



BRIEFING PAPER

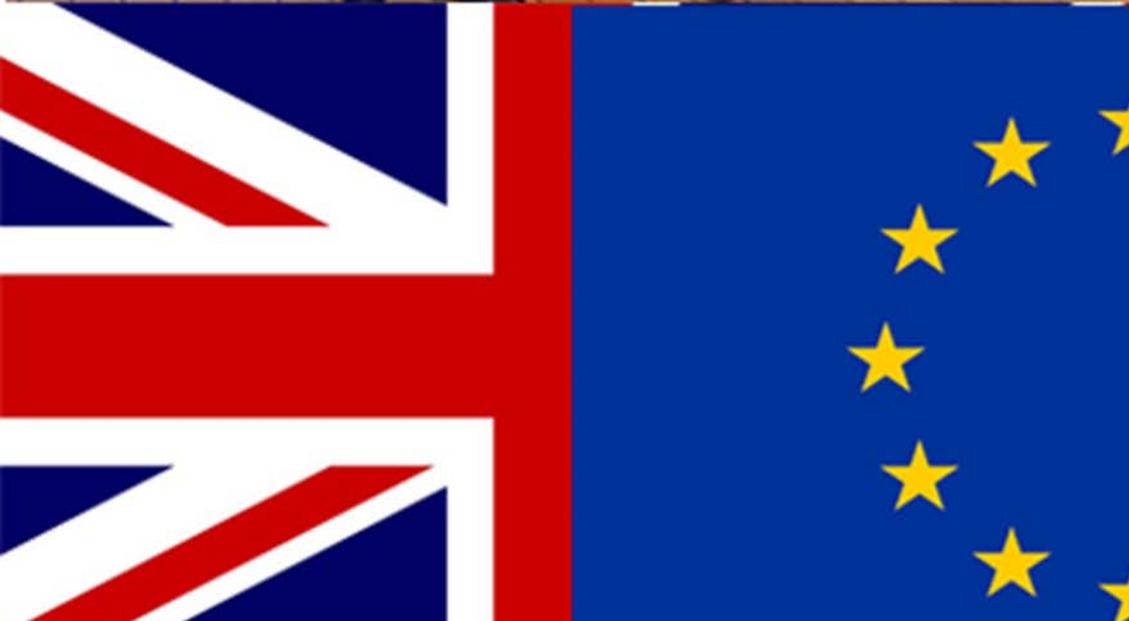
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Brexit: the August negotiations

By Vaughne Miller,
Arabella Lang, John
Curtis, Dominic Webb,
Philip Brien, Catherine
Fairbairn

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Summary

The third round of Brexit negotiations ran from 28 to 31 August 2017. Before the third round the UK published three position papers, four future partnership papers and four technical notes. The talks focused on the following areas:

- **Citizens' rights**

The EU and UK negotiators, Michel Barnier and David Davis, continued to discuss their respective positions, in particular, issues not covered in the previous round, such as professional qualifications and economic rights. An updated comparative [joint technical note](#) was agreed by both parties.

- **Financial settlement**

The negotiators continued discussions and compared the respective legal analyses of the UK's obligations towards the EU. The UK did not publish its analysis.

- **Ireland and overall governance**

There were discussions on Ireland/Northern Ireland issues (Common Travel Area, the 'Good Friday' agreement) and the overall governance of the withdrawal agreement.

- **Other separation issues**

Euratom, goods placed on the market, on-going EU procedures, judicial cooperation in civil and criminal matters were also discussed.

While some advances were made in aspects of citizens' rights and technical aspects of other separation issues, little progress was made on the financial settlement, with the EU continuing to press the Government for a "clear position" on the UK's recognition of its "legal and moral" commitments to a settlement.

Progress was also made on agreeing the principles behind the Common Travel Area and the North-South and East-West cooperation set out in the Good Friday Agreement. However, detailed technical discussion is still needed, particularly on the issue on the movement of goods across the border.

The UK negotiator, David Davis, maintained that the two sides had made "concrete progress on many important issues". But Michel Barnier, the EU's chief negotiator, said there had been no progress on major issues and suggested there might not be enough time to negotiate an orderly UK withdrawal from the EU. He did not think "sufficient progress" would be made by October, in order to start the second phase of the negotiations on future EU-UK relations.

On 5 September David Davis made a [statement](#) to Parliament on progress in the negotiations. He was more optimistic about progress in key areas than Michel Barnier, although he too acknowledged there are significant differences in some areas.

The next two rounds of negotiations start on 18 September and 9 October, and the European Council on 19 – 20 October will be the first opportunity for the EU27 to consider formally whether "sufficient progress" has been made in the first phase of negotiations.

This paper follows two Commons Library briefing papers on the Brexit negotiations, [Brexit: the talks begin](#), 12 July 2017, and [Brexit: the July negotiations](#), 2 August 2017.

1. What happened in round three?

1.1 The agenda

The third round of Brexit negotiations ran from 28 to 31 August. The main areas for discussion were citizens' rights, the financial settlement, Ireland/Northern Ireland and other separation issues. The three negotiating groups covering citizens' rights, the financial settlement and other separation issues met on 29 and 30 August, while the Coordinators, who are looking at Ireland/Northern Ireland issues and the governance of the withdrawal agreement, met on 30 August.¹

- **Citizens' rights**

The EU and UK negotiators, Michel Barnier and David Davis, continued to discuss their respective positions, in particular, issues not covered in the previous round, such as professional qualifications and economic rights. An updated comparative [joint technical note](#) was agreed by both parties.

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There were discussions on Ireland/Northern Ireland issues (Common Travel Area, the 'Good Friday' agreement) and the overall governance of the withdrawal agreement.

- **Other separation issues**

Euratom, goods placed on the market, on-going EU procedures, judicial cooperation in civil and criminal matters were also discussed.

1.2 Opening and closing statements

Opening remarks

In his [opening remarks](#) the Secretary of State for Exiting the EU, David Davis, said that for the UK, the third round was "about driving forward the technical discussions across all the issues". He wanted to "lock in the points where we agree, unpick the areas where we disagree, and make further progress on the whole range of issues". But for this, "flexibility and imagination" would be needed on both sides.

Final statements

In their final statements, David Davis and Michel Barnier gave somewhat different and sometimes conflicting accounts of the outcome of the

¹ See [Programme](#), 3rd round of EU-UK Article 50 negotiations, 25 August 2017.

August talks, to the extent that [one commentator](#) wondered if the two had actually attended the same talks.

Michel Barnier

Michel Barnier said they had made “some useful clarifications on a lot of points, for example, the status of frontier workers, the aggregation of social security rights, and pending legal proceedings before the Court of Justice” and that “the discussion on Ireland was fruitful”. But he regretted they had “made no decisive progress on the main subjects”.²

Barnier was also critical of the new UK papers published before the talks:

The UK wants to take back control, it wants to adopt its own standards and regulations.

But it also wants to have these standards recognised automatically in the EU. That is what UK papers ask for.

This is simply impossible. You cannot be outside the Single Market and shape its legal order.

Mr Barnier detected a sense of “nostalgia” in the UK position on its future relationship with the EU, to which David Davis was reported to have responded: “I wouldn’t confuse a belief in the free market for nostalgia”.³

David Davis

In his [closing remarks](#), David Davis maintained they had “seen some concrete progress” and that he had “delivered” on establishing areas of agreement and working through areas of disagreement “to ensure that we make further progress on a whole range of issues”.

He insisted “issues around our withdrawal and our future relationship are inextricably linked” and so the UK approach “of setting out positions on them both is designed to progress the current negotiations as swiftly as possible”.

In the discussions on the governance of citizens’ rights and the wider withdrawal agreement, Mr Davis said his team had been willing to discuss “creative solutions”, and that it was time for the Commission to match this willingness.

He also [said](#) the two sides had “reached almost complete agreement” in their approaches to privileges and immunities and to confidentiality requirements on shared information after Brexit.

David Davis’s statement to Parliament

David Davis made a [statement](#) in the Commons on 5 September on the negotiations in July and August, saying: “it is clear that we have made concrete progress on many important issues”. He explained that the first two rounds had not been “about establishing jointly agreed legal text”, but “about reaching a detailed understanding of each other’s position, understanding where there might be room for compromise

² European Commission press release, [Speech](#) by Michel Barnier at the press conference following the third round of Article 50 negotiations with the United Kingdom, 31 August 2017.

³ [The Telegraph, 31 August 2017](#).

and beginning to drill down into technical detail on a number of issues”.

Mr Davis outlined areas of progress as follows:

The agreement on healthcare rights, for example, will mean British pensioners living in the EU will continue to have their healthcare arrangements protected both where they live and when they travel to another member state, where they will still be able to use an EHIC card. On mutual recognition of qualifications, we have made progress in protecting the recognition of qualifications for British citizens resident in the EU27, and EU27 citizens resident in the UK. In fact, each one of those areas of agreement is reciprocal, and they will work for Brits in the EU and EU 27 citizens in the UK. They help to provide certainty and clarity for EU 27 citizens in the UK and UK citizens in the EU 27. They will make a tangible difference to those people’s lives. I hope everyone recognises the importance of that.

He clarified where there was still disagreement even in these areas.⁴

The recognition must extend to students who are currently studying for a qualification, it must apply to onward movement by UK citizens in the EU, and it should extend more broadly to protect the livelihoods of thousands of people which depend on qualifications that will be gained before we exit the EU. In those areas, the EU’s proposals fall short of ensuring that UK citizens in the EU and EU citizens in the UK can continue to lead their lives broadly as they do now.

