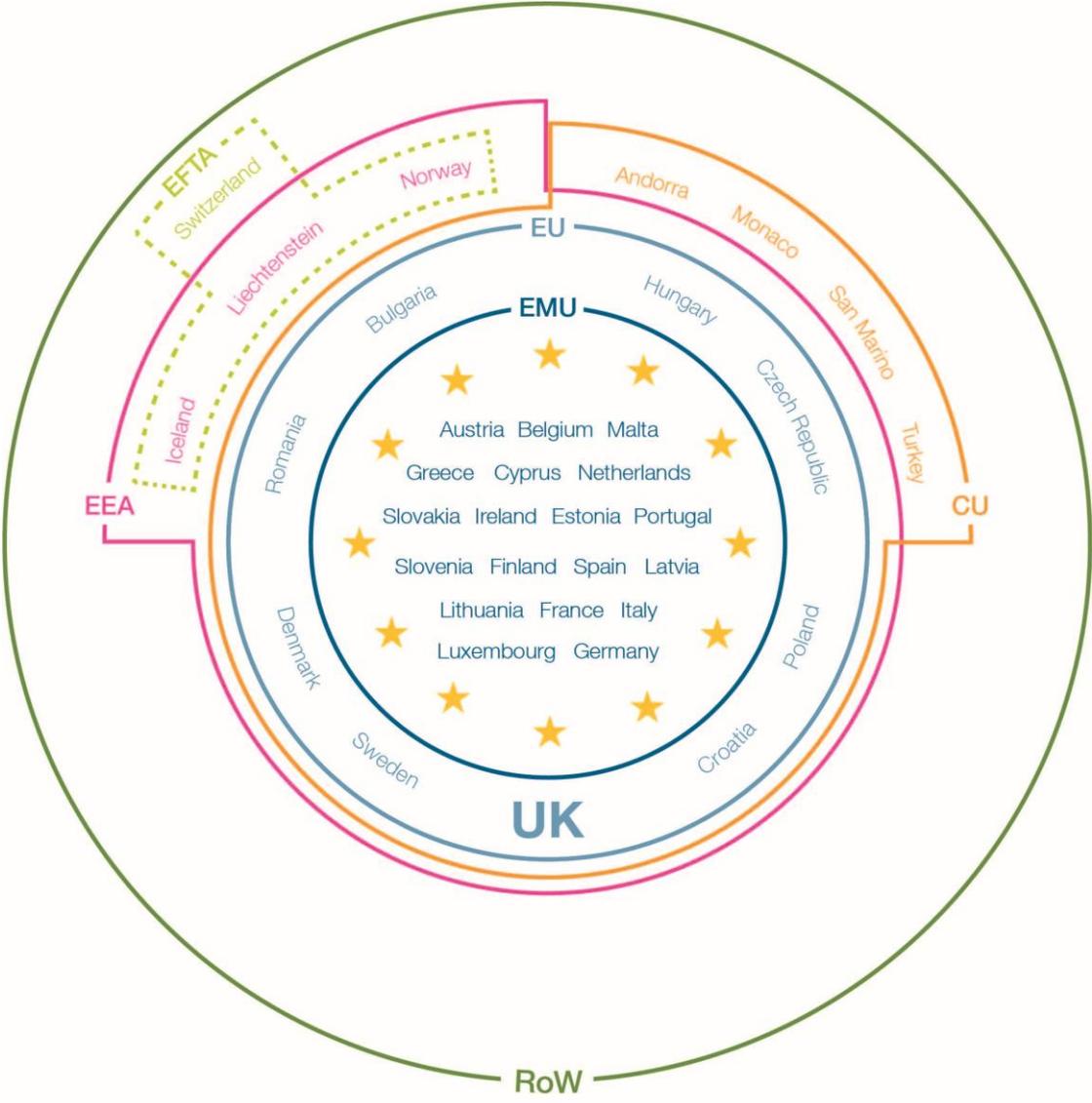


# 339 negotiating points for Brexit from a UK perspective

A production of the Allen & Overy Global Law Intelligence Unit



- EMU European Monetary Union
- EU European Union
- EEA European Economic Area
- EFTA European Free Trade Association
- CU Customs Union
- RoW Rest of the World

27 March 2017



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## Preface

This paper looks at key points in the Brexit negotiations. These are to help concentrate the mind and work out the principles. Not all the detail of course. Even though there are 339 points, they are not comprehensive.

The points are the points of our Intelligence Unit, not Allen & Overy and not the UK government or the EU 27. The UK government and the EU 27 will have their own points and their own strategy: at the time of writing we do not know what these are.

The paper is written from a UK perspective. Although we do not know the EU 27 negotiating positions at the time of writing, we do at various junctures set out possible EU points to the contrary so that the debate is not one-sided. It is important to note that as a global firm doing international work for a wide range of clients operating across all sectors, Allen & Overy is interested in both sides of the negotiations. Our Intelligence Unit could equally have set out 339 points from the EU 27's perspective.

Overall we aim to be constructive. The best way to secure agreement quickly is for each side to understand the viewpoint of the other side. We hope that there are enough points which are not partisan so that this paper is useful in defining areas of common interest.

We believe that the most unsatisfactory result would be for the parties not to agree so that the UK just exits unilaterally. We believe that this might leave the UK and the other nations of Europe embittered and resentful for a generation. That would not be good for the future of Europe.

Obviously the points are not legal opinions.

**Philip Wood CBE, QC (Hon)**

Head of the Allen & Overy Global Law Intelligence Unit

**27 March 2017**



# The 339 negotiating points

## General

1. Europe as a region has had several centuries of great achievement – intellectual, scientific, artistic and many others
2. Europe is the largest economic power in the world
3. The UK and the EU have bonds of common endeavour and should face the future as partners
4. The UK seeks a special relationship with the EU. Special relationships are endorsed by EU practice
5. The closest union in terms of centralised sovereignty is the 19-country Eurozone. The second inner circle comprises the nine non-euro EU member states. The third comprises the EEA countries. Switzerland is in the next ring. In the fifth ring there is Turkey, to be joined by Ukraine if so agreed. The outer sixth ring is occupied by numerous countries with free trade and similar agreements with the EU of varying intensity. The seventh ring comprises third countries bound by international treaty links such as the WTO and defence alliances
6. Each of the sovereign countries in these different rings entered into treaties pooling sovereignty to the degree they desired
7. The UK's proposed relationship matches the degree of sovereignty and the degree of partnership which the UK considers to reflect its circumstances
8. This relationship is within the general scope of the EU's current relationships with other states. Although it is not a direct model of an existing relationship, it is not new in concept
9. Article 8(1) of the Treaty of the European Union provides that the EU “shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of Union and characterised by close and peaceful relations based on cooperation”.

### *Possible EU position*

The EU may maintain that it does not favour extending the scope of special deals outside the existing categories and that the EU prefers a unified Europe to a multispeed Europe as far as possible.

