

Shadow Boxing: A commentary on the Brexit negotiations so far

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Summary

The sequence of Brexit negotiation papers shows the emergence of a strategy of “snares and lures” on the part of the UK, together with a policy of delay and the lack of a money offer. Some see this as rectifying the gradual start for which the UK has been roundly criticised. Maybe so. In any event, it is certainly intended to overcome the EU’s restrictive timetabling. Such guile has borne scant fruit so far, save to take the two sides to deadlock - possibly its intention. This would be despite the widespread view that the timetable benefits the EU, with evidence accumulating that the UK has been choosing to temporise for at least a month. This could be the slow-burn equivalent of the “row of the summer” promised by David Davis; or to herald May’s Florence speech on 22 September; or to undermine Barnier’s report to his principals in October; or to await Merkel’s expected re-election; or (should this last fail to animate an outbreak of sweet reason) to foreshadow the announcement of a “Plan B” to grab the attention of the EU’s principals.

- The paper trail left by the two sides offers almost everything needed to understand the Brexit deadlock. Instead it has been neglected. The European press isn’t sufficiently interested to go beyond its official sources; while Britain’s discord has reduced once serious journalism to partisan hyperbole, with releases of negotiation paperwork shoehorned into incendiary headlines and the house line. Thus this note.
- The UK’s papers generally follow May’s Lancaster House speech in January and their accumulation goes far to rectify any early lack of preparedness.¹ Much appearing as current domestic controversy, eg, transitional arrangements, was prefigured in early remarks by both sides.
- Stickiness about the ECJ is less about a fusty concern for sovereignty and more about pragmatic economics. The UK’s dynamic service sector doesn’t trust the European court and can’t afford to place its future in hands it regards as unreliable.

1 Claims that the Government was slow to act also overlook the nine-month delay occasioned by home-grown legalities. On 3 July 2016, the London solicitors, [Mishcon de Reya](#), announced that they had been in contact with Government lawyers since 27 June, four days after the referendum; that they had retained barristers to take the matter to court on behalf of a syndicate of clients; and that they sought new participants. The case was settled six months later: on 24 January 2017, the Supreme Court held that the Government needed parliamentary authority before it could trigger Article 50. This took a further eight weeks: the European Union (Notification of Withdrawal) Bill obtained its first reading in the House of Commons on 26 January and royal assent on 16 March. HMG served Article 50 Notice thirteen days later.

- Some things are simply missing: the EU's sequencing excludes any but indirect references to future trade in goods and services. So far, the UK has said nothing about financial services and neither side has issued dedicated paperwork on transition. In addition, the EU is almost entirely silent on its "flanking policies", which include agriculture, fishing, environmental protections and company law.
- The EU's objectives show up as largely transparent: first, to preserve the integrity of its own institutions and budget; then order, aligned with a mercantilism that at this stage is generally defensive. The UK's objectives also appear as order, plus continuity aligned with mercantilism of a more aggressive character.
- The EU's tactics embrace legalities, its trademark sequencing, and deployment of the tame European media. Although Brussels apparently seized the agenda at the outset, in some senses Barnier was not the first to speak. Indeed, notwithstanding partisans' faith in the EU's superpowers, the paperwork shows that Brexit caught Brussels on the back foot.
- The UK has made hay of late, pointing out that the EU's legalisms are not invariably compelling. As might be expected, its own positions are more given to pragmatics. There is uncertain evidence of a change in approach after the June election: in any event since mid-July, papers show increasing guile, trying to make covert mileage on the agenda and to overcome the EU's sequencing, in particular with its six "Future Partnership Papers". Less than game-changers, they have left the other side frustrated and testy.

Introduction

Historians of the early stages of the Brexit talks will be unusually well-served. Both sides have aired their thinking publicly on the Internet, in what diplomats call "non-papers". These may be ignored in battle but may be useful in buying time or to mollify local interests. Unfortunately, the lay public may reasonably be disappointed with the seriousness of any attention to the paper-trail in our own time. With the exception of the odd summary analysis (see [here](#) for a good example from Hugh Bennet of Brexit Central), no-one has looked at the negotiation documents in the round, that is with respect to each other, as to their place in the diplomatic process, and as signals to domestic constituencies and third parties.