He called for flexibility and pragmatism on both sides in dealing with, for example, the specified cut-off date for lawful residency requirements, future family reunion, compliance and enforcement.

He said (c 44) there had been “significant, concrete progress in the vital area of Northern Ireland and Ireland”, and that they had “agreed to work up shared principles on the common travel area”, which was a “major change”.

On the financial settlement (c 44), he conceded there were “significant differences”:

Finally, on the financial settlement, we have been clear that the UK and the EU will have financial obligations to each other that will survive our exit from the European Union. In July, the Commission set out the European Union position. We have a duty to our taxpayers to interrogate that position rigorously, and that is what we did, line by line—it might have been a little bit of a shock to the Commission, but that is what we did line by line. At the August round, we set out our analysis of the EU’s position. We also had in-depth discussions on the European Investment Bank and other off-budget issues.

It is clear that the two sides have very different legal stances. But, as we said in the article 50 letter, the settlement should be in accordance with law and in the spirit of the UK’s continuing partnership with the EU. Michel Barnier and I agreed that we do not anticipate making incremental progress on the final shape of a financial deal in every round. Generally, we should not underestimate the usefulness of the process so far, but it is also

⁴ The [joint technical note](#) on citizens’ rights also clarifies some of these assertions.

clear that there are significant differences to be bridged in this sector.

The Shadow Secretary of State for Exiting the European Union, Keir Starmer, thought (c 46) “the current state of affairs and the slow progress are a real cause for concern”. He referred to government “flawed red lines” on issues such as the role of the Court of Justice of the EU (CJEU) and the rights of EU citizens in the UK and vice versa, and thought the Government was being unrealistic in what it wanted to achieve:

We are obviously reaching the stage of the negotiations where fantasy meets brutal reality. The truth is that too many promises have been made about Brexit that cannot be kept.

1.3 Press and other comment

Most press comment noted a lack of progress in round three.

The *Financial Times* reported, 31 August, that both sides had “made progress on a handful of second order issues. But on the big matters, most notably the demand that Britain makes a financial payment to the EU, there has been no progress”. Another FT report, 30 August, spoke of “minimal advances and entrenched positions”, continuing:

Britain hopes talks will move to a more intense, free-flowing conversations in the early autumn as member states soften once the consequences of an inflexible, rigid line become clear. It is unwilling to move on financial issues until that flexibility is clear. By contrast, the EU side sees the UK wasting time on a flawed strategy that will not bear fruit by October. At this stage there is little sign of dissent within the EU27 over the divorce-first sequence for talks, with Paris and Berlin urging member states to hold the line.

Many reports picked up on David Davis allegedly commenting on the [Andrew Marr show](#) that the Commission was “silly” to claim no progress had been made,⁵ and most also reported the International Trade Secretary, Liam Fox, accusing the European Commission of trying to “blackmail” Britain.⁶

Many commentators described the negotiations and their accompanying press conferences as “[tense](#)” or “[testy](#)”, with the overall mood apparently one of [bitterness](#) and [frustration](#). *The Guardian* [summarised](#) the final conference by saying “It was hard not to conclude... that these were two men – and two sides – largely talking past each other”. The *EUObserver* [reported](#) on UK criticism of the EU approach to budget issues for being “top down” and “maximalist”.

⁵ For example, Independent, 3 September, [David Davis calls Michel Barnier "silly" over his stance on Brexit negotiations](#); Politico, 3 September, [David Davis: Barnier's Brexit stance looks 'silly'](#); Politics Home, 3 September, [David Davis condemns 'silly' Michel Barnier as he denies £50bn divorce bill claim](#). David Davis denied this on 5 September in the [debate](#) following his statement on progress in the negotiations (c 57).

⁶ [Politico, 3 September](#);

2. Phase one priority areas

2.1 Citizens' rights

Nuanced agreement

Agreement was reached on the need for reciprocal rights for EU and UK citizens in some areas, including aspects of the mutual recognition of professional qualifications. But clarification is still needed on the personal scope of rights and how they will be enforced.

On health care and social security both sides agreed that commitments were needed on protecting pensions, existing health care rights and future social security costs of EU and UK citizens. On cross-border workers (those who live in one Member State and work in another) they said there would be an agreement on protection from discrimination.

There was some agreement on how the EU health insurance card (EHIC) would be applicable for UK citizens living in the EU and to EU27 citizens in the UK. A UK citizen already living in another EU State on Brexit day will be able to continue to use the EHIC. After that date, the situation for EU citizens travelling to the UK or UK citizens travelling to the EU, it is not clear. The EU wants this to be included in a future relations agreement.

Agreement on the enforcement of citizens' rights remained elusive. The EU wants CJEU enforcement, while the Government wants UK jurisdiction.

The negotiators agreed a definition of "pending cases" before the CJEU after Brexit, but there is still disagreement over whether there will be a role for UK legal advisers to judges.

The joint technical note

The EU-UK [Joint technical note on EU-UK positions on citizens' rights after third round of negotiations](#), 31 August 2017, up-dated the July technical note showing areas of agreement, disagreement and where further discussion is needed in six broad areas:

- Personal scope (i.e. the people affected by the end of free movement to and from the UK)
- The nature of the agreement (i.e. its status in law, monitoring of compliance, enforcement of rights and the relevance of EU law)
- Residence (i.e. acquiring and losing rights of residence and administrative procedures)
- Social security coordination
- Professional qualifications (i.e. recognition of such qualifications)
- Other economic rights

There were five areas of convergence: frontier workers, aspects of social security coordination and healthcare; but around 20 areas of divergence,⁷ including the following:

Topic	EU position	UK position
European Health Insurance Card (EHIC)	Agreement on retention of EHIC for UK citizens already living in another Member State on Brexit day. Issue of UK citizens in general keeping EHIC is for negotiations on EU-UK future relations	UK wants to continue the scheme under provisions in EU Regulation 883/2004 without need for cross-border situation on Brexit day.
Cut-off date for when EU citizens must be in the UK to qualify for 'settled status'	Date of Brexit - 29 March 2019	Between 29 March 2017 and 29 March 2019.
Future family reunion	Rights of EU citizens to bring current and future family members to UK (including non-EU family members) as set out in Free Movement Directive (2004/38).	Matter of equal treatment of EU and UK citizens under applicable national rules. So future family members should be subject to same rules that apply to non-EU nationals joining UK citizens, or to post-Brexit immigration arrangements for EU citizens who arrive after specified date.
Compliance and enforcement: legal redress for EU citizens in the UK to enforce their rights	EU Commission should monitor rights and CJEU should have jurisdiction to protect these rights. Citizens' rights must be directly enforceable in national jurisdictions, under control of Court of Justice of EU.	Citizens' rights (and other rights) will be enshrined in UK law and enforced by UK courts. UK will consider creation of independent monitoring body.
Voting rights in local/municipal elections	This right is based on EU law and citizenship rights.	Right to stand/vote in local elections in country of residence should remain.
Posted workers' rights (posted worker is	The EU regards posted workers as service providers,	Posted workers are within scope of withdrawal

⁷ The [EUObserver, 31 August](#), provides a useful summary of where the EU and the UK stand on citizens' rights issues.

Topic	EU position	UK position
“employee who is sent by an employer to carry out a service in another member state for a temporary period”)	not as citizens using free movement rights. They should not be included in citizens’ rights agreement as they pay national insurance in their home countries.	agreement and should be protected.
Right of holders of residence to onward movement within the EU	UK nationals have protected rights only in State of residence on Brexit day.	UK nationals moving within EU27 after specified date should keep all existing rights.
Territorial scope of recognition of professional qualifications	No Single Market rights after withdrawal; grandfathering of recognition decisions only in State where UK national resides or works.	Right to recognition of qualification and right to practise a profession should apply across EU27.

There were eight areas where more discussion is needed: aspects of residency cut-off dates, clarification regarding UK citizens in the EU and family members, administrative procedures for residency, aspects of social security coordination and mutual recognition of professional qualifications.

2.2 Ireland and Northern Ireland

The Ireland-Northern Ireland situation is being discussed as part of the higher-level ‘dialogue’ on Ireland/Northern Ireland issues such as the maintaining the Common Travel Area and the peace agreement.

On 16 August the UK Government published a [position paper](#) on Northern Ireland and Ireland. The move was welcomed by both the Irish Government and the EU Commission, but both expressed reservations. A Commission spokesman described it as “a positive step towards really starting phase one of the negotiations”.⁸ They added, however: “Frictionless trade is not possible outside the single market and customs union”.⁹ Simon Coveney, the Irish Foreign Secretary, said the paper provided “badly needed clarity” and he welcomed its principles, but said it was still lacking “detailed answers”.¹⁰ He also warned that Ireland would not allow itself “to be used as a pawn” in Brexit

⁸ [UK to seek Irish border waivers on customs and food safety after Brexit](#), The Guardian, 16 August 2017.

⁹ [‘UK position paper on Irish border ‘throws up even more questions’](#), Financial Times, 16 August 2017.