## Free trade

10. The EU should agree a comprehensive free trade agreement with the UK which provides for mutual trade in goods free of tariffs and non-tariff barriers. There should be no quantitative restrictions
11. Any national restriction on the free sale of goods is a restriction on liberty
12. All restrictions on liberty must be justified by some higher value
13. The economic and material benefits of free trade are beyond doubt
14. Both the UK and the EU have over past generations placed a high value on free trade in goods
15. The UK will have the same regulatory standards for goods to be exported to the EU. Businesses adopt the same voluntary standards
16. In addition the existing common regulations are based on global standards
17. Article 21(2)(e) of the main treaty states that the EU shall work for “a high degree of cooperation in all fields of international relations”, in order to (amongst other things) “encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade”
18. The EU is the UK’s largest export market and the UK is the largest goods export market for the EU. The EU exports more to the UK than vice versa. Supply chains are deeply integrated
19. The EU has around 60 free trade agreements with third countries
20. The EU is negotiating or has proposed free trade agreements with a great many other countries, including Brazil, China, India, Japan, Singapore, the US, Vietnam and many other countries in Africa, Asia, Latin America and elsewhere
21. The EU has a free trade agreement, for example, with Zimbabwe and St Lucia
22. Aside from the EEA, the current EU free trade agreements do not generally make free trade conditional on the free movement of people
23. Internationally, although there are exceptions, it is not the general treaty practice to link free trade to the free movement of people
24. The proposal that the UK cannot cherry-pick free trade without the obligation of free movement of people is not endorsed by EU or international practice

25. The UK will wish to negotiate its own preferential trade agreements around the world. The UK will establish its own WTO schedules covering trade in goods and services
26. EEA/EFTA states have the right to conclude free trade agreements with other countries
27. The UK requests the EU to help facilitate the transfer to the UK individually of rights under the existing EU free trade agreements, so as to preserve consistency

***Possible EU positions***

The EU may maintain that free movement of people is a fundamental principle for the EU which the EU will do its utmost to protect

The EU may not favour a special free trade deal for a withdrawing member

The EU, if it agrees to a special free trade agreement with the UK, may believe it is obliged under treaty rules or politically to extend similar benefits to third countries.

## **Customs arrangement**

28. A free trade area is a group of states which have eliminated most or all of customs duties (tariffs) on movements of goods within the area.
29. A customs union also generally allows goods to move between member states of the union free of tariffs but in addition obliges the members to impose common tariffs against third countries and not to enter into separate customs agreements with the other states
30. Because they have no common external tariffs, free trade agreements typically contain standardised country of origin rules to deal with the risk of importers accessing a free trade area unfairly (by importing through a low tariff member state)
31. Unlike custom unions, free trade areas and other similar arrangements therefore require customs checks to enforce origin rules
32. The UK wishes to enter into free trade agreements with third countries. It therefore proposes a bespoke customs arrangement, not the current customs union
33. The associated customs checks to enforce origin rules are a potential restriction on free trade and could hinder the free movement of goods
34. It is in the interests of all parties that free trade in goods should not be hindered by bureaucratic red-tape. In particular, it is a priority of the governments of the UK and the Republic of Ireland to avoid a customs border between the Republic of Ireland and Northern Ireland

35. However, a country's customs checks should be frictionless as far as possible, and there is now sufficient international experience and technology to ensure that this is achieved to a large extent notwithstanding the need to enforce origin rules
36. The EU should authorise the UK to certify EU standards (so that goods can display the CE mark) in order to avoid border delays
37. The UK has substantial experience of efficient customs administration in view of its international trading status and has one of the most efficient customs regimes
38. Turkey has a customs union arrangement with the EU. The EEA countries and the EU have a free trade arrangement. There are therefore precedents for EU customs arrangements with third countries
39. Customs unions are not typically conditional on the free movement of people.

#### *Possible EU position*

The EU could argue that its arrangements with the EEA countries involve acceptance of the four freedoms and adherence to certain EU rules, and that the UK should not obtain similar market access without accepting the same rules. It might also argue that the agreement with Turkey is on favourable terms given Turkey's status as an aspirant EU member.

### **Freedom of money and finance**

40. **Principles** Europe should take a giant step forward and lead in promoting the freedom of the use of money and the investments in which it is stored. It should cast off ancient superstitions and the fear of finance
41. The reliance of our societies on investments is now colossal and likely to increase
42. Financial services are not in principle different from goods. They are things which people need and use in their daily lives. If the trade in goods should be free, so should the trade in financial services
43. Some reasons for freedom are economic, for example, freedom increases the availability of finance, increases the marketability of things we own, drives down costs, increases choice, enhances innovation and reduces paperwork and expense. It reduces the waste of time, that irreplaceable quality
44. Other reasons for freedom are philosophical and moral
45. It goes without saying that freedom must be accompanied by legal restriction in order to protect freedom. The law restricts us so as to liberate us

46. **Money and freedom** The money of the people should be free in its use. In the term “money” we include investments such as bank deposits and securities in which money is stored
47. Money is the product of the work of the people, their work and labour
48. The freedom of money is essential for free trade in goods and services. These connect the peoples of the world to each other
49. Money also connects us to our future via pensions and our other savings
50. If money is not free, then the people are slaves and serfs to their patch of land, to the present. They are victims of the future
51. Territorial restrictions on money and investments are like exchange controls, a form of financial oppression unless manifestly justified
52. Pursuant to these principles, all financial services offered by UK corporations authorised by the UK authorities should be permitted in the EU on no less favourable terms as are available to EU businesses so long as the UK maintains substantially consistent regulatory regimes in accordance with the good international standards and so long as the UK agrees to normal regulatory cooperation with the EU authorities.
53. This would apply to cross-border business and establishments of any kind. The permission would be reciprocal
54. **EU practice** The EU already uses free trade agreements to go beyond GATS arrangements. See for example the agreement with Mexico and the draft agreement with Singapore
55. **Growth in GDP** It seems likely that world-wide the moneys of the people of the planet will increase as GDP grows
56. Some forecasts have predicted that the GDP of the world during coming decades could be many multiples of what it is now
57. This growth would be expressed in money
58. This money would not go under the mattress – it would go into banks, capital markets and corporations
59. It will go into financial centres which can enlarge the possibilities of distribution and the usefulness of the savings of the people

60. **Compliance with regulatory standards** Any sovereign state seeking access should be able to show that it has a reasonable system of authorisation such as for commercial and investment banks, credit card issuers, leasing businesses, insurers, collective investment schemes and other funds, dealers in securities, investment managers and advisers, custodians of securities, dealers in derivatives, credit rating agencies, exchanges, markets, central counterparties and depositaries, and payment and settlement systems
61. Regulatory codes should, for example, cover reasonable provision concerning such matters as capital, liquidity, conduct of business (for example conflicts of interest, duties of skill and care, protection of client assets, controls on promotion, the keeping of records and the like), transparency, clearing, market infrastructure, short selling, benchmarks, mortgage and consumer credit, and regulatory powers and cooperation, sanctions for insider dealing and market abuse, rules for public prospectuses and rules about the insolvency of financial institutions
62. **Equivalence** These provisions need not be exactly equivalent but should be in accordance with commonly accepted international standards, approximate and consistent
63. Consistency should be stable, objective and decided by representative committees with an appeal to an independent tribunal
64. **UK's regulatory regime** The UK is a world leader in the development of regulatory standards for financial services. It exercises world-leading standards of supervision. Fear of loss to EU citizens, the fear of systemic contagion and mis-selling arising from regulatory laxness is not therefore an issue
65. UK insolvency law and practice does not discriminate against foreign creditors so there is no necessity for EU control over insolvency to protect EU citizens
66. In the case of free trade in financial services the UK regime is already harmonious with that of the EU so that there is no significant divergence to overcome. The parties are not starting afresh. They have a common regime with equal regulation
67. **Other points** In the absence of passporting, the necessity for financial businesses to obtain authorisation in 27 different countries would give rise to expensive bureaucracy, delays and expense on all sides
68. There would be a multiplication of regulatory regimes which would be expensive for both businesses and for the countries concerned

69. Major businesses may not be prepared to incur the trouble and expense of authorisation in smaller countries in the EU so those countries might be deprived of services, choice and the essential financing of their governments, banks and businesses

*Possible EU positions*

The EU may argue that financial services impose systemic risks for sovereign states which is a justification for restrictions on freedom

The EU may argue that access needs precise equivalence and that financial services play too important a role in modern societies to weaken or dilute the standards.