In the UK at least, the papers have been seen through lenses so partisan as to detract from their real meaning. The purpose of this note is to correct this, with a view to adding to our understanding of the part played in the Brexit negotiations of

- agreeing the stance internally and maintaining unity thereafter;
- putting pressure on and wrong-footing the other side; and
- throwing up makeweight issues to distract the other side or as eventual give-aways.

Note that we may not be able to enjoy these insights indefinitely. If the talks get over the hump of the next month or two, both sides could find it serves their purposes to abandon the unprecedented project of ventilating their positions in this way.

Throughout this note, documents are characterised by length, expressed as number of pages. This is always an imperfect gauge, worse still in this instance as both sides pad out their paperwork. All EU documents have a cover page, so its “Position paper” ponderously entitled “Essential principles on ongoing union judicial and administrative procedures” offers readers a total of two pages out of its nominal three. Some of the UK’s position papers have not just a cover sheet but also a blank inside front cover: its position paper on Privileges and Immunities has less than 1½ pages of text out of a nominal count of four pages. Why does this matter? First, it contributes to the shadow-boxing theme of this note’s title. Second, it impedes a measure of the negotiators’ priorities with a count of their text. Nonetheless, the appendices make an attempt to do so.

It is impossible to tell how the UK’s election affected the sequences we describe. From July onwards, the UK may be observed to develop a number of negotiating strands, reasonably to be seen as guileful. These include the six “Future partnership papers”, which seek to draw the EU team beyond their self-inflicted restrictions; a steadfast failure to offer any cash; and temporising paperwork bound to slow things down. It is beyond any outsider to know how this might have played out had the election gone otherwise.

1. PRE-NEGOTIATION MATERIAL

Early signals from the UK

The UK indicated its stance in four preliminary documents. On 17 January 2017, the Prime Minister’s Lancaster House speech was intended to reassure the EU, *inter alia* by stating her wish for successful negotiations, distancing the government from the zealotry of an orchestrated breakdown in relations. It set out five high-level themes, with the usual combination of high principle and political opportunism, expanded into twelve objectives².

Certainty and clarity This introduced what is formally the European Union (Withdrawal) Bill 2017-19, (known informally and subsequently throughout as the Great Repeal Bill), to bring the *aquis* under British law; and addressed a couple of concerns at that time in the air: continuity of farm and university payments and a Parliamentary vote on the outcome of negotiations.

2 These were

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|---|--|
| 1. Providing certainty and clarity. | 7. Protecting workers’ rights. |
| 2. Taking control of our own laws. | 8. Free trade with European markets. |
| 3. Strengthening the Union. | 9. Securing new trade agreements with other countries. |
| 4. Protecting our strong and historic ties with Ireland and maintaining the Common Travel Area. | 10. Ensuring the UK remains the best place for science and innovation. |
| 5. Controlling immigration. | 11. Cooperating in the fight against crime and terrorism. |
| 6. Securing rights for EU nationals in the UK, and UK nationals in the EU. | 12 Delivering a smooth, orderly exit from the EU. |

A stronger Britain This called for an end to ECJ jurisdiction, gave nods to the devolved regions of Great Britain and committed to the Common Travel Area with Ireland.

A fairer Britain This combined the principle of controlling immigration with an offer to guarantee the rights of EU citizens in the UK on the basis of reciprocity and some bromides on workers' rights.

A truly global Britain This set out the objectives of free trade with the EU while leaving the single market and preventing "huge" contributions to the EU budget; stated the intention of negotiating deals with third countries; waved to the Science lobby; and promised continued cooperation on crime and terrorism.

A phased approach This called for a "smooth orderly Brexit", without "some form of unlimited transitional status".

Two days later on 19 January 2007, the Chancellor's Davos speech to the CBI took a more robust stance with its comments that

...we will have to do whatever is necessary to ensure the continued competitiveness of our economy in those circumstances.

This was taken as threatening the EU with tax and regulatory competition.

The White Paper on withdrawal was published on 2 February. It restated the twelve Lancaster House objectives. It then expanded on specific topics including dispute resolution (including an appendix of examples); the longstanding character of all-Ireland co-operation (also including an appendix of details); the exposure of European fishing fleets to UK waters; the salience of UK financial services; UK defence commitments; and an interim "implementation" stage, which would not, however, be "transitional".