¹⁰ [‘Progress, but no solution to Ireland’s Brexit problem’](#), Politico, 18 August 2017

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negotiations.¹¹ Emphasising further the complexities of finding a solution, Mr Coveney added: “There is no straightforward solution to this. If there was we would have heard it by now. This is going to require a unique political solution”.¹²

Business groups also welcomed the increased detail from the UK Government, but acknowledged that gaps existed between the two sides’ negotiating positions. The British Institute of Directors commented that the position paper was a “significant step forward but unsurprisingly throws up even more questions”, and the chief executive of Ireland’s biggest business organisation, Chambers Ireland, stated: “Both the EU and the UK appear to have very different ideas of what is workable”.¹³

During the talks UK Chancellor of the Exchequer Philip Hammond travelled to Dublin to meet the Taoiseach, Leo Varadkar, Irish ministers and businesses. At the same time the *Irish Times* published an opinion piece by Mr Hammond, emphasising the deep economic and political ties between the two countries, and the UK Government’s determination to strengthen these after Brexit. He also made clear that the Government was determined to “avoid any physical border infrastructure on either side of the Border between Ireland and Northern Ireland”.¹⁴

In his closing speech Michel Barnier said that despite the lack of “decisive progress on the main subjects”, the “discussion on Ireland was fruitful”.¹⁵ Describing in the negotiations in more detail, he went on:

We made real progress on the question of the Common Travel Area, on the basis of guarantees by the United Kingdom, and we clarified, in a constructive manner, what remains to be done, particularly with regards to North-South cooperation in the Good Friday Agreement.

David Davis echoed these positive sentiments, saying:

We had a good discussion on maintaining the Common Travel Area and on safeguarding the Good Friday Agreement, on the basis of the UK paper.

We think there is a high degree of convergence on these key issues, and we agreed to work up shared principles on the Common Travel Area.

We also agreed to carry out further joint technical work on cross-border co-operation under the Good Friday Agreement.¹⁶

¹¹ [‘UK position paper on Irish border ‘throws up even more questions’](#), Financial Times, 16 August 2017.

¹² [‘Progress, but no solution to Ireland’s Brexit problem’](#), Politico, 18 August 2017

¹³ [‘UK position paper on Irish border ‘throws up even more questions’](#), Financial Times, 16 August 2017.

¹⁴ [‘Philip Hammond: We are determined to avoid a physical Border in Ireland’](#), Irish Times, 31 August 2017.

¹⁵ [Speech by Michel Barnier at the press conference following the third round of Article 50 negotiations with the United Kingdom, EU Commission](#), 31 August 2017.

¹⁶ [‘David Davis’ closing remarks at the end of the third round of EU exit negotiations in Brussels’](#), Department for Exiting the European Union, 31 August 2017.

The consensus of the press coverage was that there was a 'breakthrough' on the issue of the Common Travel Area. The EU does want more detail from the UK on how to preserve the benefits of the Good Friday Agreement, but Mr Barnier said negotiators were "able to clarify work that still needs to be done in a constructive spirit".¹⁷

According to the BBC, however, despite the progress made, it "also emerged that the totality of cross-border institutions and relationships has not yet been defined, nor has there been a substantial analysis of how Brexit could impact on them".¹⁸ The report also described the joint technical work that David Davis alluded to in his closing statement as "a substantial piece of technical work which will take months rather than weeks to complete".¹⁹

The Guardian reported that Commission officials "made it clear that the British [proposal for a customs waiver](#) on the border was a non-starter".²⁰ The *Irish Times* also reported that sources in Brussels and Dublin told the paper it was "now highly unlikely that the EU would judge that sufficient progress had been made by October's meeting of the European Council", meaning that future arrangements for the functioning of the border would not be discussed until after the December meeting of the European Council at the earliest.²¹

In contrast to this account, Pieter Cleppe, of the campaign group Open Europe (which has long campaigned for EU reform), argued that the EU position on not beginning future relations talks until "sufficient progress" has been made in phase one is not sustainable, and the EU will likely soften its stance.²² He thought the EU had already lowered the threshold for moving on to talks on future relations, having first asked for an 'agreement' on the financial settlement, before then requiring sufficient progress towards an agreement position.

He also argued that as the reality of the gap in the EU budget caused by the UK's exit looms closer, it will encourage Member States to bring such discussions forward. Mr Cleppe further mentions that while the Taoiseach, Leo Varadkar, has not urged the trade talks to start as soon as possible, his statement that it was "common sense" that an agreement on the Irish border cannot be reached until the shape of future trading relations between the UK and EU are known, was an implicit endorsement of the UK Government position.²³

¹⁷ ['Brexit talks round 3-what we learned'](#), Politico, 1 September 2017.

¹⁸ ['Brexit: Barnier says substantial work needed over Irish border'](#), BBC News, 4 September 2017.

¹⁹ ['Brexit: Barnier says substantial work needed over Irish border'](#), BBC News, 4 September 2017.

²⁰ ['EU's border stance paves way for Northern Ireland to get special status'](#), The Guardian, 1 September 2017.

²¹ ['Major breakthrough in Irish strand of Brexit talks'](#), Irish Times, 1 September 2017.

²² ['Why the EU will have to start talking about trade soon'](#), Open Europe, 1 August 2017.

²³ ['Varadkar: Need for Brexit deal before Border plan 'common sense''](#), Irish Times, 20 August 2017.

Michel Barnier, on a visit to Ireland on 4 September, said after a meeting with Simon Coveney that “a lot more substantial work” is required to preserve Irish cross-border co-operation after Brexit.²⁴

Echoing previous statements, Mr Coveney said it was clear that UK aspirations to a frictionless border “were not credible answers” to the problem, without threatening the integrity of the single market.²⁵ In a similar vein Mr Barnier made clear that the challenge of the border issue was “that any solution we look at it will have to be fully compatible with Union law and the single market”, pointing to the limits of the “creative solutions” the Commission promised to consider during the negotiations.²⁶

Mr Coveney said Ireland would be in a “uniquely vulnerable position” because of Brexit and would face potentially “extraordinarily negative” impacts. Despite these concerns, both he and Mr Barnier emphasised their unity in their approach to Brexit, with Mr Coveney saying Ireland was in weekly “if not daily” contact with the European Commission about Irish Brexit issues, and Mr Barnier stating: “Ireland’s concerns are the Union’s concerns, and all Member States and EU institutions are fully united in this regard”.²⁷

On a more positive note Michel Barnier emphasised the progress made on the Common Travel Area and stated that apart from some detail he was not aware of significant blockages to agreement on the issue.²⁸ Simon Coveney thought that with continuing strong pressure from the UK to move discussions on to the second phase (future EU-UK relations), he had a “very strong sense” that more progress could be made on phase-one issues ahead of the move.²⁹ The *Irish Times* also reported that a Commission position paper on the Irish border was likely to be published the week beginning 11 September.

2.3 Financial settlement

The EU published a position paper on 24 May, [Essential Principles on Financial Settlement](#), on the calculation of the financial settlement, and Michel Barnier was hoping for a similar paper from the UK Government. The Government did not publish a paper on the financial settlement, although there were reports of a UK legal analysis at the negotiations.

In July David Davis said in a [Written Ministerial Statement](#)³⁰ that the Government would indeed have some payment obligations, but [said](#)

²⁴ [‘Brexit: Barnier says substantial work needed over Irish border’](#), BBC News, 4 September 2017.

²⁵ [‘EU stands with Ireland in Brexit talks. Barnier assures Coveney’](#), Irish Times, 4 September 2017.

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ David Davis said: “On the financial settlement, [...], the Government has been clear that we will work with the EU to determine a fair settlement of the UK’s rights and obligations as a departing member state, in accordance with the law and in the spirit of our continuing partnership. The Government recognises that the UK has obligations to the EU, and the EU obligations to the UK, that will survive the UK’s withdrawal—and that these need to be resolved”.

after the third round: “the Commission has set out its position and we have a duty to our taxpayers to interrogate it rigorously”.

Negotiations continued on the scale and scope of the payments for which the UK will be liable on leaving the EU, but little progress was made towards agreeing precisely what these obligations would include. The EU continued to press the Government for a “clear position” on the UK’s recognition of its “legal and moral” commitments to a financial settlement. At the opening press conference on 28 August, Michel Barnier stressed that “we need UK positions on *all* separation issues”, an emphasis that David Davis apparently did not miss, given his response that “for the United Kingdom, the week ahead is about driving forward the technical discussions across all the issues – *all* the issues”.

Referring to the UK’s financial settlement, Michel Barnier said in his [statement](#) at the end of the negotiations “this week the UK explained that these obligations will be limited to their last payment to the EU budget before departure”. He criticised this position by listing examples of commitments that the UK had made that extend past the UK’s departure, including loan guarantees for Ukraine and funding for developing countries, and said “after this week, it is clear that the UK does not feel legally obliged to honour these obligations after departure”.

David Davis’s [response](#) did not directly address this concern, except to acknowledge that “it is fair to say, across the piece, we have a very different legal stance”. The statement suggested that the UK has presented its own legal analyses of its potential financial obligations. Davis did, however, seek to emphasise that “the settlement should be in accordance with law and in the spirit of the UK’s continuing partnership with the EU”. His conclusion was that “we have succeeded in building mutual understanding, but it is also clear that there are still significant differences to be bridged”.

In the [Q&A](#) following these statements, David Davis expanded on his position:

the European Union made a claim on the United Kingdom – on the United Kingdom taxpayer – for a large sum of money, unspecified but undoubtedly large, and on the basis of what it determined to be our legal obligations. And so the proper approach to that is to go through line by line and see whether or not we believe those legal obligations are correctly codified.

He went on to say that “we’re a country that meets our international obligations... but those obligations have got to be well specified and they’ve got to be real. They don’t necessarily have to be legal – we also recognise moral obligations sometimes”.

Barnier’s response was that:

in order to make these discussions simpler, we set out a very precise list of commitments and accounts [referring to [the EU position paper](#) published before the first round of negotiations] that have to be resolved, that the 28 subscribed to and the 27 will not agree to having to pay on their own based on the current

financial perspectives, and we have a list of all the legal bases underpinning these commitments.

