties are revised.

II. What Will the Scope of the Exit Agreement and the Trade Agreement Include?

1. Exit Agreement

The Exit Agreement must set out the arrangements for the UK's withdrawal and would likely extend important EU provisions for a certain period. There is no comparable precedent for this agreement as the only other territory that has left the community, Greenland, stood in very different circumstances[3] with a much less complicated economy and level of entanglement. Nevertheless, it took Greenland three years to conclude its withdrawal process.

The Exit Agreement could encompass a wide range of issues including:

— The UK's budget contribution and the receipt of EU funding by UK entities, at least until the end of the EU's current multi-annual budget in December 2020;

— The rights of EU citizens living in the UK and vice versa;

[3] Greenland is officially part of the Kingdom of Denmark. It has a population of only approximately 56,000 people and its main economic sector is the fishing industry. Greenland ended up retaining the benefits of membership through its connection with Denmark, while retaining control over its fishing quota, which was the main issue in these negotiations.

— The status of EU institutions in the UK, such as the European Banking Authority;

— The transfer of regulatory responsibilities;

— Jurisdictional arrangements for contracts governed by EU law;

— Transitional arrangements for UK exit from EU trade agreements with third countries; and

— Temporary provisions regarding the UK's access to the Single Market (and the EU's access to the UK market).

To What Extent Can the Exit Agreement Regulate the Post-Brexit Relationship?

A significant procedural difference between the two agreements is that the Exit Agreement requires only QMV for approval, while a Trade Agreement would likely require unanimity.

It will be extremely difficult to agree a fully-fledged Trade Agreement before the expiry of the two-year period (*see below*). PM May has, however, indicated that the UK Government would prefer to avoid a "cliff" situation where all the trade benefits of its membership in the EU would immediately disappear. Thus, the UK may advocate for a more ambitious Exit Agreement that allows for crucial provisions to be maintained during a transitional period, while granting both parties additional time to negotiate a long-term Trade Agreement. For example, free movement of persons, the "passporting" of financial services, continued access to zero tariffs, and mutual recognition of product standards are highly important issues that might be considered in the Exit Agreement, and would also overlap with priorities of the Trade Agreement.

2. Trade Agreement

In two important speeches, PM May has clarified her position on several crucial matters for the UK's future relationship with the EU:

October 2, 2016[4]

— "*We are going to be a fully-independent, sovereign country, a country that is no longer part of a political union with supranational institutions that can override national parliaments and courts*".

— "*I want [the future agreement] to include cooperation on law enforcement and counter-terrorism work. I want it to involve free trade, in goods and services. We are not leaving the European Union only to give up control of immigration again. And we are not leaving only to return to the jurisdiction of the European Court of Justice*".

January 17, 2017[5]

— "*So we do not seek membership of the Single Market. Instead we seek the greatest possible access to it through a new, comprehensive, bold and ambitious Free Trade Agreement*"; "*[…] because when the EU's leaders say they believe the four freedoms of the Single Market are indivisible, we respect that position*".

— "*[T]hat Agreement may take in elements of current Single Market arrangements in certain areas – on the export of cars and lorries for example, or the freedom to provide financial services across national borders*".

— "*I do not want Britain to be part of the Common Commercial Policy and I do not want us to be bound by the Common External Tariff. […] But I do want us to have a customs agreement with the EU.*"

— "*I want to remove as many barriers to trade as possible. And I want Britain to be free to establish our own tariff schedules at the World Trade Organization*".

[4] PM May, Brexit speech to Conservative conference, October 2, 2016, http://www.independent.co.uk/news/uk/politics/theresa-may-conference-speech-article-50-brexit-eu-a7341926.html.

[5] PM May, Speech Laying out the UK's Plan for Brexit, January 17, 2017.

— "*I want us to have reached an agreement about our future partnership by the time the two-year Article 50 process has concluded*".

What are the Key Issues for Both Parties?

Based on PM May's position, it is clear that the UK will reject the supremacy of EU law and the jurisdiction of the Court of Justice of the European Union ("CJEU") in interpreting British laws. The UK, however, desires access to the EU's Single Market to the fullest extent possible.