## **The City of London**

70. The City of London is a symbol of the freedom of the use of money and investments
71. The City is one of the two largest financial centres in the world. It is located in Europe
72. The freedom to use money and its investment is improved if the financial centre has numerous participants who in turn provide a market, attract expertise and justify the cost of financial infrastructure
73. This freedom is weakened if the financial centre is fragmented and dissipated
74. If GDP does increase, as forecast, there will be enough work for numerous financial centres and the enlargement of financial centres in the EU
75. It is to the advantage of the EU that the freedoms of the City should be available to the EU and its peoples
76. The City is the largest market in Europe for the financing of EU sovereigns by new issues of debt and by syndicated bank loans
77. The City is also the largest market in Europe for the financing of European banks. The ability of banks to finance themselves, particularly in times of stress, is crucial to the stability and growth of EU economies
78. The City is the largest market in Europe for the financing of corporations by debt and equity. These corporations are engines of growth and prosperity
79. Europe needs a large capital market. The City cheapens the cost of capital for the EU

80. The City hosts the largest foreign exchange market in the world so as to enhance the freedom of money
81. The City has the largest clearing and settlement entities (including central counterparties) in Europe. The clearing house for interest swaps is the largest in the world
82. The City is a major centre for insurance and reinsurance
83. The City has to compete with other financial centres – for example, in Singapore, New York and Hong Kong. The EU should enable their European financial centre to compete successfully
84. The withdrawal of UK financial services in the City could be disruptive in the EU. It could, for example, significantly disrupt payment and settlement infrastructure which handle enormous amounts annually far exceeding world GDP.

#### *Possible EU position*

Particular EU member states may seek to benefit from financial businesses locating in their territories instead of the City and believe that it is sensible to spread the risks.

### **Freedom of financial services: particular cases**

85. **Banking** Banks are like lakes which collect the earnings of the people like rain and then use the waters to irrigate the land, for example, in the form of power stations, enterprises and homes. It is to the wider benefit of the citizens of Europe that there should be the most extensive pooling of savings possible
86. The EU does not have to assume responsibility for bank failures in the UK. The EU does not guarantee bank deposits in its member states or third countries
87. The UK pioneered the favoured bank resolution legislation in Europe
88. **Foreign exchange** The foreign exchange market is the largest market in the world with a turnover which is a many times multiple of world GDP. London is the largest foreign exchange market. It is essential for trade and everything else that there should be an efficient means for exchange of currencies
89. **Dealing and investments** Investments should be as freely marketable as possible in as wide a region as possible. The dealing is mainly between sophisticated professionals, although often ultimately on behalf of individuals

90. **Underwriting** The underwriting of issues of bonds or shares enables sovereigns, banks and businesses to raise money in order to finance what they do for the improvement of our societies. Large deals are international and require an international spread of underwriters who will buy the securities and then distribute them amongst their clients. This process should be as free as possible to enhance marketability, the availability of capital, competition and choice
91. **Prospectuses** The circulation of offering circulars and other prospectuses in connection with the underwriting of securities should be as free as possible so as to enhance the availability of capital
92. **Funds** People should be able to pool their investments with others in mutual funds (collective investment schemes). This spreads their risk and also provides liquidity in a similar way to banks. This activity should be as free as possible
93. **Custodianship of securities** There must be some means whereby individuals, funds, sovereigns, central banks and businesses can place their investments in a safe "warehouse" by way of custody. There should be free access to custodians in locations, like the UK, which have the essential device of the trust so that their investments are protected on the insolvency of the custodian
94. **Financial advice** In an increasingly complicated and financialised world, people should be able to get financial advice wherever they want so that there is more competition. Competition improves quality and drives down prices
95. **Derivatives** Although derivatives are not technically insurance, just as you can insure your home against a fire or your car against a crash, so you can insure your investments, the amount of interest you have to pay and other risks. One of the deepest markets in the world for derivatives is London and people in the UK and in the EU ought to have reciprocal access. People should be allowed to insure their financial assets, as well as their other assets
96. **Exchanges and central counterparties** Markets in investments, commodities and money require the infrastructure of exchanges to process billions of deals and the establishment of central counterparties to mutualise deals, with the resulting huge diminution of risks by netting if a party defaults. These exchanges and central counterparties are intricate and very expensive. If Europe did not have these establishments, there would be nothing on the plate for breakfast
97. The legal rules in the UK are extremely friendly to these institutions, even in the absence of fortifying EU law. These rules include rules about set-off, netting, collateral and trusts
98. **Euro clearing** In the light of EU suggestions that the clearing of euros should be moved to the eurozone, the splintering and fragmentation of currency settlements is more likely to cause extra risks because of the lack of multi-currency central clearing

99. London has exceptional experience and standards of operating clearing systems of this magnitude. It does not appear necessary that euro clearing should be regulated in the EU in order to maintain stability
100. Restrictions on clearing of the euro in London might amount to de facto exchange controls so that the euro ceases to be fully convertible
101. The clearing might move to New York or elsewhere
102. **Securitisations** Securitisations are simple transactions, typically with simple assets like home mortgages. Assets should be freely marketable in as large a region as possible. Securitisations greatly increase the availability of capital for the common good
103. **Wholesale markets** Already in the world there is substantially a free market for transactions between non-retail professionals – foreign exchange, underwriting equity and debt, prospectuses, sale of investments, mutual funds, custody of investments, corporate advice and the like
104. This wholesale free market should be continued and enhanced
105. Consumers can be separately protected
106. **ESAs** The UK will wish to discuss its continued participation in the European (Financial Services) Supervisory Authorities.

#### *Possible EU position*

The EU may argue that the stability of financial markets and the protection of national taxpayers should be a priority over freedom.

### **Free movement of other services**

107. Services now typically account for around 75 per cent of the GDP of most advanced economies. They have replaced manufacturing and goods
108. Apart from financial services, services include such items as the professions, retail and wholesale, construction, technology, hotels, tourism, creative industries, medical services, business services, catering, education and sport
109. For the same reasons that trade in goods should be free, so should the trade in services
110. The EU already has or is negotiating a Trade in Services Agreement with 20 countries. Some of its existing free trade agreements also cover freedom of specified services

111. The reciprocal recognition of qualifications and the freedom to provide professional services, coupled with appropriate freedom of establishment, should continue to apply to the professions of doctors, nurses, dentists, vets, midwives, architects, accountants, management consultants and lawyers in a similar way to the present arrangements under EU law
112. The arrangements concerning lawyers should also cover rights of audience before courts and professional privilege for communications.

*Possible EU position*

The EU may argue that the freedom of establishment and services requires the free movement of people.

## **Controls on immigration**

113. The UK government proposes that the EU Free Movement Directive will no longer apply and the UK will control its own immigration. This will apply also to the immigration from the EEA states and Switzerland
114. The UK will always need immigrants and welcomes the contribution which immigrants make
115. Nearly all countries impose controls on immigration. The EU itself controls immigration at its outer borders
116. Immigration into the UK has recently been at record levels: 300,000 per annum, with about half coming from the EU
117. The achievement of freedom of movement of people across regions or across continents or even across the whole world may be a dream for a “one world” future. But most countries seem to think, not yet
118. Common justice and fairness require that the EU and the UK should reciprocally honour the acquired rights of immigrants from their respective domains
119. There are about three million EU national immigrants in the UK. There are about one million UK national immigrants in the EU. They should be given such rights reciprocally as they would have had in the absence of the UK withdrawal.

*Possible EU position*

The EU may argue that the free movement of people within the EU is a major principle which has been hard won by much struggle over many decades.