After the August negotiating round, International Trade Secretary Liam Fox [described](#) the EU's position as "blackmail" and called on the UK and EU to move on to discussing a trade deal. The Prime Minister's [comments](#) were more conciliatory, but echoed the desire to begin trade discussions.

More detailed background on the exit bill is available in the Library Briefing Paper [Brexit: the exit bill](#), 31 July 2017.

2.4 Other separation issues

The UK's exit from Euratom was also discussed and David Davis said the negotiators were "well placed to make even more progress in the next round" of talks in September. In his [statement](#) to Parliament he said he had reiterated "a strong mutual interest in ensuring that the UK and the European Atomic Energy Community, or Euratom, continue to work closely together in the future as part of a comprehensive new partnership".

According to [Politico, 31 August](#), the two sides were close to agreement on tariff rate quotas that they can present to the World Trade Organization (WTO).

There was also "almost complete agreement" on the privileges and immunities enjoyed by those who work in the EU institutions, agencies and other bodies in the EU and the UK, and on a "mutual approach" to continuing to protect confidentiality and shared information.

2.5 What didn't happen?

There was little or no progress on several matters the UK would like to settle early on but which the EU regards as relating to a future relations agreement, such as customs and trade relations. The UK Government has argued that these are also crucial for finding a solution to the Ireland/Northern Ireland border issues, and should therefore be discussed in the first phase of the negotiations. In his [closing remarks](#) on 31 August, David Davis said he thought that in many areas "there is an unavoidable overlap between withdrawal and the future and they cannot be neatly compartmentalised".

3. What happens next?

3.1 More frequent meetings?

The next scheduled negotiating round begins on 18 September and the fifth round on 9 October.³¹ Reports have suggested that the Government wants to extend the next round “on a rolling week-by-week basis until a breakthrough is reached on the contentious issue of Britain’s ‘exit bill’”.³²

It is not clear that the EU would agree to this, as it has made clear that Brexit is not its priority and that it has other more important matters to address.

3.2 New Government ‘engagement unit’

In early August Politico [reported](#) (9 August) that a new ‘engagement unit’ was being established by DExEU and the FCO, which will make use of the UK’s EU Ambassadors throughout the EU to explain and promote the UK’s Brexit aims to EU governments, businesses and other “stakeholders”. Politico cited a DExEU spokesperson on ramping up the communications network, campaigns and stakeholder engagement, “that will enable the government to communicate its message effectively in EU Member States as well as at home”.

Ahead of the third round of talks, the Government held confidential briefing sessions on 17 and 24 August for EU ambassadors at the FCO to explain the Government’s negotiating position in key areas. They were led by Alex Ellis, director general of DExEU and a senior member of the UK negotiating team. The first meeting was attended by representatives from the EU27 and covered the UK’s papers on customs and Northern Ireland. The second session included representatives from EEA members, Iceland and Norway, and concerned other Government papers, including on data protection and the jurisdiction of the CJEU. One diplomat described the session as “very vague and ambiguous”.³³

3.3 More Government papers

In his statement to Parliament on 5 September, David Davis [outlined](#) (c 45) future partnership papers the Government would be publishing in line with its strategy of seeking to include future relations issues within the remit of the current withdrawal negotiations:

Alongside the negotiations, we have also published a number of papers which set out our thinking regarding our future special partnership with the EU. These future partnership papers are different from our papers that set out the position for the negotiations under our withdrawal agreement. Our future partnership papers are part of a concerted effort to pragmatically drive the progress we all want to see. All along, we have argued that talks around our withdrawal cannot be treated in isolation

³¹ See [Terms of Reference for the Article 50 TEU negotiation](#), 19 June 2017.

³² Politico, [UK seeks ‘continuous’ talks to propel Brexit resolution](#), 4 September

³³ Politico, 30 August 2017, updated 4 September 2017, [UK Brexit charm offensive falls flat](#).

from the future partnership that we want. We can only resolve some of these issues with an eye on how the new partnership will work in the future. For example, on Northern Ireland it would be helpful to our shared objectives on avoiding a hard border to be able to begin discussions on how future customs arrangements will work. Furthermore, if we agree the comprehensive free trade agreement we are seeking as part of our future partnership, solutions in Northern Ireland are, of course, easier to deliver.

A second example is on financial matters. As I have said, the days of making vast yearly contributions to the EU budget will end when we leave. But there may be programmes that the UK wants to consider participating in as part of the new partnership that we seek. Naturally, we need to work out which of those we want to pursue; we need to discuss them as part of our talks on withdrawal from the EU and our future as its long-standing friend and closest neighbour.

A third example is on wider separation issues. While we are happy to negotiate and make progress on the separation issues, it is our long-term aim that ultimately many of these arrangements will not be necessary. With the clock ticking—to quote Mr Barnier—it would not be in either of our interests to run aspects of the negotiations twice. Last week, we turned our consideration to the next round of talks, and my message to the Commission was: let us continue to work together constructively, but put people above process.

To that end, my team will publish further papers in the coming weeks, continuing to set out our ambition for these negotiations, and the new deep and special partnership the UK wants to build with the EU. Ultimately, businesses and citizens on both sides want us to move swiftly on to discussing our future partnership, and we want that to happen after the European Council in October if possible.

3.4 Is “sufficient progress” being made to move on?

Reports on the August talks were doubtful that sufficient progress will have been made by October to move on to phase two. What assurances does Michel Barnier need in order to allow talks on the UK’s future relations to begin, as envisaged in the European Council [Guidelines](#) of 29 April 2017?

After round two Michel Barnier [considered](#) that the UK needed to clarify its position on the financial settlement before the EU can make the sufficient progress judgment. Reports suggested he did not think enough progress would be made by October.³⁴ The UK, however, was “confident we will have made sufficient progress by October to advance the talks to the next phase”.³⁵

Mr Barnier did not think the Government’s August position papers removed ambiguity,³⁶ and he was concerned from the start of the third

³⁴ See for example ‘[EU “set to suspend Brexit trade talks” over lack of progress on divorce bill and citizens’ rights](#)’, Independent, 27 July 2017.

³⁵ DExEU spokeswoman, quoted in ‘[Early talks on post-Brexit trade deal “increasingly unlikely”](#)’, Guardian, 27 July 2017.

³⁶ Commission president Jean-Claude Juncker said on 29 August that none of the 11 UK position papers were “actually satisfactory”: EUObserver, [Round of Brexit talks to](#)

round that the UK team was not negotiating “seriously” enough on all Brexit issues to make progress and move on to phase two. He said in his [closing speech](#):

At the current speed, we are far from being able to recommend to the European Council that there has been sufficient progress in order to start discussions on the future relationship, while we are finalising the withdrawal agreement throughout 2018.³⁷

Conceding that progress at each round would not be incremental, David Davis thought they had “succeeded in building mutual understanding”, but that “it’s also clear there are significant differences to be bridged”.³⁸ He remains convinced that it is not possible to disengage aspects of withdrawal, such as trade and customs, from future relations, but Michel Barnier is sticking to his mandate of a phased, conditional approach.

The [European Parliament](#) Brexit Steering Group signalled on 25 July that it would also make a judgment on sufficient progress, although it has no formal role in that decision:

The European Parliament cannot be clear enough that sufficient progress means progress across the board, and not just in one or two areas. The European Parliament will formally and in due time indicate when the point of ‘sufficient progress’ has been reached.

On 30 August the European Parliament Brexit coordinator, Guy Verhofstadt, told the EP’s Employment Committee that progress at the August talks had been slow “and that it may be difficult to make sufficient progress on issues such as citizens’ rights by October”.³⁹

At each meeting of the EP’s Committee on Constitutional Affairs (AFCO) there is an exchange of views on Brexit with Guy Verhofstadt.⁴⁰ The most recent of these took place on 4 September. According to [Politico](#) (5 September), the EP will shortly publish a report on progress in the negotiations, in which it has identified “more than one-quarter of the 69 identified rights issues” where citizens’ rights are likely to be at risk.

The EU intends to stick firmly to the phased approach set out in the European Council Guidelines and the Commission Negotiating Directives, to which the UK tacitly agreed. David Davis conceded that

[end in bad blood](#), 31 August 2017, while David Davis [said](#) in his closing speech they represented “the hard work and detailed thinking that has been going on behind the scenes across Whitehall over the past twelve months. They offer pragmatic and innovative solutions to issues related to our withdrawal and the future deep and special partnership that we want with the European Union”.

³⁷ [Speech](#), Michel Barnier following third round of Brexit negotiations, 31 August 2017.

³⁸ Politico, 31 August 2017, [Michel Barnier: ‘No decisive progress’ on key Brexit issues](#).

³⁹ See [The Parliament Magazine](#), 31 August 2017.

⁴⁰ Links to AFCO meetings where Brexit was discussed are at <http://www.europarl.europa.eu/committees/en/afco/subject-files.html?id=20170131CDT01101>.

the mandate structure made it “difficult for Mr Barnier and his team to be as flexible as they might want to be”.⁴¹

3.5 European Council meeting, 19-20 October

The European Council’s October meeting will be the first opportunity for the EU27 to consider formally whether “sufficient progress” has been made in the first phase of negotiations. If the answer is yes, discussions could move onto the second phase, which will include free trade, customs, justice and home affairs issues, and transition arrangements.

If the October European Council deems that sufficient progress to move on has not been made, a decision is likely to have to wait until the next scheduled meeting of the European Council on 14-15 December.

⁴¹ [HC Deb 5 September 2017, c 57.](#)

4. Keeping Parliament informed

Parliament was not sitting during the third round of talks and the Commons select committees were not formed, although the Lords European Union Committee was already [taking evidence](#) on the Brexit negotiations on 11 July.