The White Paper also introduced outright argumentative material, in particular a dozen polemical charts. Some of these were intended to dispel domestic criticism, with comparisons of annual and maternity leave in the UK and EU, as well as the contribution of trade to UK GDP. Some were intended to tee up support among the EU's member states, including the UK's trade balance with individual EU countries and the share of UK value in EU exports. Some were intended to show general fixity of purpose, comparing the number of EU citizens in the UK with the number of UK citizens in EU countries, and highlighting the UK's exports beyond the EU and its fastest growing overseas markets.

The White Paper on domestic legislation, published on 30 March, was notable as introducing the UK's signature objective, a "deep and special partnership with the European Union". It then set out the principles of the forthcoming Great Repeal Bill, to bring legacy European regulation under the control of Parliament. These papers set a course which the UK has followed more-or-less consistently since.

Responses from the EU

Formally the EU followed its own timetable: on 29 April the European Council issued its Guidelines. These included the customary promises that the UK would be "a close partner in the future", but promptly invoked a "level playing field" (*contra* Hammond's hint of tax and regulatory competition) and rejected "cherry picking" or a "sector by sector" approach. The

guidelines went on to state that the negotiations would be conducted openly and that the EU would hold firm to its positions.

This was the document which first drew a distinction between settling the past (including the rights of citizens and financial contributions) before moving on to the future (including trade). The guidelines asserted that the UK would remain subject to its obligations to co-operate on EU business up to the date of withdrawal, but nodded to the complications arising. The paper contemplated transitional arrangements; its references to the ECJ did not go so far as to assert that it would claim jurisdiction over the UK after withdrawal.

The European Council's guidelines betray its chagrin at the position in which it found itself. They note that "European integration has brought peace and prosperity to Europe and allowed for an unprecedented level and scope of cooperation"; and that the "United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption..."³ The paper signalled an essentially reactive stance, to ensure that European public and private bodies "take all necessary steps to prepare for the consequences of the United Kingdom's withdrawal".

The Guidelines introduced complications which continue to bedevil the negotiations. The natural bargain between the two sides is money from the UK for access to the EU market. In the nature of things, the UK would want to make the one conditional on the other. The sequencing has the effect of precluding explicit conditionality, though this seemed to be reintroduced by invoking the EU's customary principle that "nothing is agreed until everything is agreed".

On an informal basis, moreover, EU officials responded to the UK's position with episodic unscripted remarks and leaks to tractable journalists. This was augmented by comments from British politicians and media inclining to the Leave camp. The general tenor was that the UK's stance was incoherent and unrealistic (throwing back Boris Johnson's facetious "have our cake and eat it"). At the same time the EU itself was further preparing its own stance, in rounds of internal documents and occasional public debate.

The Brits like to have it that the EU's extensive paperwork falls out of the difficulty of herding the cats which make up its members. In fact, the UK shows up in a similar light, using the conventional paraphernalia of speeches and white papers to cultivate domestic constituencies. In addition, appendices 1 and 2 show scant evidence that the sequence of publications or the comparative volume of paperwork justify criticising the UK as unengaged. Such complaints could well have something to do with negotiating tactics. This becomes clearer when we look at the papers issued for the negotiation process itself.

3 Is it hard not to be tickled by the traces of the back-and-forth of the drafting meeting in the immediately following passage.

"...in particular in the United Kingdom but also, to a lesser extent, in other Member States."

Negotiation paperwork

On 22 May, the General Secretariat of the EU published its 18-page *Directives for negotiation*. This spoke of an “orderly withdrawal” and invoked the European Council’s guidelines. The directives were explicitly restricted to the first part of the processes defined by the European Council: that is “disentanglement” of the past to the exclusion of future relations. In addition, the explicit exclusion of services seemed to promise something for the UK if it took a positive course over the negotiations’ first stage. A paragraph on Ireland recognised its thorny character. The paragraph on the ECJ opened the door to a harder line than that of the European Council, which would supervise any transitional arrangement. Citizens’ rights and the financial settlement each attracted seven hundred words of detail. The Directives also set out various heads for discussion, most of which have found further expression in the negotiating papers which followed⁴. On 12 July, the European Commission published a press release stating that

Discussions on...a future relationship with the United Kingdom will only begin once sufficient progress has been made in all areas of the first phase of the negotiations...Michel Barnier has said publicly that he hoped...to report sufficient progress...in October.