The Single Market is premised on four freedoms: freedom of movement for goods, freedom of movement for persons, freedom of establishment, and freedom of movement for capital and payments. Underpinning these freedoms are the basic principles of non-discrimination (imported goods cannot be treated differently from domestic goods) and mutual recognition (legislation of one Member State is to be treated as equivalent to the domestic legislation of another Member State).[6] These principles and freedoms are captured in an enormous and evolving body of law known as the *acquis communautaire* to which participants in the Single Market (*i.e.* EU Member States and other parties to specific agreements) must adhere. The *acquis* essentially provides for a common system of regulations and standards that removes all internal barriers and other regulatory obstacles to the freedom of movement of goods and services. The ultimate enforcer of these rules is the CJEU which has the authority to interpret EU law and overrule national authorities under the principle of primacy of EU law over national law.

Against this background, the EU is not likely to acquiesce to full Single Market access without the UK's compliance with the overall Single Market legislation under the control of the CJEU. The UK's position also excludes a number of scenarios for its future trade relationship with the EU.

What Will the EU–UK Trade Relationship Not Look Like?

EEA (Norwegian model)

— Explicitly, the UK will not join the European Economic Area ("EEA"). This would have allowed the UK to retain access to the Single Market but remain subject to a majority of EU laws, and would also have permitted the free movement of people. Such a scenario would also require the UK to adhere to EU laws without participation in law-making, and subject it (directly or indirectly) to the jurisdiction and case law of the CJEU.

Switzerland model

— Explicitly, the UK will not emulate the Swiss model by negotiating market access on a sector-by-sector basis through a network of bilateral treaties with the EU. This model would have allowed partial access to the EU's Single Market, with the notable exception of most services sectors in Switzerland's case, and required the UK to permit the free movement of people. Mutual recognition of product standards is effected through a Mutual Recognition Agreement which allows conformity assessments of a product intended for sale across the entire European market to take place in only one certification authority, either in Switzerland or in the EU. This model anticipates a degree of institutional independence as it does not transfer legal or decision making-authority to a supranational body, with certain exceptions, *e.g.* in civil aviation. Nevertheless, it would require the UK to accept most of EU law, where implicated in the bilateral treaties, without participating in its creation.

WTO-only

— The UK does not intend to default to a WTO-only trading relationship with the EU pursuant to PM May's stated goal of achieving a "*new agreement with the European Union*". Whether this ends up being the default solution (due, for example, to the failure of negotiations) remains to be seen.

[6] *See: Cassis de Dijon*, Article 3 of the EC Treaty providing for "*the approximation of the laws of Member States to the extent required for the functioning of the common market*".

EU–Turkey customs union

— In her January speech, PM May also ruled out the replication of the EU–Turkey customs union framework which removes tariffs and other trade restrictions between both parties in industrial goods. This model requires Turkey to adhere to the EU's common commercial policy ("CCP") and adopt all present and future preferential agreements of the EU. The EU–Turkey customs union also obliges Turkey to subscribe to the EU laws relating to regulation of the implicated sectors, while not participating in the creation of those laws. It also provides for the jurisdiction of the CJEU in applying or interpreting the agreement, where the Association Council (comprising equal representation of both parties) unanimously decides to do so.

What Possibilities Remain?

A Traditional or Enhanced Free Trade Agreement

In all likelihood, the basis of a future relationship will contain the characteristics of a Free Trade Agreement ("FTA") and may be further enhanced as a "*comprehensive*" and "*ambitious*" agreement. Beyond trade in goods and services, PM May has noted a negotiating interest in law enforcement and counter-terrorism, and has mentioned the possibility of a broader "*customs agreement*". There will certainly be other areas of importance to the UK and EU that could form part of these negotiations.

III. What Are The Key Procedural Issues In a Potential UK–EU Trade Agreement?

There are important procedural implications based on whether an agreement is characterized as a "mixed" agreement or an "EU-only" agreement. Essentially, if the EU–UK Trade Agreement falls under an area of *exclusive competence* of the EU ("EU-only" agreement), the EU is authorized to conclude that agreement. If the agreement contains provisions in areas of *shared competence* between the EU and its Member States, it is considered a "mixed agreement" and its conclusion would require each EU Member State to individually ratify it in accordance with its national procedures (which may require a referendum in some countries).

1. EU-only Agreement (Exclusive Competence)

Article 3 of the Treaty on the Functioning of the European Union ("TFEU") defines areas of exclusive competence as: the customs union; competition rules for the internal market; monetary policy; conservation of marine biological resources under the common fisheries policy; and the CCP.