On 11 July David Davis [told](#) the Lords EU Committee that in general, his “aim is to report back to Parliament as soon as possible. I will report back in the Commons—and I imagine Lady Anelay will in the Lords—on the progress, or non-progress if that is what it is, immediately after each stage of negotiation, where it is possible. Recess does not necessarily allow that”.⁴²

On 9 August David Davis [wrote](#) to Lord Jay of Ewelme, Chair of the Lords EU Committee, to update the Committee on the July negotiations – which he described as “difficult, but ultimately productive, discussions” – and to volunteer to appear before the Committee in October after the fourth and fifth negotiating rounds.

In his [reply](#) on 10 August Lord Jay reminded Mr Davis that he had promised the UK Parliament would be kept at least as well informed as the European Parliament is by the EU Commission, so an appearance in October would fall short of that pledge:

We note, however, that if you do not appear until October, three months—almost a fifth of the likely total duration of the negotiations—will have passed since your appearance in July. This would not, given the pace of the developments described in your letter, as well as the reported imminent publication of new UK position papers, be sufficient. You will recall that Michel Barnier has committed to reporting to the European Parliament’s Brexit Steering Group both before and after every round of negotiations. If we are to have access to information equivalent to that afforded to the European Parliament, we would expect to hold a session with ministers or officials in each of the four-week negotiating cycles.

The Committee therefore, in line with the Government’s responsibilities to Parliament that are outlined in your letter, expects to receive an oral update on the negotiations when the House returns in September. We accordingly repeat our request that you, or a senior colleague, should meet the Committee in the week beginning 11 September, as well as in October and subsequently.

David Davis [replied](#) on 29 August, drawing attention to the “distinct constitutional relationship” the EP has with the Commission. He continued:

The informal Brexit Steering Group [...] conducts meetings with Mr Barnier in private with no publicly available record of what was said. It is therefore not appropriate to compare such meetings with select committee public evidence sessions which take place in the UK Parliament.

⁴² See Lords Library briefing, [Leaving the European Union: Reporting to Parliament on the Progress of Negotiations](#), Queen’s Speech Debate on 7 September 2017.

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He also pointed out that Michel Barnier had only delivered two speeches to the EP, compared with his seven oral statements to the Commons and associated parliamentary questions and interventions, “something which is not customary in the European Parliament”.

On 5 September David Davis made a [statement](#) to Parliament on progress in the negotiations. Aspects of his statement and the ensuing debate are included elsewhere in this paper.

On 7 September 2017, the House of Lords will debate a question tabled by Lord Dykes (Crossbench) on the Government’s plans to report regularly to Parliament on the Brexit negotiations.

5. Government papers

In the week before the third round of talks the Government [published](#) three position papers, four future partnership papers and four technical notes (including one joint EU-UK note).

5.1 Position papers

Continuity in the availability of goods

The Government published a position paper on 21 August on the [Continuity in the availability of goods for the EU and UK](#). In July 2017, the European Commission had published a paper on [Goods placed on the Market under union law before the withdrawal date](#). The *Financial Times* reported that no progress was made on the issue of goods in mid-production at the point of Brexit.⁴³

The UK paper proposed the following four principles:

- First, to ensure the continued availability of products on EU and UK markets at the date of withdrawal, goods placed on the Single Market before exit should continue to circulate freely in the UK and the EU, without additional requirements or restrictions.
- Second, to avoid unnecessary duplication of activities and provide legal certainty, where businesses have undertaken compliance activities prior to exit, they should not be required to duplicate these activities in order to place goods on the UK and the EU market after exit. This includes recognising the validity of type approvals, certificates and registrations issued prior to exit.
- Third, to ensure that goods in circulation continue to comply with product legislation, and market surveillance authorities can ensure the necessary action is taken with respect to non-compliant products, the agreement should facilitate the continued oversight of goods.
- Fourth, where goods are supplied with services, there should be no restriction to the provision of these services that could undermine the agreement on goods.⁴⁴

According to the *Financial Times* there are differences between the UK and EU positions.⁴⁵

In his [statement](#) to Parliament on 5 September (c 44), David Davis said “both parties reiterated the importance of providing legal certainty for businesses and consumers across the EU and the UK at the point of departure. In that area, in particular, we emphasised that the broader principles outlined in the UK’s position paper seek to minimise the type

⁴³ [Minimal talks progress as Brexit sides play cards close](#), *Financial Times*, 30 August 2017.

⁴⁴ HM Government, [Continuity in the availability of goods for the EU and UK](#), August 2017, p3.

⁴⁵ [UK positions itself for next round of Brexit talks](#), *Financial Times*, 28 August 2017.

of uncertainty and disruption for business that we are all working to avoid”.

Confidentiality and access to documents

This position paper published on 21 August is about information obtained by the UK and the EU while the UK is a Member State.

The UK paper proposes that information that is confidential before Brexit should remain so after Brexit, e.g. to cover sensitive economic data shared during EU trade discussions. The EU’s paper in June (on issues relating to the functioning of the Union Institutions, Agencies and Bodies) had outlined similar proposals: that any EU classified information received before the withdrawal date should have the same level of protection guaranteed.

Although this is unlikely to be controversial, Open Britain believes “this is an attempt by the Government to evade scrutiny and escape historical judgment on the flaws in their approach to Britain’s exit from the EU”.⁴⁶ *The Guardian* thought (21 August) the UK’s response to the earlier Commission proposal “underlines the increasing distrust between London and Brussels”.

UK paper - General principles

1. Respecting obligations of confidentiality and protecting sensitive information is important.
2. Arrangements on confidentiality and the handling of such information should be reciprocal and with equivalent level of protection to UK and EU after Brexit.
3. These protections should be equivalent to those set out in the existing regimes.

Confidentiality

4. Current obligation on members and officials of EU institutions under Article 339 TFEU and Treaty Protocol 4 Article 37 not to disclose certain information obtained in the course of their duties should continue.
5. Withdrawal Agreement should enable an equivalent level of protection to be maintained on reciprocal basis regarding information obtained before Brexit.
6. Individuals bound by Article 339 before Brexit should continue to respect their obligations under the Treaty and information about UK individuals and interests should continue to receive the same protection.

Access to documents

7. UK documents held by EU institutions, offices, agencies and bodies are subject to disclosure and protection regimes set out in Regulation (EC) 1049/2001 and related EU law. Documents held by UK but originating from EU are governed by disclosure regimes in UK law, subject to specific EU obligations. UK and EU should have equivalent

⁴⁶ Open Britain, [Bryant – Ministers trying to dodge scrutiny by covering up Brexit documents](#), 27 August 2017.

protections and obligations after withdrawal to those in EU law before Brexit.

Classification of documents

8. EU classified information is currently governed by Council Agreement of 4 May 2011 between EU Member States. The information covered by this agreement and in the possession of either party before Brexit should continue to have an equivalent level of protection after Brexit.

Withdrawal/implementation measures

9. This approach should apply as far as possible to documentation or information which may need to be created, exchanged or obtained by UK or EU after Brexit with regard to the Withdrawal Agreement.

Ireland and Northern Ireland

The UK paper sets out proposals dealing with four main areas:

- Upholding the Belfast ('Good Friday') Agreement (GFA):
 - There is no change in the right of those born in Northern Ireland to identify as British or Irish or both, and to hold citizenship of one or both.
 - The EU, the Irish Government and the NI Executive should continue to fund the PEACE IV programme, and the programme could potentially be extended beyond the current 2014-2020 framework.
- Maintaining the Common Travel Area (CTA) and associated reciprocal rights:
 - The Withdrawal Agreement should recognise the status of the CTA. The UK is content to include an assurance that this would not compromise Irish obligations, including free movement for EEA nationals in Ireland.
- Preserving North-South/East-West cooperation:
 - The UK and the EU should focus initially on reaching agreement on the principles of North-South and East-West cooperation, and the energy market requires specific early consideration.
- Avoiding a hard border for the movement of goods;
 - Negotiations should, at the earliest opportunity, focus on issues critical to the border, i.e. customs arrangements and processes such as sanitary and phytosanitary measures (to protect animals and plants from pests, contaminants and diseases). The dialogue should also consider and scope other barriers, e.g. product standards and intellectual property rights.
 - The potential models for the land border should be developed on the basis of nine key principles :
 - a. Recognise the crucial importance of avoiding a return to a hard border for the peace process in Northern Ireland. This must mean aiming to avoid any physical border

infrastructure in either the UK or Ireland for any purpose (including customs or agri-food checks).

b. Respect the provisions of the Belfast ('Good Friday') Agreement in all its parts, with particular reference to: the three-stranded constitutional framework set out in the Agreement; the need to respect and treat equally the identity, ethos and aspirations of both communities; and the importance of promoting sustained economic growth in Northern Ireland.

c. Recognise the unique nature of the land border, in particular: its history and geography, the cross-border movements of smaller traders, farmers and individuals, the need to protect everyday movement of goods, and the integrated nature of the agri-food industry.

d. Prevent the creation of new barriers to doing business within the UK, including between Northern Ireland and Great Britain.

e. Address other regulatory and customs-related barriers necessary to deliver as frictionless a land border as possible, including waivers from security and safety declarations, and ensuring there is no requirement for product standards checks or intellectual property rights checks at the border.

f. Address the transit of goods to and from Ireland to the rest of the EU via the UK – in line with the European Commission's directives – through UK membership of the Common Transit Convention.

g. Consider how best to protect the integrity of both the EU Customs Union, Single Market and trade policy, and the new independent UK customs regime, internal market and trade policy, in the context of finding flexible and imaginative solutions, while recognising that the solution will need to go beyond any previous precedents.

h. Take account of the importance of trade between Ireland and the UK and aim to avoid economic harm to Ireland as an EU Member State.

i. Agree at an early stage a time-limited interim period, linked to the speed at which the implementation of new arrangements could take place that allows for a smooth and orderly transition.⁴⁷

The Government argues in the paper that the Irish border illustrates the links between withdrawal issues being discussed in the first phase of the negotiations and discussions on future relations, as they rely to a great extent on the future customs arrangement between the UK and the EU.⁴⁸ It suggests therefore that in order for progress to be made, the EU and UK must quickly move to this second phase.

