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THE POLITICS OF BREXIT FOR THOSE OUTSIDE THE UK

To Our Clients and Friends:

Following the widely reported Cabinet meeting at Chequers, the Prime Minister's country residence, on Friday 6 June 2018, the UK Government has now published its "White Paper" setting out its negotiating position with the EU. A copy of the White Paper can be found [here](#).

The long-delayed White Paper centres around a free trade area for goods, based on a common rulebook. The ancillary customs arrangement plan, in which the UK would collect tariffs on behalf of the EU, would then "enable the UK to control its own tariffs for trade with the rest of the world". However, the Government's previous "mutual recognition plan" for financial services has been abandoned; instead the White Paper proposes a looser partnership under the framework of the EU's existing equivalence regime.

The responses to the White Paper encapsulate the difficulties of this process. Eurosceptics remain unhappy that the Government's position is far too close to a "Soft Brexit" and have threatened to rebel against the proposed customs scheme; Remainers are upset that services (which represent 79% of the UK's GDP) are excluded.

The full detail of the 98-page White Paper is less important at this stage than the negotiating dynamics. Assuming both the UK and the EU want a deal, which is likely to be the case, M&A practitioners will be familiar with the concept that the stronger party, here the EU, will want to push the weaker party, the UK, as close to the edge as possible without tipping them over. In that sense the UK has, perhaps inadvertently, somewhat strengthened its negotiating position - albeit in a fragile way.

The rules of the UK political game

In the UK the principle of separation of powers is strong as far as the independence of the judiciary is concerned. In January 2017 the UK Supreme Court decided that the Prime Minister could not trigger the Brexit process without the authority of an express Act of Parliament.

However, unlike the United States and other presidential systems, there is virtually no separation of powers between legislature and executive. Government ministers are always also members of Parliament (both upper and lower houses). The government of the day is dependent on maintaining the confidence of the House of Commons – and will normally be drawn from the political party with the largest number of seats in the House of Commons. The Prime Minister will be the person who is the leader of that party.

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The governing Conservative Party today holds the largest number of seats in the House of Commons, but does not have an overall majority. The Conservative Government is reliant on a "confidence and supply" agreement with the Northern Ireland Democratic Unionist Party ("DUP") to give it a working majority.

Maintaining an open land border between Northern Ireland and the Republic of Ireland is crucial to maintaining the Good Friday Agreement – which underpins the Irish peace process. Maintaining an open border between Northern Ireland and the rest of the UK is of fundamental importance to the unionist parties in Northern Ireland – not least the DUP. Thus, the management of the flow of goods and people across the Irish land border, and between Northern Ireland and the UK, have become critical issues in the Brexit debate and negotiations. The White Paper's proposed free trade area for goods would avoid friction at the border.

Parliament will have a vote on the final Brexit deal, but if the Government loses that vote then it will almost certainly fall and a General Election will follow – more on this below.

In addition, if the Prime Minister does not continue to have the support of her party, she would cease to be leader and be replaced. Providing the Conservative Party continued to maintain its effective majority in the House of Commons, there would not necessarily be a general election on a change in prime minister (as happened when Margaret Thatcher was replaced by John Major in 1990)

The position of the UK Government

The UK Cabinet had four prominent campaigners for Brexit: David Davis (Secretary for Exiting the EU), Boris Johnson (Foreign Secretary), Michael Gove (Environment and Agriculture Secretary) and Liam Fox (Secretary for International Trade). David Davis and Boris Johnson have both resigned in protest after the Chequers meeting but, so far, Michael Gove and Liam Fox have stayed in the Cabinet. To that extent, at least for the moment, the Brexit camp has been split and although the Leave activists are unhappy, they are now weaker and more divided for the reasons described below.

The Prime Minister can face a personal vote of confidence if 48 Conservative MPs demand such a vote. However, she can only be removed if at least 159 of the 316 Conservative MPs then vote against her. It is currently unlikely that this will happen (although the balance may well change once Brexit has happened – and in the lead up to a general election). Although more than 48 Conservative MPs would in principle be willing to call a vote of confidence, it is believed that they would not win the subsequent vote to remove her. If by chance that did happen, then Conservative MPs would select two of their members, who would be put to a vote of Conservative activists. It is likely that at least one of them would be a strong Leaver, and would win the activists' vote.

The position in Parliament

The current view on the maths is as follows: The Conservatives and DUP have 326 MPs out of a total of 650. It is thought that somewhere between 60 and 80 Conservative MPs might vote against a "Soft Brexit" as currently proposed – and one has to assume it will become softer as negotiations with the EU continue. The opposition Labour party is equally split. The Labour leadership of Jeremy Corbyn and

John McDonnell are likely to vote against any Brexit deal in order to bring the Government down, irrespective of whether that would lead to the UK crashing out of the EU with no deal. However it is thought that sufficient opposition MPs would side with the Government in order to vote a "Soft Brexit" through the House of Commons.

Once the final position is resolved, whether a "Soft Brexit" or no deal, it is likely that there will be a leadership challenge against Mrs May from within the Conservative Party.

The position of the EU

So far the EU have been relatively restrained in their public comments, on the basis that they have been waiting to see the detail of the White Paper. The EU has stated on many occasions that the UK cannot "pick and choose" between those parts of the EU Single Market that it likes, and those it does not. For this reason, the proposals in the White Paper (which do not embrace all of the requirements of the Single Market), are unlikely to be welcomed by the EU. It is highly likely that the EU will push back on the UK position to some degree, but it is a dangerous game for all sides to risk a "no deal" outcome. Absent agreement on an extension the UK will leave the EU at 11 pm on 29 March 2019, but any deal will need to be agreed by late autumn 2018 so national parliaments in the EU and UK have time to vote on it.

Finally

Whatever happens with the EU the further political risk is the possibility that the Conservatives will be punished in any future General Election - allowing the left wing Jeremy Corbyn into power. It is very hard to quantify this risk. In a recent poll Jeremy Corbyn edged slightly ahead of Theresa May as a preferred Prime Minister, although "Don't Knows" had a clear majority.



This client alert was prepared by London partners Charlie Geffen and Nicholas Aleksander and of counsel Anne MacPherson.

We have a working group in London (led by Nicholas Aleksander, Patrick Doris, Charlie Geffen, Ali Nikpay and Selina Sagayam) that has been considering these issues for many months. Please feel free to contact any member of the working group or any of the other lawyers mentioned below.

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