The CCP captures the majority of traditional FTA provisions. It covers the primary scope of the EU's trade policy, *i.e.*: changes in tariff rates; the conclusion of tariff and trade agreements relating to goods and services; the commercial aspects of intellectual property; foreign direct investment; uniformity in liberalization; export policy; and trade defense such as anti-dumping or anti-subsidies measures (Article 207(1) TFEU).

Of these areas, the actual scope of foreign direct investment ("FDI") is the most contentious.

It is unclear whether provisions on portfolio investments would fall within the rubric of FDI. Questions have also arisen as to whether FDI would encompass protection of investment; these provisions typically constitute rules on investor–state dispute settlement, fair treatment, and indirect expropriation. For example, in the case of the EU–Canada Trade Agreement ("CETA"), it has been argued that the agreement's provisions regarding a new investor court to adjudicate investment disputes might fall outside the exclusive EU competence.

2. Mixed Agreement (Shared Competence)

Article 4 TFEU defines these areas of shared competence as: the internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries; the environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and common safety concerns in public health.

The issue of whether certain provisions in FTAs are within exclusive or shared competence is often unclear and pits the Commission against individual Member States. Member States, the European Parliament, the Council or the Commission may seek the European Court of Justice's ("ECJ") view on such claims pursuant to Article 218(11) TFEU. The

ECJ provided such an opinion in 1994 when the European Communities joined the WTO but the EU Treaties have significantly broadened the scope of the EU's exclusive competence since then.

3. EU–Singapore FTA

In October 2014, the Commission sought the ECJ's opinion on the EU's competence to sign and ratify an FTA with Singapore. In her preliminary (non-binding) opinion, Advocate-General Sharpston indicated that some of this agreement's provisions fall under shared competence[7] or even under the Member States' exclusive competence[8] and therefore require joint conclusion by the EU and the Member States.

4. CETA

Numerous Member States[9] consider CETA to be a mixed agreement due to provisions relating to services, transport, and investor protection. The Commission, despite viewing CETA as an agreement under the EU's exclusive competence, nevertheless proposed CETA as a mixed agreement for Council signature in recognition of political circumstances.[10] This resulted in the signature of CETA being temporarily blocked by the Walloon Parliament in Belgium in October 2016.[11] Since then, all Member States, including Belgium, have signed CETA.

The International Trade Committee of the European Parliament approved the agreement in January 2017 and the full House will vote on it in February.[12] If Parliament approves, most of the agreement could apply provisionally from as early as April 2017.[13]

5. Interim Concerns

In sum, (i) most of the trade agreements recently negotiated by the EU appear to be (or are considered by several Member States to be) mixed agreements, and, (ii) the conclusion of such mixed agreements is a complex, uncertain and potentially lengthy process involving ratification by national (and sometimes regional) parliaments, or even by referendum. Under the current EU Treaties, a "*comprehensive*" EU–UK trade agreement might well cover areas of shared competence and require a complex negotiation and conclusion process that would significantly exceed the two-year period provided for under Article 50 TEU. Against this background, possible solutions could involve, (i) negotiating an interim period under the Exit Agreement during which the UK may continue to have a degree of conditional access to the Single Market in light of its intention to transfer all European laws into British law upon exit (as part of the Great Repeal Bill) and probably subject to payment of contributions to the EU budget; and/or (ii) negotiating a Trade Agreement on areas that clearly relate to the EU's exclusive competence only (*e.g.* trade in goods). In order to comply with WTO rules, such an agreement would have to cover "substantially all trade" (at least in goods) between the parties.

IV. What Are The Potential Effects of Brexit on Core Trade Matters?

This section provides a brief summary of systemic changes that may affect businesses as a result of the UK's departure from the Single Market.

1. Tariffs on Goods

The EU Single Market and customs union allow goods from any Member State to cross borders within the EU freely, without being subject to any tariffs or border controls.