The proposals for avoiding a hard land border in this paper are grounded in part by those set out by the Government [position paper](#) on

⁴⁷ [Northern Ireland and Ireland: Position Paper](#), August 2017, para 45.

⁴⁸ [UK positions itself for next round of Brexit talks, Financial Times](#), 28 August 2017.

future customs arrangements between the UK and EU.⁴⁹ These proposals put forward two options. The first would be “a highly streamlined customs arrangement” based in part on technological solutions. The Government recognises, however, that further measures, specific to the Irish border, would be needed. One approach suggested was an exemption for small businesses.⁵⁰

For those not eligible for this exemption, the Government suggested mutual recognition of Authorised Economic Operators and “trusted trader” schemes which would allow simplified customs procedures.

According to a report in *The Guardian*:

EU officials dismissed this [trusted trader status] as a non-starter, saying such a concept was predicated on the EU suspending the application of its own laws, which it did not consider “a sound basis” for progress on the border issue.⁵¹

The Government’s paper also highlighted the issue of sanitary and phytosanitary (SPS) checks. These are checks to ensure food safety and animal and plant health which are particularly important in the context of the Irish border, given the volume of agri-food trade. The Government said one option would be “regulatory equivalence” where the UK and EU agree the same high standards but where there is flexibility in how to achieve this. In the Government’s view, this could eliminate the need for SPS checks at the border.⁵²

The European Commission appears to have dismissed such a solution. According to the *Irish Times* a ‘Commission source’ told the paper “crucial to the EU’s animal control regime were not only regulations [...] but the institutions and mechanisms to enforce them which the UK is unwilling to remain part of”.⁵³ The *Financial Times* also suggested that this model of “regulatory equivalence would prevent the UK from loosening regulation, and this could potentially hinder trade deals with countries like the US which might want, for example, to make hormone-treated beef or chlorinated chicken available in British supermarkets and which are banned under current EU regulations”.⁵⁴

The Commission has not yet produced its own position paper on the Irish border issue.

5.2 Future partnership papers

The exchange and protection of personal data

The UK [paper](#) recognises:

⁴⁹ [Future customs arrangements, A future partnership paper](#), August 2017

⁵⁰ [Northern Ireland and Ireland: Position Paper](#), August 2017, para 48.

⁵¹ [UK’s approach to Brexit is ‘nostalgic and unrealistic’, says EU negotiator](#), Guardian, 31 August 2017.

⁵² [Northern Ireland and Ireland: Position Paper](#), August 2017, para 57.

⁵³ [Major breakthrough in Irish strand of Brexit talks](#), Irish Times, 1 September 2017.

⁵⁴ [‘UK position paper on Irish border ‘throws up even more questions’](#), Financial Times, 16 August 2017.

- That being able to move data is important for the economies of the UK and the EU, and for cooperating in the fight against serious crime and terrorism.
- That a balance needs to be struck between having effective data protection when personal data is stored and moved, particularly when this data is transferred to another country.
- That at the point of Brexit, the UK's data protection regime will be in step with that in the EU, as the UK has signed up to recent changes both on the general use of personal data—the General Data Protection Regulation (GDPR)—and on law enforcement—the Data Protection Directive (DPD).
- That once the UK is outside the EU, UK businesses that wish to operate in the EEA “may still be required to meet GDPR standards” for personal data.

The preferred method for businesses and public authorities in countries outside the EU to continue to transfer data to and from countries in the EEA is by securing an adequacy decision from the EU Commission. This means they can continue to transfer data from the EEA to a third country without having to satisfy themselves that adequate safeguards are in place for each transfer. The EU Commission can make an adequacy decision after an assessment of:

whether the nature of that country's data protection rules and the means for ensuring their effective supervision and enforcement, are sufficient to provide an adequate level of protection. [Para.34]

The UK paper briefly sets out how the EU Commission makes an adequacy decision in order to ascertain whether the data protection standards in the third country are “essentially equivalent” to those applied in the EU (a test set by the CJEU in [Schrems](#)). Securing an adequacy decision involves a legal process which does not have a set timeframe. (The Commission recently announced plans to conclude its adequacy decision with Japan by early 2018).

The paper gives examples of various ways in which data protection operates internationally and how data can flow freely between EEA and non-EEA countries. It points out there are alternatives to an adequacy decision - the UK currently transfers data to non-EEA countries without an adequacy decision - but acknowledges that for the UK outside the EU to extend these provisions to cover transfers with the EU would be burdensome and “represent a missed opportunity”. [TechUk](#), the industry body for the technology sector, have said alternatives to an adequacy decision [involve costly administrative processes or creating new data centres within an EU country](#).

UK-EU model for exchanging and protecting personal data

The UK proposes that, as part of its “deep and special partnership” with the EU, it would continue to exchange and protect personal data broadly along the lines of the current relationship, so:

- maintaining the free flow of personal data between the UK and the EU, while protecting the privacy of individuals;

- providing confidence to businesses, public authorities and individuals that data will still be able to flow, while not imposing unnecessary additional costs to business;

It also suggests that the EU and UK will be able to take part in “ongoing regulatory cooperation” on current and future data protection issues, while at the same time respecting UK sovereignty and allowing the UK “to maintain and develop its position as a leader in data protection”.

The Government’s proposed model “could build on the existing adequacy model” in two key respects:

- **Regulatory cooperation** between the EU and the UK would continue, including an ongoing role for the UK’s [Information Commissioner’s Office \(ICO\)](#) in EU regulatory fora, with the UK Government retaining “responsibility for the content and direction of data protection policy and legislation within the UK”.
- **Certainty and stability** for business. The paper proposes three things to avoid regulatory uncertainty around data flows on the point of exit:
 - The EU and UK “agree early” to “mutually recognise each other’s data protection frameworks”, so removing doubts around data flows when the UK leaves the EU
 - A transition period, or seeking certainty “around how we can extend current provisions, alongside an agreed negotiating timeline for longer-term arrangements”
 - The UK will liaise with third countries which currently have an adequacy decision with the EU, to “make sure that flows of data between the UK and third countries with existing EU adequacy decisions can continue”.

The paper lists the third countries with adequacy decisions (para 37). These include Canada (for commercial organisations subject to the PIPED Act, Guernsey, the Isle of Man, Jersey, New Zealand, Switzerland, and the US (for certified companies). The paper describes the Canada and the EU-US Privacy Shield as partial adequacy decisions.

Data protection, surveillance and law enforcement

The Government had mentioned the current security relationship with Europe in its White Paper and in the Prime Minister’s Lancaster House speech. The UK wants to continue to share intelligence material with allies in the EU, and remain part of structures such as Europol, Prüm, and Passenger Name Record Data systems.

The UK position paper mentions the value of data sharing for the fight against serious crime and terrorism, but does not provide much more detail beyond that the EU and UK cooperate already, and that sharing of personal data is crucial to protect citizens across the EU. It refers to the need for an “appropriate balance must be maintained between individuals’ right to privacy and control over their own data, [...] and the

ability of law enforcement bodies to protect citizens from crime and terrorism.”

The paper also says that the future EU-UK data sharing partnership must be one that “respects UK sovereignty, including the UK’s ability to protect the security of its citizens”

It does not explain beyond that the implications of the proposed model for continued data sharing and law enforcement measures, if such continued data sharing is conditional on securing a data adequacy decision. The debate about balancing privacy/data protection and security is current, and continuing UK alignment with EU data protection laws could come into tension with the Government’s approach to the mass retention of data for security purposes. Finding a balance between privacy and sharing data, and cooperating internationally, is important to counter the ongoing terror threat in Europe.

Enforcement and dispute resolution

The Government published a [future partnership paper on enforcement and dispute resolution](#) on 23 August 2017.

Both sides in the negotiations recognise that mechanisms for enforcing the withdrawal agreement and resolving disputes arising from it will be central to the whole agreement, and to any transitional period. These mechanisms could be one of the major areas of dispute.

A role for the CJEU?

The main question is whether the CJEU will have any continuing role, for enforcement of the agreement, interpreting its provisions or having its rulings taken into account.

The [EU position](#) sees CJEU jurisdiction as the only way of ensuring full and consistent application of things like [citizens’ rights](#), and it is likely to insist on some kind of role for the CJEU where the agreement or any transitional arrangements replicate EU law. The EU is [constitutionally limited](#) because the CJEU asserts exclusive jurisdiction to give binding interpretations of EU law with effect for the EU legal order.

On the other hand, in the UK’s ‘future partnership’ paper, [Enforcement and dispute resolution](#), 23 August 2017, the Government demands an end to the ‘direct jurisdiction’ of the CJEU for enforcement or dispute resolution, insisting that there are no precedents for this in relation to agreements with non-EU Member States. It has set out various alternative models, without saying which it prefers.