## Courts and tribunals

120. The UK proposes to end the jurisdiction of the Court of Justice of the European Union by reason of the UK wish for sovereignty over its own laws
121. It is not necessary for there to be a single tribunal to harmonise law in Europe sufficiently so that it works
122. There are numerous examples of the courts of member states taking different views, but this does not prejudice the free market. An example is different decisions on asymmetric jurisdiction clauses
123. Supreme courts in other countries typically only harmonise a small area of law. Thus in the United States, there is much legal diversity, notwithstanding the presence of a supreme court. The same is true of Canada. Nevertheless, those countries have much closer integration than the EU. The conclusion is that central tribunals are not essential to achieve substantial consistency in practice
124. The CJEU is mainly concerned with a common policy on the four freedoms. The UK after withdrawal would have a separate regime
125. Laws do not have to be exactly the same. Absolute harmonisation prevents competition and can lead to doubtful legal policies
126. Senior courts in the UK and the EU are likely to reach similar conclusions on major matters
127. Since so much of EU law is written in intricate detail, there is less scope for courts to make major changes
128. The existing interpretations will be made part of UK law so as to maintain consistency
129. The senior courts in the UK are likely to regard the judgments of senior EU courts as persuasive. UK legislation may so provide. There is precedent for this in the case of the EEA
130. Any future changes could be dealt with by UK legislation if appropriate.

### *Possible EU position*

The EU may argue that the judicial branch of government should be supreme and should be centralised so as to enhance predictability and harmony and prevent forum shopping.

## Withdrawal costs: general principles

### How the EU budget works

This box gives background on the EU budget. Figures are order of magnitude only and are based on the financial statements for 2015.

The EU settles a draft budget annually and the member states contribute to the budget in the year after the budget is adopted. In addition, the EU has what is called a multiannual financial framework which contains budget forecasts for seven years ahead. The current framework covers the period 2014 to 2020. The next framework is supposed to be agreed by early 2018. This framework fixes ceilings and is subject to detailed rules about adjustments.

The revenues of the EU are called the EU's "own resources". By far the largest of these resources (typically around 70 per cent) come from member state contributions which are calculated as a proportion of each member state's Gross National Income. The member state contributions are about 0.6 per cent of the EU GNI. The rest is made up of part of national VAT (about 12 per cent of total own resources,) customs duties (mostly the external common tariff after deduction of 20 per cent for collection costs and amounting to about 11 per cent of own resources,) and finally other revenues, such as fines for violation of EU law (6 per cent of own resources). The UK rebate is 66 per cent of the difference between the UK contribution and its receipts from the budget.

In 2014, the German contribution was around €26 billion (22 per cent), the French contribution about €20 billion (17 per cent), the Italian contribution about €14 billion (12 per cent) and the UK fourth with about €11.3 billion net (around one per cent of the typical relevant UK budget and 7.5 per cent of the EU budget but 12 per cent on a gross basis). The UK contribution to the EU annual budget works out less than 40p per day per person.

The total of the annual EU budget in terms of payments has typically been around €150 billion (the latest for 2017 is €160 billion). This is less than 1 per cent of the total Gross National Income of member states. By comparison, the annual budget of the UK is around £750 billion (€975 billion), which is more than six times that of the whole of the EU.

As to expenditure, the biggest expenditure in terms of payments is on agriculture which absorbs 40 per cent of the budget (€60 billion). The next largest item is the development of lesser developed EU regions (cohesion) absorbing nearly 40 per cent (€60 billion). The third area, absorbing about 7 per cent of the budget, is the internal market (€10.5 billion), such as navigation satellites, infrastructure, digital networks and loans and grants to small businesses.

The international programme absorbs about 5 per cent of the budget (€3.3 billion), eg aid and armed conflicts. Security and citizenship absorb less than 2 per cent (1.3 billion) and cover such matters as immigration, public health and consumer protection.

Only 6 per cent of the budget is devoted to administration and the bureaucracy, such as the European Commission, the European Parliament and the Council of Ministers.

Hence the lion's share of the budget – nearly 80 per cent. is spent on agriculture and developing less well developed regions.

The main sources for the finances of the EU are articles 310-319 of the Treaty on the Functioning of the European Union, the Financial Regulation 966/2012, the Common Provisions Regulation 1303/2013, a Regulation 1311/2013 laying down the Multiannual Financial Framework, a Regulation 1150/2000 on the manner of payment of own resources and others.

The financial statements of the EU are prepared on the basis of accruals-based accounting rules that are based on the International Public Sector Accounting Standards.

131. **Only legal obligations** The UK should make only those payments to the EU which it is obliged to make pursuant to a legally binding obligation. It seems inappropriate for the UK to use taxpayers money to make voluntary payments
132. A statement of political policy, a statement of future intention, a "moral" obligation and a "good faith" commitment, though they may have political and reputational consequences, are not legally binding obligations
133. Normally government statements of intention for example, to pay pensions or contributions to the health service over future years do not give rise to contracts on which people can sue. One cannot sue a government on its manifesto
134. The multiannual financial framework is an economic plan setting out financial targets and political intentions subject to change.
135. The framework does not itself constitute legally binding commitments of member states which are only committed annually.
136. Any legally binding obligation on a sovereign state to make large payments for the benefit of other sovereign states must be express, specific and unarguable
137. **Article 50** Under article 50 of the main EU treaty, the EU treaties expressly cease to apply to the UK two years from the date of service of a notice of withdrawal if no withdrawal agreement is

reached and approved. That means that from that time any provisions in the treaties whereby the UK is expected to continue to make budget and other payments to the EU terminate

138. Any EU regulations or the like drawing their force from the treaties will also cease to apply, including the regulations setting out the contributions of member states and the multiannual financial framework
139. Under article 50, the treaties (and hence the dependent regulations) also expressly cease to apply to the UK from the date of entry into force of the withdrawal agreement
140. **Only member states are bound** The regulations applying to contributions by member states by their specific terms apply only to "member states". This does not include states which have ceased to be member states
141. A citizen who leaves a country to live somewhere else generally ceases to be taxable by the country of former residence. So if the UK leaves the EU, it ceases to be taxable by the EU
142. The legal procedures applying to EU finance law show that a state has to be a member state to be involved. For example, the collection of customs duties, sugar levies and VAT forming EU "own resources" does not apply to a state which has ceased to be a member state. Each annual budget and the multiannual financial framework depend on the involvement of European institutions in which the UK would not participate if not a member state. The UK will have no vote. These must mean that a departing state ceases to be liable. No taxation without representation
143. Hence after the UK has ceased to be a member state (in March 2019 unless otherwise agreed), there are no legal obligations of the UK to make further contributions to the EU beyond the annual budget unless expressly and specifically agreed
144. **Financial years** EU budgets and accounts are only for each single financial year 1 January to 31 December. Any UK commitment to contribute to the EU budget is only for the financial year of the budget
145. The Financial Regulation 966/2012 is clear on when the member state obligation arises. Article 40 provides that "Once the budget has been definitively adopted, each Member State shall from 1 January of the following financial year ... be bound to make the payments due to the Union," as specified in the relevant regulation No 1150/2020. The binding obligation arises only on that date after the adoption of an annual budget and only if the state is still a member state
146. Thus EU funding is only legally committed by member states on an annual basis