Agenda and Terms of reference

On 19 June, the EU published its one-page agenda for the first round of negotiations, to conclude with a press conference. Also on 19 June, both sides published an agreed two-page Terms of reference. This set up three negotiating subgroups on Citizens’ rights, Financial settlement, and “Other separation issues”; set a sequence of one week on and three weeks off; announced four rounds of future meetings on 17th July, 28th August, 18th September and 9th October; and declared that negotiations and supporting material would be open by default unless one of the parties requested otherwise. We have seen that the open character of these negotiations and their supporting material reflected the need on both sides to cultivate constituencies, but at this point the EU made some mileage on transparency, in effect making a virtue out of necessity. This was followed up with a round of seven papers over the next nine days. On 12 September, it was announced that the 18 September meeting would be postponed for a week. We may see how the issues of agenda and sequencing have played out from examination of the critical topics of Sovereignty, Citizen’s rights and Final monetary contribution, to which we now turn.

⁴ These included

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|---|---|
| <ol style="list-style-type: none"> 1. Citizens’ rights. 2. Financial settlement. 3. Goods placed on the market under Union law before the withdrawal date. 4. Ongoing judicial cooperation in civil, commercial and criminal matters between Member States under Union law. 5 Ongoing administrative and law enforcement cooperation procedures under Union law. | <ol style="list-style-type: none"> 6. Ongoing Union judicial and administrative procedures.. 7. Privileges and Immunities. 8. Free trade with European markets. 9. Nuclear material. 10. Governance of the agreement. 11. Procedural arrangements for the conduct of the negotiations |
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2. CRITICAL ISSUES

Sovereignty

If the UK has made a tussle out of matters bearing upon sovereignty, this is not because it has become transfixed by principle, but because of a firm grip on its economic interests. We see this if we consider the sequence of events and the character of the documentation.

On 28 June the EU followed its 22 May Directives with five position papers setting out “Essential principles” on legalities. These were on

- Governance
- Functioning of the Institutions Agencies and Bodies
- Judicial cooperation in civil and commercial matters
- Ongoing police and judicial cooperation
- Ongoing union judicial and administrative procedures

In many respects the four-page paper on Governance was nuanced. It drew distinctions between matters before and after the date of withdrawal and sought no more than that the ECJ’s future case law “should...be taken into account”. It also held out the prospect of disputes regarding the agreement itself being settled by “the means foreseen in the Withdrawal Agreement”. The paper contemplated a joint committee to supervise the implementation of the agreement; and followed the Directives, in seeking that the Commission and ECJ should have jurisdiction over the rights of EU citizens for “the duration of the protection of citizen’s rights in the Withdrawal Agreement”. It did, however, lay the ground for a draconian approach to enforcement by seeking that

...where one party considers that the other party has not taken the necessary steps to comply with a ruling of the Court of Justice, the complaining party may seize (*sic* in original) the Court to request a lump sum or a penalty payment or the suspension of certain parts of the Withdrawal Agreements.

The three-page paper on the Functioning of the Institutions Agencies and Bodies, sought the continuation of diplomatic and other privileges for its bodies and employees in the UK after withdrawal, the maintenance of professional confidentiality, as well as various arrangements for government documentation.

The three page paper on Judicial cooperation in civil and commercial matters sought that contracts entered into under EU law before the date of withdrawal should be subject to EU jurisdiction and law as “applicable on the withdrawal date”.

The three-page paper on Ongoing police and judicial cooperation sought the continuation of existing co-operation agreements including the European Arrest Warrant; and that confidential information obtained before the date of withdrawal should be subject to European regulations.

The three-page paper on Ongoing union judicial and administrative procedures, sought the maintenance of the jurisdiction of the ECJ and other EU bodies on matters pending before the date of withdrawal.

On their face, these papers need not have been seen as provocative, with a strong impression of laying the ground for constructive negotiations.

In the event, the UK responded on 13 July with three ranging shots. These included

- A three-page technical note on Implementing the withdrawal agreement. In effect the Government's lawyers were arguing for the country's full-blooded reversion to its own legal system pointing out that

The EU Treaties are unique in requiring parties to implement them by incorporating the concept of direct effect into their domestic legal orders. That concept is specific to EU law, and reflects the fact that the Treaties have created their own legal system which forms an integral part of the legal systems of the Member States.