Different mechanisms for different issues

Different mechanisms are likely to be appropriate for different issues. While most individual complaints would probably continue to be dealt with by national courts, the withdrawal agreement might for example stipulate one or more of the following:

- An arbitration arrangement for state-level disputes between the UK and the EU

- A Joint Committee to track and/or resolve divergence between UK and EU law
- A special international court – similar to the [EFTA court](#) – dealing with requests from UK courts
- A specialised domestic tribunal dealing with such cases

The withdrawal agreement might also set out some kind of role for the CJEU and its case law, for instance:

- A system of references from UK courts or any new mechanisms to the CJEU, for binding interpretation of any EU law provisions in the agreement
- A requirement to take into account CJEU case law for any transitional arrangements that provide for the continued application of EU law
- A requirement to take into account CJEU case law for areas where the UK wants to retain regulatory equivalence (eg [data protection](#))
- Rules for [disputes pending](#) before the CJEU on exit day, and for EU law disputes where the facts arose before exit day

Providing a cross-border civil judicial cooperation framework

Current position

In respect of civil, commercial and family cases raising cross-border issues, a series of EU and international instruments set out rules governing:

- which country's law applies;
- which country's courts have jurisdiction;
- the recognition and enforcement in one country of a judgment obtained in another country;
- the approach to managing insolvency.

Post-Brexit

The Government has stated that, post-Brexit, the UK will no longer be part of the civil judicial cooperation system that exists between EU Member States. The Government recognises the need to negotiate and agree a new framework.⁵⁵

On 13 July 2017, the EU published a position paper, [Judicial Cooperation in Civil and Commercial matters](#).⁵⁶ The Government's policy paper, [Providing a cross-border civil judicial cooperation framework - a future partnership paper](#), published on 22 August 2017, sets out the UK's position and responds to the EU's paper. It also details

⁵⁵ [Providing a cross-border civil judicial cooperation framework - a future partnership paper](#), 22 August 2017, paragraph 8.

⁵⁶ TF50 (2017) 9/2.

the existing EU instruments and international agreements and what they cover.

The UK's position

Cross border interactions between the UK and EU countries

The Government acknowledges the importance, for UK and EU consumers, citizens, families and businesses, of having coherent common rules to govern interactions between legal systems. The Government considers that the current framework provides predictability and certainty:

It plays an important role in enabling businesses to trade with confidence across borders, providing legal certainty in cross-border transactions and avoiding delays and excessive costs where individual and family rights need to be protected in cross-border situations.⁵⁷

The UK is seeking a similar arrangement for the future:

The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework.⁵⁸

The Government considers that, in cross border interactions, citizens and businesses need to have continuing confidence about which country's courts would deal with any dispute, which laws would apply, and to know that judgments and orders obtained would be recognised and enforced, as is the case now.⁵⁹

The Government also speaks of a framework which would "mirror closely the current EU system and would provide a clear basis to support cross-border activities, after the UK's withdrawal".⁶⁰

From the list of current EU instruments, the UK intends to incorporate into domestic law the Rome I and II instruments on choice of law and applicable law in contractual and non-contractual matters.⁶¹ These regulations do not require reciprocity.⁶²

The Government notes that Scotland and Northern Ireland have their own separate judicial systems and states that it will continue to work with the Devolved Administrations and stakeholders in Scotland and Northern Ireland to ensure that a future civil judicial cooperation agreement benefits all parts of the UK.⁶³

⁵⁷ Paragraph 7

⁵⁸ [Providing a cross-border civil judicial cooperation framework - a future partnership paper](#), 22 August 2017, paragraph 19.

⁵⁹ Ibid, paragraph 3

⁶⁰ Ibid, paragraph 25

⁶¹ Ibid, paragraph 19

⁶² House of Lords European Union Committee, [Brexit: justice for families, individuals and businesses?](#), 20 March 2017, HL Paper 134 2016-17, paragraph 125, Box 16.

⁶³ [Providing a cross-border civil judicial cooperation framework - a future partnership paper](#), 22 August 2017, paragraph 16.

The Government considers that both the UK and the EU would benefit from an interim period that allows for a smooth transition to a new relationship in civil judicial cooperation.⁶⁴

The UK has reiterated that when it leaves the EU, the CJEU will no longer have direct jurisdiction in the UK, because the CJEU derives its jurisdiction and authority from the EU Treaties. However, it states that “where appropriate, the UK and the EU will need to ensure future civil judicial cooperation takes into account regional legal arrangements, including the fact that the CJEU will remain the ultimate arbiter of EU law within the EU”.⁶⁵

The UK’s policy paper does not provide further detail as to how a new framework might be structured.

Arrangements with countries outside the EU

The UK intends to continue to participate in the Hague Conference on Private International Law and the United Nations Commission on International Trade Law (UNCITRAL). The UK also intends to participate in those Hague Conventions to which it is already a party and those in which it currently participates as an EU Member State.

The Government will also seek to continue to participate in the 2007 Lugano Convention, which, by virtue of membership of the EU, forms the basis for the UK’s civil cooperation with Norway, Iceland and Switzerland.⁶⁶

The EU’s position paper

EU principles

The [EU’s position paper](#) sets out the main principles that the Commission considers should apply on the withdrawal date to the winding down of the existing relationship between the EU and the UK.

The EU proposes that:

- the Withdrawal Agreement should ensure that the relevant provisions of EU law on jurisdiction, recognition and enforcement applicable on the withdrawal date should continue to govern judicial proceedings and procedures in civil and commercial matters pending on the withdrawal date;
- the relevant provisions of EU law applicable on the withdrawal date should continue to apply to choices of forum and choices of law made prior the withdrawal date;
- judicial cooperation procedures that are ongoing on the withdrawal date should continue to be governed by the relevant provisions of EU law applicable on the withdrawal date.

The EU also lists the EU instruments it considers the Withdrawal Agreement should cover.

⁶⁴ Ibid, paragraph 23

⁶⁵ Ibid, paragraph 20

⁶⁶ Ibid, paragraphs 21-22

UK response

The Government's position is that it is in the interests of both the UK and the EU for cooperation in this field to continue. However, without prejudice to the negotiations on the future partnership between the UK and the EU, Annex A to its position paper sets out the UK's view of the principles that should govern the winding down of the existing relationship in the event that no agreement on a future relationship can be reached.

The UK's position, in that event, appears to be largely in agreement with the EU's position paper. It states that:

- existing EU rules governing the **applicable law** for contractual and non-contractual obligations should continue to apply to contracts concluded before the withdrawal date, and in respect of non-contractual liability, to events giving rise to damage which occur before withdrawal date;
- existing EU rules governing **jurisdiction** to determine disputes should continue to apply to all legal proceedings instituted before withdrawal date;
- where a **choice of court** has been made prior to withdrawal date, existing EU rules should continue to apply to establishment of jurisdiction, and recognition and enforcement of any resulting judicial decision, where a dispute arises to which such a choice applies, whether before or after withdrawal date;
- existing EU rules governing **recognition and enforcement of judicial decisions** should continue to apply to judicial decisions given before the withdrawal date, and to judicial decisions given after the withdrawal date in proceedings which were instituted before that date;
- **judicial cooperation procedures and requests for information** within the European Judicial Network in civil and commercial matters which are pending on the date of withdrawal should continue to be governed by existing EU rules. The UK agrees that there is a need to identify the appropriate procedural stage that has to have been reached for the procedure to continue in accordance with those rules.⁶⁷

⁶⁷ Ibid, pp 9-10

Future customs arrangements

In August 2017, the Government published a position paper on future customs arrangements.⁶⁸ This said:

As we leave the European Union and therefore the EU Customs Union, the Government seeks a new customs arrangement that facilitates the freest and most frictionless trade possible in goods between the UK and the EU, and allows us to forge new trade relationships with our partners in Europe and around the world.⁶⁹

Transition period to avoid cliff edge

The paper proposed a transition period for the implementation of the new customs arrangements to avoid a “cliff edge”. It said:

The Government is keen to explore with the EU a model for an interim period which would ensure that businesses and people in the UK and the EU only have to adjust once to a new customs relationship. This could be delivered through a continued close association with the EU Customs Union for a time-limited period after the UK has left the EU. This could involve a new and time-limited customs union between the UK and the EU Customs Union, based on a shared external tariff and without customs processes and duties between the UK and the EU. The length of the interim period needs further consideration and will be linked to the speed at which the implementation of new arrangements could take place. We intend to discuss implementation timelines with business as part of our engagement with stakeholders.⁷⁰

The Government envisages being able to pursue new trade negotiations with other countries during this interim period but no new trade deals would be implemented during this period where they were inconsistent with the interim agreement.

Longer term arrangements

In the longer term, the Government proposed two options for future customs arrangements with the EU: “a highly streamlined customs arrangement” and a “new customs partnership”:

A highly streamlined customs arrangement between the UK and the EU, streamlining and simplifying requirements, leaving as few additional requirements on EU trade as possible. This would aim to: continue some of the existing arrangements between the UK and the EU; put in place new negotiated and potentially unilateral facilitations to reduce and remove barriers to trade; and implement technology-based solutions to make it easier to comply with customs procedures. This approach involves utilising the UK’s existing tried and trusted third country processes for UK-EU trade, building on EU and international precedents, and developing new innovative facilitations to deliver as frictionless a customs border as possible.

A new customs partnership with the EU, aligning our approach to the customs border in a way that removes the need for a UK-EU customs border. One potential approach would involve the UK mirroring the EU’s requirements for imports from the rest of the world where their final destination is the EU. This is

⁶⁸ [Future customs arrangements: A future partnership paper](#), August 2017.

⁶⁹ *Ibid*, para 1.