147. **EU separate legal personality** The EU has its own separate legal personality as an international organisation under public international law. See article 47 of the main treaty
148. The EU is responsible for its own liabilities. The members of an international organisation having legal personality are not legally liable for the separate commitments of the international organisation unless there is an explicit legally binding obligation. See the *International Tin Council* litigation in 1989-90
149. Hence member states of the EU are not liable for EU obligations unless specifically so provided
150. **Public international law** Under public international law, it is considered that there is no clearly settled rule that a state withdrawing from a loose association of states is responsible for the commitments of the association
151. A Vienna Convention of 1983 regarding state succession never came into force and in any event would not have applied to a withdrawal from an association of states
152. Customary public international law does not provide workable rules on the division of assets and liabilities
153. Customary law is in any event overridden by the express terms of article 50
154. **Conclusion** It follows that any payments by the UK to the EU for post-withdrawal liabilities require the free agreement of the UK except to the extent otherwise agreed
155. **Advance notice of Brexit** Some years ago the UK announced that it would hold a referendum on EU membership. The EU had time to prepare financially for the contingency that the UK might vote to leave, if the EU were to be prudent in its financial affairs, as required by the treaties
156. Withdrawal will be almost three years from the date of the Brexit referendum result on 24 June 2016 to the end of the article 50 period and two years from service of notice of withdrawal under article 50. These are adequate periods to adjust and to mitigate. The regulation governing the multiannual framework specifically contemplated changes
157. There is adequate time to reflect the withdrawal in the next multiannual financial framework currently being prepared for the seven years from 2020 after the UK will have ceased to be a member state
158. **Gifts are revocable** As will be seen, most of the proposed spending of the EU in coming years is essentially cohesion aid or subsidies, ie gifts. It is not unreasonable to revoke a gift if circumstances change. In private law, contracts to make a gift are revocable until the gift is actually made

159. Recipients must be taken to know that future benefits depend on who are member states and what their taxable capacity is at the time
160. The EU has made spending proposals in excess of the money available. These unfunded proposals are the responsibility of the EU alone
161. **Vienna Convention** To the extent the Convention is relevant, a provision on termination in the Vienna Convention on the Law of Treaties 1969 does not apply in this case. Article 70(1) provides:
- "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
- (a) releases the parties from any obligation further to perform the treaty;
- (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."
- The continuing obligations under (b) are terminated on UK withdrawal because, as shown above, the EU treaties expressly no longer apply after the UK has ceased to be a member state. Hence "the treaty otherwise provides"
162. The "ordinary" interpretation of treaties stipulated by article 31 of the Convention requires that, if it was intended that a withdrawing member state should be liable for large contributions stretching years into the future after the state is no longer a member state, article 50 would have said so. But it does not
163. **Recognition of liabilities** It is believed that member states do not recognise all future liabilities under the multiannual financial framework in their accounts as legal commitments to pay. In most cases, nor does the EU in its own annual accounts
164. **No damages or penalties** The withdrawal of the UK from the EU is not a breach of contract or treaty. Hence no legal compensation for a breach of a legal obligation is due
165. The UK should not pay a penalty for a legitimate legal act. Withdrawal is endorsed by the EU treaties
166. Member states do not pay tribute or a club fee to participate in the EU. They only pay for actual expenditure. There is no concept of a subscription fee for market access.

### *Possible EU positions*

Some EU politicians have argued that the UK should be penalised to deter other withdrawals

Some EU opinion may consider it just to impose a price for the trouble and effort. The EU may request a sweetener

The EU may argue that there was an expectation that the UK would continue to be responsible for its share of the financing of projects already started, regardless of legal commitment, that moral commitments count and that the reputation of the UK as a reliable partner is at stake

The EU may argue that once items in the multiannual financial framework have been legally authorised under the Financial Regulation, then this is a legal commitment of the EU under the Common Provisions Regulations and hence ultimately of member states, whether or not they remain as a member. This should apply particularly to projects already commenced

The EU may take a different view of the legal analysis.

## **Withdrawal costs: particular cases**

167. **Agriculture** Support for agriculture and fisheries is about 40 per cent of the EU budget (all figures in this section are very rough and are based on the most recent financial statements for 2015). This is a very large proportion
168. The UK has long been doubtful about the value of these subsidies in the modern world
169. The UK will develop its own new policies for assistance for UK farmers and fisheries and thereby relieve the EU of that burden. The UK policies will aim at more productive farming and fisheries and a clean environment
170. **EU regional aid** The cost of regional development (cohesion) absorbs a further 40 per cent of the EU budget
171. These projects are in effect aid to medium-income countries in the EU. The policies of aid are also considered to be less easily justified, especially for medium-income countries
172. The fact that around 80 per cent of the EU budget is absorbed by agricultural subsidies and aid cohesion to medium-income countries seems to raise issues of relevance. Agricultural and cohesion proposals continue to balloon
173. **Projects** Various project such as Galileo satellites, some infrastructure projects, the Erasmus student exchange and various research projects absorb about 7 per cent of the EU budget, a relatively small amount

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174. The UK may wish to continue participation in some of these projects and in that event would contribute its share of the funding in the agreed amount
175. There is ample precedent in EU practice whereby a country participates in an EU programme without contributing as a member of the single market. For example, Israel participates in certain scientific projects. So the proposal that a state cannot pick and choose is not supported by the facts
176. **International aid** International aid payments, together with payments in respect of armed conflicts and humanitarian and epidemic crises amount to about 5 per cent of the budget
177. The UK will make its own payments in place of EU payments for these matters to the extent considered appropriate
178. **Security and citizenship** EU payments under the head of security and citizenship amount to less than 2 per cent of the EU budget. These include such matters as justice, home affairs, border protection, immigration, asylum, anti-terrorism, public health, consumer protection, culture, information and communications and disaster aid
179. Some of these will fall away automatically on withdrawal. In the case of almost all of the others, these should be internal matters for the EU and therefore the fiscal responsibility of the EU, not the UK
180. **Administrative costs** The administrative costs of the EU, such as pensions and salaries and the costs of EU government institutions, such as the European Commission and the European Parliament, are about 6 per cent of the EU budget. The UK would not have a legal obligation to contribute towards these after withdrawal since it would no longer exercise governmental powers in the EU
181. **Ongoing participation** The above shows that payments by the UK for any continuing programmes in which the UK participates would be a tiny fraction of the current UK contribution
182. **Pensions** In the absence of an existing specific UK assumption of pension obligations, the UK is not primarily liable in law for the pensions or remuneration of EU civil servants and other EU personnel. They are obligations of the EU as a separate legal personality. Payments are covered out of the annual EU administrative budget for which the UK is not responsible after withdrawal. The scheme is not funded by a trust fund and the contributions out of staff salaries are not used to finance a pension fund but are simply used for other expenses by the EU
183. Article 83 of the Staff Regulations provides:

"Benefits paid under this pension scheme shall be charged to the budget of the Communities. Member-states shall jointly guarantee payment of such benefits in accordance with the scale laid down for financing such expenditure."

184. The guarantee of pensions by member states in the regulation is a secondary liability, payable only if the EU does not pay. It only applies to member states. The UK will not be a member state
185. Hence a UK contribution to post-withdrawal pension payments requires the agreement of the UK.

*Possible EU position*

The EU may take the view that the UK is responsible for its share of all the pensions promised to EU officials, regardless of their nationality

186. **Borrowings and guarantees** For the reasons given above, the UK is not responsible for any EU liabilities which accrue post-withdrawal in respect of bond issues raised by the EU or guarantees or other protection given by the EU in respect of loans made by EU institutions, except as may have been expressly agreed in clear and specific words
187. **Other items** The UK will pay to the EU its share of VAT and customs duties collected by the UK and the UK contribution as the EU "own resources" up to the appropriate withdrawal date
188. To avoid circularity of payment, the UK may set off payments due to it from the EU against any liability the UK may have to the EU
189. The UK's position in relation to the European Investment Bank and the European Investment Fund requires separate analysis.

*Possible EU positions*

The EU may take the view that it has historically placed great emphasis on the common agricultural policy to ensure food security

The EU may argue that the economic equality of lesser developed regions in the EU in the interests of cohesion is a sound policy

190. **UK government proposals** In the White Paper of the UK government dated February 2017, the UK set out certain policies for funding budget existing allocations by the UK government. See the box.