The paper rejected the EU's argument that

...certain provisions in the Withdrawal Agreement, in particular those concerning citizens' rights, should be directly enforceable in the law of the United Kingdom and have the same legal effect as EU law does.

as "inappropriate and unnecessary"; offering the high-sounding assurance that

It is the UK's longstanding position that it will always comply with the rule of law...

- The core of the six-page position paper on Ongoing Union judicial and administrative proceedings was the argument that

...leaving the EU will end the jurisdiction of the [European Court of Justice] in the UK, a position consistent with international legal precedent, placing the UK in the same position as all other third countries, including those with which the EU has deep and close relationships.

while restating that the UK was after a "new, deep and special partnership with the EU". Once away from the paper's robust expression of principle, its details left it open for lawyers accustomed to reach settlements to do so in this instance.

- The UK's four-page position paper on Privileges and immunities began by restating its ambition for a "new, deep and special partnership with the EU"; going on to argue that privileges etc. should be governed by "functional need" and only on a limited basis.

On 21 August, the UK added to these with a couple of more trenchant responses.

- A four-page position paper on Confidentiality and access to documents, which argued for the principles of reciprocity and general continuity, while remaining silent on jurisdiction and enforcement.
- A thirteen-page Future partnership paper on Providing a cross-border civil judicial cooperation framework, which like all "Future partnership papers" (and as noted elsewhere, similarly to some other UK documents), began "The United Kingdom wants to build a new, deep and special partnership with the European Union". It made it clear

that there was to be a series of such papers and seemed to seek to dispel criticism from the EU or domestic quarters by stating that it reflected

...the engagement the Government has sought from external parties with expertise in these policy areas, and...the very extensive work undertaken across Government since last year's referendum.

The UK's judicial cooperation paper notes that the country is a leading forum for civil litigation and that English law governs 40% of global arbitration. In this light, it seeks to go beyond the concerns of the EU's document on the subject, by paving the way for "cooperation in this field to continue as part of our future partnership". The paper should be seen as reflecting HMG's engagement with the domestic constituency of legal practitioners, concerned that the independent and reliable character of adjudication under English law should not be complicated by the ECJ and explains why the British negotiators are taking such a hard line on the topic.

In addition (and depending upon your point of view), it either shows that future trade is inextricably linked to what the EU's Directives conceived of as past "entanglement"; or shows the guile of the British negotiators in drip-feeding trade issues into this stage of the negotiations.

Over the next week, the UK raised the stakes by publishing three papers.

- A 14-page Future partnership paper on Enforcement and dispute resolution (23 August), which begins with the now customary remarks about the "new, deep and special relationship". It sets the UK's objectives of an orderly withdrawal and "respect[ing] the autonomy of EU law and UK legal systems while taking control of our own laws..." It then seeks to draw out differences between UK and EU interpretations of jurisdiction and enforceability. There is much material - to lay eyes, somewhat makeweight - about distinctions between the periods over which laws apply; statute and case law (ie, law and its interpretation); and binding decisions and those which need merely to be taken into account.

The heart of the UK's enforcement paper is an argument for dispute resolution procedures which exclude the ECJ to the greatest extent possible, not merely in respect of trade matters. In part this goes to the matter drawn out above: British legal practitioners wish to be able to reassure contracting parties and litigants that they are free of the uncertainty of decisions from other jurisdictions.

But there is more to it than that. Britain is trying to pave the way to protect its exporters, in particular its exporters of services. They are hampered not by tariffs but by regulations, which the single market purports to address.⁵ This makes dispute resolution critical to the UK, as services are over four-fifths of Britain's economy, the source of net export earnings and the fastest growing part of global economies and trade. At present,

⁵ We should not exaggerate the Single Market's achievements as many services still lack common regulation. Insurance has proved particularly thorny; indeed, even within such a national market as the United States, insurers have to deal with regulation at the State level. On the other hand, this gives a strong clue that in this industry at least, regulatory divergence is not crippling.

British exporters of services enjoy whatever regulatory equivalence the single market has achieved. On Brexit, however, the UK has to leave the single market in order to negotiate Free Trade Agreements with third parties. In the nature of things, once it leaves its regulations will diverge - possibly by virtue of the very Free Trade Agreements it wishes to negotiate. The EU has a history of unapologetic mercantilism - regulations which favour its own businesses, so the UK fears discriminatory rules and partisan adjudication by the ECJ. In this light, the UK position is unambiguous:

...all agreements between the EU and a third country [provide] that the courts of one party are not given direct jurisdiction over the other in order to resolve disputes between them. Such an arrangement would be incompatible with the principle of having a fair and neutral means of resolving disputes, as well as with the principle of mutual respect for the sovereignty and legal autonomy of the parties to the agreement.