⁷⁰ *Ibid*, para 48.

of course unprecedented as an approach and could be challenging to implement and we will look to explore the principles of this with business and the EU.⁷¹

Views on the UK proposals

Michel Barnier had said in a speech in July:

I have heard some people in the UK argue that one can leave the single market and build a customs union to achieve "frictionless trade" – that is not possible.⁷²

Open Europe described the publication of the paper as a "welcome development" and said the proposals for the interim arrangements were "sensible". Some questions remained about the interim arrangements, however, such as whether the UK would make any payments to the EU and whether there would be any role for the European Court of Justice. With regard to the longer term arrangements, Open Europe favoured the streamlined customs arrangement:

Of the two long-term models under consideration, Open Europe believes the option for a UK-EU customs facilitation agreement is preferable. This best balances safeguarding barrier-free UK-EU trade with ensuring that the UK is best able to conduct a genuinely independent trade policy once it leaves the EU. It will also likely be easier to negotiate given it follows existing international models for bilateral cooperation in customs procedures.⁷³

Peter Holmes of Sussex University was sceptical about the extent to which technology could streamline customs procedures. He said the "first option of a 'streamlined' customs arrangement will likely still involve a lot of red tape and delays for businesses, which must prove they meet the EU's standards". The second option of the new customs partnership would require "complex tracking procedures", especially for components and would also need a supra-national body to monitor compliance.⁷⁴

Politico reported that EU diplomats said that the UK's proposals on customs and the Irish border sounded like "a fairy tale" and accused the UK of cherry-picking.⁷⁵

5.3 Technical Notes

Joint technical note on EU-UK positions on citizens' rights

See section 2.2 of this paper for information on this note.

⁷¹ HM Government, [Future customs arrangements: A future partnership paper](#), August 2017, para 4

⁷² [Speech](#) by Michel Barnier 6 July 2017

⁷³ Aarti Shankar, [The UK should opt for a customs facilitation agreement with the EU](#), Open Europe, 15 August 2017

⁷⁴ Peter Holmes, [The UK's plan for post-Brexit customs is more hopeful than realistic](#), The Conversation, 16 August 2017

⁷⁵ [Brussels scoffs at Britain's customs proposals ahead of Brexit talks](#), Politico, 23 August 2017

Euratom technical notes

Although there was an exchange of information on nuclear issues, and the Government had published two new papers,⁷⁶ the EU maintains that progress will only be possible once the Government has made proposals on safeguarding materials.

In the technical note on spent fuel and radioactive waste, the Government said it requires “reciprocal assurances” from Euratom Member States that the legal responsibility for EU27 spent fuel and radioactive waste held in the UK will be respected and “not eroded as a result of, or subsequently to, the UK’s withdrawal from Euratom”.⁷⁷

Furthermore, the Government has asked that the Withdrawal Agreement provide an “unequivocal statement” on the rights and obligations of the parties concerned, in case of future disputes over material to be returned to the country of origin. The Withdrawal Agreement should also include a mechanism for the resolution of such disputes, “in line with the wider approach to dispute resolution that is to be set out in the Withdrawal Agreement”.⁷⁸

The technical note on existing contracts for the supply of nuclear material concluded that “clarity is needed in relation to nuclear supply contracts that have been approved by the Euratom Supply Agency or European Commission”.

Privileges and immunities

In addition to position papers published by the EU and the UK in July,⁷⁹ on 28 August the UK Government published an additional [Technical Note: Functionality and Protocol 7](#) .

EU Position

The position paper covers three areas and refers to existing legislation to ensure that there is some continuation of protection for members, officials, other servants and also former members and servants of EU institutions, bodies and agencies after the UK's departure.

- **Privileges and immunities of Union institutions, agencies and bodies in the UK:** Residual activities in the UK should have “a level of protection equivalent to the currently applicable rules” to current and former groups as identified above. The section explicitly mentions the operations of the European Investment Bank.
- **Obligation of professional secrecy:** The paper refers to an obligation of professional secrecy and for “continued

⁷⁶ Department for Exiting the European Union, A [Technical note on existing contracts for the supply of nuclear material](#) and a [Technical note on spent fuel and radioactive waste](#) policy papers, 28 August 2017.

⁷⁷ [Technical note on spent fuel and radioactive waste](#), para 5

⁷⁸ Ibid, para 9

⁷⁹ UK: 'Privileges and Immunities', 13 July 2017; EU: 'Essential Principles on Issues relating to the Functioning of the Union, Institutions, Agencies and Bodies', 20 July 2017.

compliance with obligations incurred before the withdrawal date”.

- **Management of access to documents requests and of EU classified information:** These obligations include those relating to the appropriate treatment of confidential and classified documents by both sides.

UK Position

The position paper consists of three main sections which differ slightly from the views in the EU paper.

- **General principles on privileges and immunities:** The first point in this section mentions forming a “new, deep and special partnership with the EU”. The paper mentions the implementation of “legally acceptable framework of privileges and immunities”.
- **Privileges and immunities for the purposes of withdrawal:** The paper mentions granting privileges and immunities of international organisations on the grounds of “functional need”. The UK recognises that privileges and immunities may need to apply for a reasonable time to enable for the winding down of operations of an asset or agency. The paper continues to address appropriate transitional arrangements which should consist of a reciprocal arrangement.
- **Future arrangements:** This section mentions that the UK is “ready to agree a comprehensive set of privileges and immunities” and mentions the possibility of a continued EU presence in the UK. This section also refers to the UK's continued involvement in EU programmes, agencies or other activities. The paper ends by emphasising that the withdrawal and the UK's future relationship are “inextricably linked”.

Comparison of Position Papers

Essentially, the papers agree on the continuation of privileges and immunities for institutions, agencies and bodies with residual activities in the UK. The EIB is mentioned specifically by both papers. The papers broadly agree on the need for professional secrecy for any transitional arrangements.

The EU wants a general agreement to apply to all its institutions, agencies and bodies whereas the UK privileges and immunities to be granted on “functional need”.

The UK paper specifically addresses future arrangements and the continued involvement of the UK in EU programmes, agencies and other activities. The papers do not address the future of existing agencies within the UK.

6. EU and UK Brexit papers

Below are links to EU and Government policy and position papers published up to round three of the negotiations.

EU position paper	UK Government paper
Position paper transmitted to the EU27: essential principles on citizens' rights , 29 May 2017	Safeguarding the position of EU citizens in the UK and UK nationals in the EU , policy paper, 26 June 2017
Position paper transmitted to the UK: essential principles on citizens' rights , 12 June 2017	Technical note on implementing the withdrawal agreement , Policy paper, 13 July 2017
Position paper transmitted to the EU27: essential principles on the financial settlement , 29 May 2017	
Position paper transmitted to the UK: essential principles on the financial settlement , 12 June 2017	
Joint technical note on EU-UK positions on citizens' rights after second round of negotiations , 20 July 2017	Joint technical note on EU-UK positions on citizens' rights after second round of negotiations , 20 July 2017
Joint technical note on EU-UK positions on citizens' rights after third round of negotiations , 31 August 2017	Joint technical note on EU-UK positions on citizens' rights after third round of negotiations , 31 August 2017
Position paper transmitted to EU27 on Issues relating to the Functioning of the Union Institutions, Agencies and Bodies , 29 June 2017	Confidentiality and access to documents - position paper , policy paper, 21 August 2017
Position paper on Issues relating to the Functioning of the Union Institutions, Agencies and Bodies , 13 July 2017	
Position paper transmitted to EU27 on Ongoing Police and Judicial Cooperation in Criminal matters , 29 June 2017	
Position paper on Ongoing Police and Judicial Cooperation in Criminal matters , 13 July 2017	
Position paper transmitted to EU27 on Governance , 29 June 2017, and EU Position paper to UK on Governance , 13 July 2017	Enforcement and dispute resolution - a future partnership paper Policy paper, 23 August 2017
Position paper transmitted to EU27 on Judicial Cooperation in Civil and Commercial matters , 28 June 2017	Providing a cross-border civil judicial cooperation framework - a future partnership paper , Policy paper, 22 August 2017

EU position paper	UK Government paper
<p>EU Position paper on Judicial Cooperation in Civil and Commercial matters, 12 July 2017</p>	
<p>Position paper transmitted to EU27 on Ongoing Union Judicial and Administrative Procedures, 28 June 2017</p>	
<p>Position paper on Ongoing Union Judicial and Administrative Procedures, 13 July 2017</p>	
	<p>The exchange and protection of personal data - a future partnership paper, Policy paper, 24 August 2017</p>
<p>Position paper transmitted to EU27 on Goods placed on the Market under Union law before the withdrawal date, 29 June 2017</p>	<p>Continuity in the availability of goods for the EU and the UK - position paper, Policy paper, 21 August 2017</p>
<p>EU Position paper Goods placed on the Market under Union law before the withdrawal date, 12 July 2017</p>	
	<p>Northern Ireland and Ireland - position paper Policy paper, 16 August 2017</p>
	<p>Future customs arrangements - a future partnership paper, Policy paper, 15 August 2017</p>
<p>Position paper transmitted to EU27 on nuclear materials and safeguard equipment (Euratom), 23 June 2017</p>	<p>Nuclear materials and safeguards issues - position paper, policy paper, 13 July 2017;</p>
<p>Position paper on nuclear materials and safeguard equipment (Euratom), 13 July 2017</p>	<p>Technical note on existing contracts for the supply of nuclear material, policy 28 August 2017</p>
	<p>Technical note on spent fuel and radioactive waste, policy paper, 28 August 2017</p>
<p>Essential Principles on Issues relating to the Functioning of the Union, Institutions, Agencies and Bodies, 20 July 2017</p>	<p>Privileges and immunities - position paper, policy paper, 13 July 2017</p>
	<p>Technical note on functionality and Protocol Z, 28 August 2017</p>

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