The UK government stated in its White Paper of February 2017 that it will honour certain funding commitments. The statement said:

- All European Structural and Investment Funds projects signed, or with funding agreements that were in place before the Autumn Statement 2016 will be fully funded, even when these projects continue beyond the UK's departure from the EU. This includes agri-environment schemes under the Common Agricultural Policy.
- For projects signed after the Autumn Statement 2016 and which continue after the UK has left the EU, HM Treasury will honour funding for projects if they provide strong value for money and are in line with domestic strategic priorities.
- For bids made directly to the Commission by UK organisations (including for Horizon 2020, the EU's research and innovation programme and in funds for health and education) institutions, universities and businesses should continue to bid for funding. The UK government will work with the Commission to ensure payment when funds are awarded. HM Treasury will underwrite the payment of such awards, even when specific projects continue beyond the UK's departure from the EU.
- HM Treasury has also provided a guarantee to the agricultural sector that it will receive the same level of funding that it would have received under Pillar 1 of the Common Agricultural Policy until the end of the Multiannual Financial Framework in 2020.
- In case of the devolved administrations (in Scotland, Northern Ireland and Wales), the UK is offering the same level of reassurance as it is offering to UK government departments in relation to programmes they administer, but for which they expected to rely on EU funding.
- The Government will consult closely with stakeholders to review all EU funding schemes in the round, to ensure any on-going funding commitments best serve the UK's national interests.

The UK has also made confirmations about students and research councils.

## EU law generally

191. The UK wishes to have sovereignty over its own laws. EU law is a major part of UK law. Excessive harmonisation can restrict healthy competition between legal models
192. EU law will cease to have primacy over UK law
193. Europe as a region has delivered legal systems to over 80 per cent of the world's jurisdictions – the English common law, the Napoleonic and the Roman-Germanic. Out of the 320 jurisdictions of the world, more than 270 are based on the legal system of a western European country

194. The law is the one universal religion that everybody believes in
195. Societies can survive without their religions but a society cannot survive without law
196. The EU is the largest law harmonisation project the world has even seen. Yet harmonisation can smother choice and hence useful competition between legal systems which might otherwise become illiberal and oppressive
197. The legal choices made in the attempt to harmonise different models can be the wrong choices
198. The EU specialised to a large extent in regulatory law which can have dangers and excesses
199. In particular many regulatory regimes establish a regulator who has legislative, executive and judicial or enforcement powers (this seems to challenge the constitutional principle of the division of power), which can impose penalties without the protections of the criminal law, which sometimes might tend to over-prescribe and which sometimes might seem over-zealous
200. Some EU regulatory law has grown unmanageable over the years without being pruned. It is not the intention of the UK to carry out a detailed review of these laws and how they should be pruned before withdrawal. But the UK expects to do so in due course. It is the duty of all law-makers to keep their legislation under review
201. Trends in public opinion in the EU and elsewhere show that many people are not content with laws considered to be oppressive or over-reaching or needlessly bureaucratic
202. Bad laws make for bad growth
203. The UK and the EU have a common interest in ensuring that the law represents the highest ideals of rationality and justice in order to promote survival and that the law reflects new circumstances.

### **Transposition of EU law: general principles**

204. The UK proposes to transpose or domesticate all relevant EU laws (the "acquis"), subject to appropriate changes, and to make the amendments to UK laws derived from the EU necessary to reflect the withdrawal
205. The transposition would be effective on the withdrawal date so as not to leave a gap or vacuum
206. The laws will be interpreted as they are up to the withdrawal date
207. The transposition ensures continuity and predictability
208. The transposition underlines the partnership between the EU and the UK and their common values

209. Accordingly the laws of the EU and the UK will be substantially similar, but the UK can subsequently develop different laws
210. The laws should generally reflect international standards, not just those of the EU
211. These parallel laws serve the common interests of competition and improvement, more in tune with the wishes of the people
212. The transposition will in many respects depend on continued cooperation and agreement between the EU and the UK such as sharing information, cooperation on common safety standards, continued reciprocal recognition of home state authorisations and regulatory regimes, reciprocal grandfathering of relevant existing authorisations, tests, certificates and acquired rights (such as for medicines), pending actions in EU tribunals, pending investigations and enforcements, jurisdiction over regulatory offences, interpretation of private contracts and other matters. Where the laws require mutual cooperation, it will usually be in the interests of the parties that cooperation is agreed
213. It is also in the interest of both the EU and the UK that they should continue the reciprocal mutual recognition in the case of the EU laws on governing law (Rome I and Rome II), jurisdiction and the enforcement of judgments (the Brussels Recast Regulation) and insolvency (the European Insolvency Regulation and the corresponding directives on the insolvency of credit institutions and insurers). Some of these are also applicable to the EEA states. Maintaining the Brussels Recast Regulation will be important to protect consumers, amongst others.

#### *Possible EU position*

The EU may argue that the laws will drift apart substantially, thereby weakening a fundamental pillar of a single market.

### **Transposition of EU law: particular cases**

214. The laws to be transposed may include some or all of those relating to the subjects identified below. Most of these laws reflect international standards amongst developed countries
215. Where a law reasonably satisfies the general international consensus between countries in similar circumstances, then it should be deemed to be consistent and equivalent to EU law, notwithstanding occasional differences in detail
216. If the position were otherwise, then the EU might be regarded effectively as using its regulatory system for protectionism
217. **Competition** There is no need to transpose EU competition law into UK law, given that the UK already has its own system of domestic legislation (although the UK will need to consider how its

antitrust regime will exempt certain agreements from prohibition in the absence of EU parallel exemptions)

218. However, there is a need for appropriate transitional provisions to allocate jurisdiction for mergers and antitrust investigations that are pending when the withdrawal takes effect. On a longer term basis, it would be desirable to enable the EU and UK competition authorities to share information both in relation to merger control but also antitrust enforcement
219. It will also be necessary to consider the extent to which findings in EU decisions establishing an infringement of the EU competition rules should be capable of being taken into account by UK courts, post-withdrawal
220. **State aid** The rules place restrictions on government support for private businesses operating in a market. The UK and the EU should agree transitional arrangements including in relation to pending state aid cases, state aid appeals, recovery obligations and compliance with existing approved state aid schemes
221. **Telecoms and media** The regulations deal with network access and competition regulation, use of radio spectrum, universal service, user rights, data retention and government interception. Although the EU telecom regulatory framework is written in the context of the Single Market, its objectives relating to effective and sustainable competition and user rights are as important to an independent UK sector as a single EU market. The UK intends to continue a regime consistent with the EU and requests reciprocity where appropriate. Harmonisation of technology standards and radio spectrum are of global relevance, and UK and EU citizens and industry will benefit from consistency as well as from the ability to offer services and make investments in EU markets
222. **Public procurement** The purpose of EU procurement rules is to create a level playing field for businesses within the EU to bid for contracts for works and services in any member state and the UK has awarded many contracts to businesses from non-UK member states. The UK is likely to seek a level playing field for UK businesses competing to provide works and services in the UK and EU member states going forward to ensure true reciprocity
223. **Environment** The UK proposes to transpose the existing regulatory regime so as to be consistent with EU standards. Stability and the doctrine of acquired rights indicate that the UK and EU should honour existing registrations under the EU regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)
224. The UK and the EU should continue with parallel REACH registrations
225. The UK will maintain its climate targets as set out in the Climate Change Act 2008