[7] *I.e.* provisions regarding air transport services, non-commercial intellectual property, and labor standards.
[8] *I.e.* provisions regarding the termination of certain bilateral investment agreements between individual Member States and Singapore.
[9] Including Austria, Belgium, Czech Republic, France, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, and the UK.
[10] *See:* http://europa.eu/rapid/press-release_IP-16-2371_en.htm.
[11] This was resolved in part by the Belgian government's agreement to seek the Opinion of the ECJ on the compatibility of the investor court system provided for in CETA.
[12] *See,* http://www.europarl.europa.eu/news/en/news-room/20170124IPR59704/ceta-trade-committee-meps-back-eu-canada-agreement.
[13] Certain clauses considered to fall within shared competence such as investor–state dispute settlement, other investment protection provisions, and parts of the financial services chapter on portfolio investments must first be ratified by each Member State.

If the UK exits without any interim arrangement for tariffs, it will default to the WTO system. Hence, the EU's Common External Tariff rates will apply to all the goods that it exports to EU countries. Depending on the actual product, tariffs will vary and could be very significant.

Industry or Product[14]	EU Common External Tariff Rate
Automobiles	10%
Food products/agriculture	Varies (*e.g.* 12.8% + €176.80 /100 kg for certain types of beef; 14.4% for certain grapes)
Chemicals	Varies (*e.g.* 0% to 5.5% for inorganic chemicals)
Pharmaceutical products	0%
Aerospace	Varies (*e.g.* 0% for airplanes; 2.7 % for certain aircraft parts)

Conversely, the UK will have to define its own tariffs vis-à-vis other countries, including the EU. These tariffs will presumably be constrained by the EU's tariff schedule in the WTO, which caps the tariffs that may be imposed and which the UK will likely take over upon exiting the Single Market. UK trade officials have informed Parliament that the UK will not be seeking to make substantive changes to its WTO schedules, noting that "*the majority of the EU Goods and Services Schedules can be replicated by the UK*".[15] However, officials also noted that more complex obligations such as agriculture Tariff Rate Quotas and agriculture subsidies will require discussions with EU-27 and other WTO members.

It is possible to negotiate for the removal of tariffs on most goods in a Trade Agreement. For example, in CETA, the tariffs for 98.7% of all EU tariff lines will ultimately be fully eliminated (either upon entry into force of the agreement or gradually within a stipulated timeframe). While all non-agricultural tariffs will drop to zero, 94% of agricultural tariffs will be eliminated. This, however, requires the conclusion of a Trade Agreement covering "substantially all trade" between the parties.

2. Rules of Origin

UK goods that are exported to the EU may benefit from preferential tariffs stipulated by the new Trade Agreement (and vice versa). However, since the UK has announced that it would be leaving the customs union, in order to qualify for those preferential rates, the UK exporter will have to prove that the product originated from the UK under mutually agreed rules of origin. As a result, absent a customs union between the parties, border controls on goods will necessarily be re-established between the UK and the EU. Rules determining origin of a product can be rather convoluted and will add additional layers of procedure and bureaucracy to trade between both parties. For example, origin may be determined based on the country of "last substantial transformation". This could be decided using different rules such as a change of tariff classification, value-added, or other special processing rules. It will be in the UK's interest to ensure harmonization of these rules with its future trade partners.

3. Technical Barriers to Trade – Mutual Recognition Agreements Required

Within the Single Market, a product that is lawfully sold in one EU country can be sold in another, even if it does not meet all of that country's technical rules. This is known as the principle of "mutual recognition". Upon exit, the UK would no longer be able to apply this principle. Instead, when exporting to any EU country, a British exporter would first need to ensure that it obtains all the regulatory approvals required from the country of import. To do this, it would need to comply with all technical and safety rules in the EU importing country. Immediately post-Brexit, this would in principle not pose concerns as UK regulations currently mirror EU

[14] 44% of UK goods and services are exported to EU countries. This table briefly notes the key industries (goods) that account for a significant proportion of trade, as highlighted by the UK Government. *See:* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515068/why-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk.pdf.

[15] "UK trade officials outline post-Brexit approach, WTO schedules update", Mlex, February 1, 2017.

regulations. However, as EU regulations continue developing, regulatory issues may arise if the UK does not provide for replication.

For certain products that already fall within international harmonization regimes (such as pharmaceuticals), the impact of loss of mutual recognition may not be as significant. In other cases, the regulatory burden could be tremendous.