This should not be dismissed as guileful opportunism by the UK's negotiators: to the contrary, it has become clear that future trade in services is intimately linked to what the EU's Directives described as the "entanglement" of the past.

- Once again, the 15-page Future partnership paper on The exchange and protection of personal data (24 August) begins by invoking Britain's ambitions for a "new, deep and special relationship" with the EU. The paper points to the growing role of the "data economy", expected to grow from two percent of EU GDP to six percent by 2020. The UK represents that its data-protection standards are, and will continue to be, world-leading and seeks that the two sides agree mutual recognition, such that the EU accepts the UK's standards as "adequate" under its own rules. This may be seen as a third example of HMG's engagement with a domestic constituency, in this instance the tech industry.
- The three-page Technical note on Functionality and protocol (28 August) is less challenging to the negotiating process. It simply seeks clarification from the EU as to various intentions and assurances, giving the sense of something of a temporising manoeuvre.

On 6 September, the EU replied in part with its four-page position paper on the Use of data, addressing material obtained from the EU before the date of withdrawal. The limited scope of the paper has the effect of narrowing the topic under discussion from the UK's more ambitious paper. It also restated the role of

"Union law, as interpreted by the Court of Justice of the European Union on the date of entry into force of the Withdrawal Agreement".

The tussle on enforcement won't go away, as the UK has shown that it is unwilling to work with the hints originally offered by the EU of restricting the ECJ's jurisdiction. This is not so much because the UK has been unable to get the EU to specify such restrictions, or that it regards them as fundamentally insufficient, or even that it is - as the title of this paper

suggests - shadow boxing. Nor should the matter be seen as a shibboleth of fusty constitutionalists, hypnotised by sovereignty. It is better seen as aggressive mercantilism: the fundamental interests of the UK's exporters of services, as well as more narrowly of the English legal community, call for comprehensive restrictions in the involvement of the ECJ in the UK's post-Brexit settlement, whether in trade or domestic matters. The UK objectives may be characterised as aggressive mercantilism, in the sense of hanging onto markets in fast-growing services or opening up new ones. This flows through to the next substantive matter, citizens' rights.

Citizens' rights

On 19 June, the EU issued the four-page final draft of its first Position paper: Essential principles - Citizens' rights, following a four-page first draft on 24 May, differing from the final issue only in formatting. The paper expanded on the relevant section of the Directives for negotiation, in particular citing applicable EU regulations. This succeeded in changing the subject from Britain's offer of reciprocity, albeit at the cost of introducing the inflammatory notion that

The Commission should have full powers for the monitoring and the Court of Justice of the European Union should have full jurisdiction corresponding to the duration of the protection of citizen's rights in the Withdrawal agreement.

In the UK, this was promptly demonised as a power-grab. On close reading, however, the paragraph contemplates ECJ jurisdiction only for a limited duration, with the following paragraph contemplating only "a mechanism analogous" to those currently invoking the ECJ. At first sight, compromises ought to be readily found.

The UK's formal response came on 29 June, in a 24-page White paper on Safeguarding the position of EU citizens. This restated the White Paper's principle of reciprocity, and undertook to create rights for EU Citizens in the UK to be enforceable under UK law, explicitly repudiating the jurisdiction of the ECJ. The right to remain in the UK would arise after five years. After withdrawal, dependents would be subject to similar rules. Benefits including healthcare would continue on the same general basis as formerly, subject to reciprocity.

The two sides have taken the unusual step of publishing their negotiating progress in a couple of comparisons. We take this to be part of the process of opinion-forming and constituency-building on both sides. On 11 August the two sides published an eleven-page Comparison of positions on Citizens' Rights. This contained 47 items of which sixteen, or one third, were contentious. As to EU residents in the UK, these embraced the treatment of temporary workers, future family members, enforcement and jurisdiction, documentation, criminal checks and parity of benefits. As to UK residents in the EU, they embraced voting rights and change of residence within the EU. A couple of items directly bearing upon the ECJ were deferred to the group negotiating governance issues

On 31 August the two sides published their second sixteen-page Comparison. This had grown by forty percent to 66 items of which 22, once again one third, were contentious. No

progress had been made to settle the issues recognised as contentious three weeks earlier, in addition to which the UK had introduced six further contentious issues, generally seeking a more liberal approach to the recognition of professional qualifications. This seems of a piece with the temporising approach seen in the technical note on Functionality and protocol, published three days earlier.