226. The status in the UK of the EU emissions trading scheme will be discussed
227. The UK will consider current EU proposals for widening liability for damage caused by environmental violations
228. The UK will consider current EU proposals for changes to waste, water, air, and hazardous substances legislation
229. The UK will wish to discuss its continued participation in the European Chemicals Agency
230. **Data protection** The UK proposes to transpose the EU regulatory regime on data protection including the proposed General Data Protection Regulation and the revised EU ePrivacy legislation. Hence the European Commission is requested to confirm the adequacy of the consequent UK regime to enable free movement of personal data from the EU to the UK. Their free transfer is important to large sectors of the economy
231. The UK intends to give reciprocal adequacy status to EU data protection. Data transfers should be stable
232. The UK will consider the proposed General Data Protection Regulation applying from 2018
233. **Public health and safety** The UK intends to continue substantially with the EU regime which protects public health and safety, including, for example, in relation to medicinal products, medical devices, biotechnology, dangerous substances, pesticides, quality of drinking and bathing water and bans on smoking and health warnings on tobacco packages and labelling
234. The UK will continue with the rule that no medical products may be placed on the market without a prior authorisation from the UK. In the EU, the prior authorisation must come either from a member state or the European Commission
235. The UK will wish to discuss its continued participation in the European Food Safety Authority.
236. **Employee protection** The UK Government intends to safeguard the rights of workers set out in EU legislation and, in some respects, to enhance them. UK employment law already exceeds some aspects of minimum EU law protection, for example, in the areas of working time, maternity and parental rights, anti-discrimination rights and protection on the transfer of undertakings
237. **Occupational and personal pensions** The UK intends to continue with the regulatory regime governing the provision of occupational and personal pensions covering, for example, how pensions are funded, how pension arrangements are governed, how individual rights are preserved and how they are protected in the event of employer failure

238. The status of existing cross-border pension schemes authorised under the Institutions for Occupational Retirement Provision (IORP) Directive should be continued reciprocally and the applicability of amended funding requirements under the IORP 2 Directive should similarly be continued
239. The UK will consider new provisions in relation to the status of non-UK pension schemes used to comply with automatic enrolment duties
240. **Consumer protection** The UK proposes to continue with the existing regime, including regulations on health and safety, misleading advertisements, unfair commercial practices, cooling off periods for contracts negotiated away from business premises, distance contracts, electronic commerce, consumer credit, product liability, unfair terms in consumer contracts, package tours and combatting late payment in commercial transactions
241. **Transport (roads, rail, air, sea, waterways)** Cooperation and reciprocity will be needed in terms of maintenance of and access to transport networks. The UK's continued involvement in the TEN-T programme is likely to be of mutual benefit in facilitating faster, smoother journeys and safer, less congested travel across the core TEN-T transport network, improving connectivity and contributing to climate change objectives. (The UK has one Core Network Corridor (the North Sea-Mediterranean Corridor running from Northern Ireland and Ireland and Scotland down through England and across to mainland Europe) which is supported by regional and national routes)
242. The UK will no longer automatically be a member of the European Common Aviation Area or the European Aviation Safety Authority so will be looking to put in place arrangements which continue to support affordable, accessible and secure air transport across Europe, enhancing connectivity and ensuring a competitive market for consumers. This will be of mutual benefit to both UK and EU airlines and passengers. Aspects which may also play a part in negotiations are the EU Slots regime, liberalisation of air traffic management, passenger rights, customs and the environment. The UK will be looking for certainty early on due to the lead times required by the industry in terms of forward planning
243. The UK's continued significant involvement in the European Aviation Safety Authority would be mutually beneficial in ensuring consistent and enhanced security levels in air transport across Europe. The alternative would be for the UK to develop its own safety certification regime which is likely to have time and cost implications and may affect airlines' ability to operate
244. **Energy** The UK's continued access to the EU energy market and involvement in Projects of Common Interest as part of the TEN-E programme is likely to be of mutual benefit in ensuring the security, affordability and sustainability of energy across Europe (including to Ireland) and the ongoing liberalisation of the market

245. An energy solution should be sought which ensures ongoing security of supply to Ireland (bearing in mind the UK will lie between it and the rest of the EU) and the electricity market operating across Ireland and Northern Ireland
246. Nuclear energy requires a separate analysis
247. **Company law** The UK proposes to continue with the existing company law structure including public takeovers, cross-border mergers, shareholder rights, capital, financial reporting, and disclosure and accounting standards
248. The regimes for the disclosure of large shareholdings and of beneficial ownership of shares will continue
249. The UK requests agreement on shared jurisdiction for public takeovers
250. The position of European companies (*Societas Europaea*) registered in the UK will need to be considered
251. **Settlement finality** The efficiency of the financial infrastructure is of pre-eminent importance, particularly for the City of London. The UK proposes to continue with the Settlement Finality Directive
252. **Financial collateral** The financial collateral legislation is also important to the stability of financial dealings. The existing regime will be maintained and possibly enhanced
253. **Family law** The UK considers that it is in the interests of both the UK and the EU that the existing regime for family jurisdiction and the recognition of family judgments (children, divorce etc.) and other arrangements relating to the family should be continued. This will require recognition and reciprocity
254. **EU arrest warrants** These are considered to assist both the UK and the EU in relation to protection of the public from crime. The UK proposes continued reciprocity
255. **Coordination of social security systems** The UK proposes continued reciprocity in relation to, for example, the receipt of social security benefits. In the pensions content, this is relevant to acquiring qualifying years for retirement under the UK state pension during periods of working in an EU member state; also entitlement to state pension increases etc.

## English law as a governing law

256. It is considered to the advantage of the EU that government policies should not aim to weaken the use of English law in major international contracts

257. If English law loses its appeal, it is considered that markets might drift to New York law, as opposed to the law of an EU state because of the familiarity of a common law system, language and other factors. Hence EU sovereigns might, for example, find that they have to issue international bonds under New York law instead of English law
258. It is in the interests of both the EU and the UK that they and their citizens have clarity, certainty, continuity and predictability in relation to English law. This also applies to the international community
259. English law is an international public utility, English law is chosen as the governing law of numerous syndicated bank loans, bond issues in the capital markets, derivatives and other very large international contracts
260. The choice of English law is often accompanied by the choice of the English courts as the forum for disputes
261. English law and New York law have a near monopoly in these international contracts
262. English law is not necessarily better than other EU systems of law. A law which is used as a governing law must make choices in its legal policies in order that the chosen legal system is suitable for the transactions concerned. These choices are tough and can be hard to make. A legal system which is suitable for one type of transaction is not necessarily suitable for another
263. For example, in the Greek debt reorganisation of 2012, there was a question as to whether new bonds issued in exchange for old bonds of the private sector should be governed by English law or the law of a Eurozone member state. It was found that the law of none of the 17 member states of the Eurozone met both of two technical legal tests considered essential to the transaction (trusts and good case law on article VIII 2b of the IMF Agreement), but English law did. There was nothing wrong with the other systems of law. But they did not make the policy choices which English law made
264. English law is used to competition from other legal systems. There is no reason why governments elsewhere should not aim at legal policies which the English have discovered through trial and error appeal to international markets
265. English law is an important support for the City of London which is in turn a support for the EU.

### *Possible EU position*

The EU may maintain that EU member states have strong legal systems which they may wish to promote in world markets and that the relevant choices their legal systems have made are the right ones for the future.

## **The role of science**

- 266. Science plays a fundamental role in the survival of mankind and the advancement of our societies
- 267. The UK is a world leader in major branches of scientific endeavour. The UK has more Nobel Laureates than any other country, except for the US
- 268. These endeavours are above politics and are a common concern. International partnership is necessary and in everybody's interest. These points should influence the outcome on the fields highlighted below
- 269. The UK would wish to remain a part of the future European Unitary Patent system
- 270. The UK would wish to retain a part of the Central Division for the Unified Patents Court in London
- 271. The UK will continue to protect copyright law in accordance with the Berne Convention
- 272. The UK will consider the future of EU database rights
- 273. The UK will continue to participate in scientific research projects at universities in Europe and elsewhere.