In order to resolve this issue, the parties might seek to negotiate a Mutual Recognition Agreement ("MRA") as part of trade negotiations. In essence, an MRA would make compliance with product laws of the other party easier. Such agreement sets the conditions under which one party will accept conformity assessment results (*e.g.* testing or certification) performed by the other party's conformity assessment bodies. A manufacturer may submit its products to a conformity assessment procedure to demonstrate compliance with the requisite legal regimes in order to place it in the export market.

Presently, the EU has MRAs with seven countries (Australia, Canada, Israel, Japan, New Zealand, Switzerland, and USA) covering a range of sectors.

Anti-Dumping/Anti-Subsidy Duties

Post-Brexit, the anti-dumping duties applied by the EU as a result of EU investigations on certain imports would no longer extend to the UK – at least as far as new post-Brexit duties are concerned.[16] Presently, the EU applies anti-dumping tariffs on a number of products such as steel products and solar panels from China and other countries, and several investigations on other products are underway. The UK will most likely develop its own trade defense rules in order to be able to impose its own measures. In the interim, UK industries may be affected by these changes in tariffs.

From another perspective, upon Brexit, UK imports might be subject to anti-dumping investigations by the EU and its industries might be subject to EU anti-dumping or anti-subsidy duties. Similarly, the UK could institute trade defense measures against EU products that are dumped in the UK.

In the context of a future Trade Agreement, the parties could in principle decide to refrain from applying trade defense measures against each other's imports. In practice, such agreements are very uncommon and the EU's FTAs (including with Turkey or Canada) typically allow for anti-dumping measures.

Trade in Services

General

Currently, UK citizens are free to establish a company in another EU country unrestricted, and have the freedom to provide or receive services in any EU country. The EU also enforces rules to facilitate the mutual recognition of professional qualifications between EU countries through several horizontal or sectoral directives.

Upon exit, the parties would default to the WTO framework for services, that is, the General Agreement on Trade and Services ("GATS"). Absent a trade agreement on services, the UK would no longer enjoy the benefits under the EU Single Market with respect to freedom of establishment and mutual recognition of professional qualifications. Instead, GATS (and the EU's current schedule of commitments regarding trade in services, which provides for a much narrower access to the Single Market and does not provide for mutual recognition) would determine its trade in services with the EU.

Financial Services

Under the Single Market rules, financial institutions authorized in the EEA to provide certain regulated services (*e.g.* deposit-taking, lending, payment services, investment services) can do so across the EEA without requiring separate authorizations in each jurisdiction. This is known as "passporting".

Again, upon exit and absent a Trade Agreement, the UK would default to the EU's schedule of commitments under the GATS. These commitments do not provide for passporting and are subject to a so-called prudential carve-out that allows EU and Member State authorities significant discretion to suspend GATS commitments for prudential reasons.

In negotiating an agreement on financial services, the UK Government has expressed its intention to aim for the "*freest possible trade in financial*

[16] An open question is whether anti-dumping duties in place upon Brexit will still apply to the UK post-Brexit.

services between the UK and EU" and to seek "*mutual cooperation arrangements that recognize the interconnectedness of market*".[17]

4. Re-negotiating WTO Commitments and Other EU FTAs

It is expected that, once the UK exits the EU, it will have to renegotiate its concessions under the WTO Agreements, including GATT and GATS. The WTO Director-General has stated that the UK "*will be a member with no country-specific commitments*". On the other hand, the UK may be bound to the EU schedules annexed to GATT and GATS, and will continue to be bound post-Brexit.

Post-Brexit, the UK will no longer be a party to preferential arrangements in EU FTAs with third countries. Similar issues as covered above will likely arise (*e.g.* higher tariffs, technical barriers, access to services) if no new treaties or interim arrangements are in place by the time the UK exits.

Among the trade agreements that the EU currently has in place, the UK will probably be most focused on bilateral re-negotiations with Canada, Singapore, and South Korea, as these are the countries most likely to have a significant impact on the British economy. Beyond this, scoping exercises have already commenced for FTAs with Australia, New Zealand, and the United States.

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We hope this memorandum provides helpful information on issues that may arise following the UK's exit from the EU. If you would like to discuss any of the issues raised by this memorandum in more detail, please call your regular firm contact or any of the authors whose contact details are set out above.

CLEARY GOTTLIEB

[17] "The United Kingdom's exit from and new partnership with the European Union", p. 42, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.