It is understandable that the topic of citizen's rights inflames those directly affected: the 2.8m EU immigrants on our shores; the 1m UK expats in the EU - largely retirees; and the newly invigorated UK youth vote, which is being encouraged to value the right to "study, live, love and work" across Europe. But the issue means something very different to those in the room, who have used it as a proxy and test-case for the trying matters of jurisdiction outlined above in the discussion of sovereignty; and below in the process squabble about the treatment of goods.

This takes us to the last "Critical issue" in this section: money.

Final monetary contribution

Also on 12 June, the EU issued its eleven-page final draft of Essential principles - Financial settlement, following a ten-page first draft on 24 May. This argued that the UK should honour its share of obligations arising out of

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| - Unpaid commitments from the EU's current multi-year budget | - Net liabilities, ie |
| - Commitments between the UK's withdrawal and 2020, the end of the budget | Pensions and other employee benefits |
| - Contingent liabilities | Provisions ⁶ |
| - Costs related to withdrawal | Financial liabilities other than borrowings |
| | Payables and accrued charges other than unpaid commitments |

It also called for the UK to be liable for its share of the liabilities of the European Investment Bank; provided for the return of the UK's share of the paid-in capital of the ECB (and in the final draft the EIB, though not of any net assets arising out of its investments in the latter); and touched on other details. It concluded with boilerplate lists, first of the 53 EU bodies, eight joint ventures and thirteen other bodies for which a settlement was required; and then of the 69 programmes (first draft - 65) and authorising "Basic Acts" underpinning the EU's demands.

The EU's financial demands could not be more extensive and may be seen as seeking to cement the EU's unity with the promise of money all round. The boilerplate lists are intended to shore up the demands with legal authority. In addition, they send a message that the UK will do well to recognise just how extensive is its "entanglement" with the EU.

The UK has not responded publicly to these proposals, but on 3 September, David Davis told Andrew Marr that three days earlier, British officials had made a 2½-hour private presentation to their EU counterparts. This challenged the legal case for any payment, but

⁶ This includes the UK's share of the essentially incalculable costs of decommissioning Euratom's nuclear facilities.

allowed that certain obligations might have a “moral” basis and that others might be acceptable politically, in other words as part of an overall bargain. There are also contested reports that the UK wants to stagger the divorce bill payments over a three year period. This would be for the optics of maintaining a similar level of annual payments as the current £13 billion.

3. OTHER ISSUES

We now turn to the other matters giving rise to negotiation paperwork. Some of these are narrowly trade-related, such as goods and customs, which have given rise to a squabble about the negotiating process, plus papers bearing indirectly upon services. Others purport to deal with high politics - Northern Ireland and Foreign policy etc. - but turn out to have earthier objectives. In addition there is paperwork addressing a couple of scientific topics - nuclear materials and collaboration. Finally we touch on what we might have expected to see, but haven't.

Goods

On 28 June, the EU published its four-page Position paper on Essential principles, Goods. This is deliberately confined to the treatment of goods placed on the market before the date of withdrawal. It is intended to allow for orderly trade processes, under pre-existing law. It is silent on enforcement and as far as it goes, is not contentious.

On 15 August, the UK published a 16-page Future partnership paper on Future customs arrangements. This outlines two approaches to the mechanics of a customs border with the EU, each calling for institutional innovations.

- “A highly streamlined...arrangement” calling for reduced requirements all round and new technology.
- “A new customs partnership” calling for the UK side to act as agent for the EU, if the latter is the final destination for the goods. This would be intended to embrace goods obtaining added-value from manufacturing processes in the UK.

The paper also rejected a hard border with Ireland. It is odd, however, that it is silent on reciprocity and the integrated supply-chains built up by makers of automobiles and aircraft.

The EU has struggled with the UK's paper on customs, which presents proposals so ambitious as to have courted criticisms of “magical thinking” (actually made about its application to Northern Ireland: see below). Its length and detail, plus its repetition in the UK's Northern Ireland paper, tell us that it was made with some seriousness.