## **Taxation**

- 274. **Value Added Tax** The UK will repeal the provisions concerning the acquisition of goods from and despatches of goods to other EU member states, and provide instead for their treatment as imports and exports. Imports will attract (often recoverable) VAT in the same way as current imports from outside the EU
- 275. The provisions requiring filing of EC Sales Lists and Intrastat declarations will be repealed and replaced with an alternative regime
- 276. Arrangements will be agreed to ensure that the VAT treatment of tour operators and others operating TOMS is not disrupted (including eliminating the need for multiple EU VAT registrations)
- 277. The UK may provide for additional categories of zero-rated supply not currently permitted under EU law

278. The UK will seek to agree provisions to deal with VAT registration arrangements for EU businesses providing electronic services to consumers in the UK and vice versa to replace the current Mini-One-Stop-Shop
279. The UK will discuss provisions to replace the current arrangements for reciprocal refunds of cross-border VAT
280. More generally, the UK will consider the need to agree harmonised VAT rules with the EU to ensure that double taxation and double non-taxation are minimised
281. **Other EU-related taxes** The UK will propose the continued application in the UK of the Parent-Subsidiary Directive and Interest and Royalties Directive so that interest, dividends and royalties can be paid intra-group between the UK and the EU without withholding taxes
282. A fundamental feature of sovereignty is the ability of a country to design its own tax system and set its own tax rates to meet the demand of its own economy and its domestic priorities for public services
283. At the same time, the UK believes that it is important for individuals and businesses to pay the taxes that are due in the UK and elsewhere, and that there should not be opportunities for artificially structuring to avoid taxes altogether (“double non-taxation”)
284. The UK has been a leading contributor to the OECD’s project on Base Erosion and Profit Shifting, and promoted the publication of the Lough Erne Declaration during its presidency of the G8 in 2013
285. Accordingly the UK will continue to adopt a policy of developing and maintaining a competitive tax system while participating in international measures to reduce the opportunities for tax avoidance and double non-taxation
286. Over time, this could involve change areas of tax law that have previously been found to be contrary to principles of EU law (in particular the freedom of establishment), but there would be no immediate plans to do so
287. The UK would be willing to continue to participate in arrangements to replicate the Mutual Assistance Directive, the EU Arbitration Convention and arrangements for the automatic exchange of tax rulings.

## **Intelligence and defence**

288. Terrorist and military threats are common to all Europe and the world as are the threats of serious crime

289. It is in the interests of the EU and the UK that they should continue to act as close allies as regards intelligence and defence
290. The UK would be important for any major defensive action
291. UK defence spending meets the NATO target
292. The UK has sophisticated anti-terrorist counter-intelligence
293. The UK has advanced protection against cyber attacks
294. The UK is one of the largest contributors to Europol. The UK proposes its continued participation.
295. The UK would expect to continue to maintain consistent sanctions

### **Withdrawal agreement**

296. The withdrawal agreement should be governed by public international law and subject to the jurisdiction of an international arbitral tribunal, rather than the law or forum of a UK or EU court. These choices of law and forum are standard in treaties
297. All parties have an interest in ensuring that the withdrawal agreement deals with both the UK withdrawal and the future relationship of the parties, as contemplated by article 50
298. One reason is that a comprehensive agreement would require only a qualified majority in the EU approval process. Otherwise any one of about 38 parliaments in the EU would have a veto over an arrangement which the majority of EU states wished to implement.

### **Other points**

299. **Devolved administrations** In order to promote unity against separatism, it is in the interests of both the UK and EU to arrive at arrangements which match the aspirations of devolved administrations. In the UK, these include Scotland, Wales and Northern Ireland, as well as the Channel Islands and other overseas territories such as Gibraltar
300. It is in the interest of all parties that a practical solution should be found for the Irish border and the Common Travel Area
301. **Human rights** The UK was one of the founding members of the UN convention and intends to maintain a vigorous human rights regime.

## **Transition**

302. It is considered to be in the interests of all parties that the negotiations should proceed with expedition in parallel without artificial sequencing or pre-conditions
303. All parties have an interest in stability and a smooth transition
304. It is suggested that many people hope that their politicians will not engage in political manoeuvres designed to hinder or delay progress
305. It is considered that all parties have an interest in ensuring that the UK does not have to take unilateral action to protect itself from a sudden exit from the EU without agreement being reached
306. A phased transition is considered desirable to enable all parties and their businesses, citizens and students to avoid a cliff-edge, to adjust and to avoid sudden change. The connections between the EU and the UK are intricate
307. The UK would expect to contribute a fair and equitable amount for EU services received during the transition in amounts to be agreed.

### ***Possible EU position***

The EU may consider that it may legitimately employ any negotiating tactics it wishes to improve bargaining power.

## **Role of the EU in the world**

308. The UK believes that it is in UK national interests that the EU should be strong and successful
309. This is because an EU which is strong economically and defensively and which has strong institutions will enhance the overall strength of Europe as a region to which the UK belongs
310. Europe without the UK will still have a population of about 440 million compared to the US 310 million and the China 1400 million
311. The economic super-powers in the world are Europe, the US and China – a tripolar world would be in balance, as opposed to an unstable bipolar world
312. European scientific inventions are the foundation of modern science and technology
313. Europe is the historic home to an extraordinary richness of music, art, literature, architecture and philosophy
314. Europe shares the most profound values of the rule of law

- 315. The establishment of a common currency in the Eurozone, the world's second largest currency, was an audacious feat based on the notion that one currency is better than 19
- 316. The withdrawal of the UK may facilitate the ever closer union which the EU desires and which is considered to be in the interests of the UK.

### **Role of the UK in the world**

- 317. The UK plays a role in the world which would be of value to a partnership with the EU and which would thereby strengthen the EU
- 318. Europe needs to be a powerful region to counter-balance the assertion of the national interests of powerful states elsewhere in the world
- 319. The UK used to be a super-power and retains many valuable special links with important countries, including with the United States and with over 50 Commonwealth countries with a combined population of nearly a third of the world
- 320. The UK was a founding member of the United Nations and has a seat on the UN Security Council
- 321. The UK is a member of G7 and the OECD
- 322. The UK is one of the largest economies in the world
- 323. The UK has a population of 65 million, the second largest in Europe
- 324. Some predict that the UK could in a few decades have the largest population in Europe
- 325. The UK is the third largest nuclear power after the United States and Russia
- 326. The UK has considerable hard and soft power
- 327. The UK is a leading promoter of global trade and services liberalisation against protectionism
- 328. The UK is a leading promoter of democracy and a market economy.

### **General conduct of the negotiations**

- 329. The withdrawal arrangements will be enshrined in legal instruments of the EU and the UK
- 330. The written laws are a special place and express the highest values of a civilisation
- 331. The written laws must not show rancour or resentment or be born out of rage
- 332. They must be measured and enlightened

333. They endure into the future. They must reflect the hopes of the future, not any ephemeral emotions of the present.

## **Conclusion**

334. All parties have an interest in stability
335. All parties have an interest in ensuring that neither side is embittered by the process so as to protect the future of Europe
336. There are many important third countries who would not be averse to seeing a weakened and divided Europe
337. All parties have an interest in seeing that the countries of Europe as a region act as good neighbours in a partnership which has strength and purpose
338. All parties should have regard to how future generations will judge us when history makes its judgments
339. The EU and the UK share a common idealism and hope.

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Other Intelligence Unit papers on Brexit:

- *A lawyer's view on Brexit*, 5 February 2016
- *A Brexit Act in 19 ¾ pages*, 30 August 2016

Allen & Overy have also produced a large number of specialist Brexit papers, available on its website.

This paper is not legal advice.

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