On 21 August, the UK published its eleven-page Position paper on Continuity in the availability of goods for the EU and the UK. This refers to the preceding paper, presents a

reply to the EU's paper on Goods, and follows the course of the UK's "Future partnership papers", in seeking to extend discussions to future trading relations with the EU.

This paper also followed the course of other UK papers published at around this time (eg, the technical note on Functionality and protocol and the Comparison of stances on citizen's rights) by temporising with remarks that the UK

...believes that the views of business and consumers must be at the heart of this discussion. The UK will continue to engage with businesses and consumer organisations to understand more about their concerns, and...is keen to use the current discussions to ensure that all the relevant issues are resolved.

Otherwise, the UK position on goods is pragmatic: "goods placed on the Single Market before exit should continue to circulate freely in the UK and the EU, without additional requirements"; and "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"; if not concessionary; "the agreement should facilitate the continued oversight of goods", as qualified by the UK's position on Ongoing union judicial and administrative proceedings. The paper devoted its final four paragraphs to goods supplied with services, where it sought to

explore in more detail...services supplied together with goods [to] take account of the deep connections between the availability of goods and the services attached to goods... The UK wants to ensure that these connections are explored comprehensively...

This has escalated to become a squabble about the negotiating process itself. The UK's paper on continuity in the supply of goods is consistent with its negotiators' objective of seeking to open up discussions to include future trading arrangements (in particular services), with a strong hint that the UK's slow-down is intended to encourage the EU to think again on this score.

On 6 September the EU published its four-page Position paper on Customs related matters. This followed the course of its simultaneously published paper on Use of Data, in seeking once again to narrow the discussion to goods in transit on the day of departure. It argued for the general principle that

rules applicable in respect of an operation when it is commenced should continue to apply to that operation until its completion

It aired the applicable bodies of EU regulation in full and argued for their full applicability (including quotas), until decisions to the contrary might become final. In general the paper should be seen as a silent rebuff to the ambitions of the UK's previous papers.

Services

Although the EU hinted at the promise of discussions about services in its Directives for negotiation, since then neither side has addressed the topic squarely. Instead both have

engaged with it indirectly, with the UK introducing the topic in the papers discussed above on Enforcement and dispute resolution and on Continuity in the availability of goods.

On 6 September, the EU published a five-page Position paper on Intellectual property rights. This called for the holders of EU IPRs (specifically including designations of origin for agricultural products) before the date of withdrawal to have the same rights under UK law. This is the only instance in which the EU touches upon one of its “Flanking policies”, in this instance the CAP.

Also on 6 September, the EU published a four-page position paper on Public procurement. This called for the maintenance of public procurements launched before the withdrawal date, as though under EU regulations.

Although the EU's paper on intellectual property rights touches upon services only in so far as bearing upon goods, the paper on public procurement engages with the topic squarely. Both should be seen as mercantilism, reflections of European private- and public-sector economic interests. These would include French farmers, the three French public service contractors operating in the UK: EDF, RATP and Veolia (the first two publicly-owned); plus the two other publicly-owned enterprises running UK rail franchises: Deutsche Bundesbahn and Nederlandse Spoorwegen. The EU's objectives may be characterised as defensively mercantile, in the sense of looking to protect existing markets in goods or in static or slow-growing services.

Northern Ireland

Issues relating to Northern Ireland are so much akin to those bearing upon sovereignty, that it is no surprise that they too have come to serve as a proxy and test-case for the tussle on adjudication. In addition, they are serving a similar purpose in the squabble about the negotiating process stemming from the UK's attempt to open up discussion on trade.

On 16 August, the UK published a 30-page Position paper on Northern Ireland and Ireland.

This presented proposals to

- uphold the Good Friday Agreement;
- maintain the Common Travel Area;
- avoid a hard border for the movement of goods; and
- preserve North-South and East-West cooperation, including on energy.

The UK acknowledges the EU's “unwavering support for the peace process” and recognises that all sides

should be mindful of the full breadth of commitments made in the... Good Friday Agreement... requir[ing] detailed and close engagement between the UK and the EU throughout the negotiations.

This paper calls for the continuation of the particular arrangements for citizenship, enabling

the people of Northern Ireland, irrespective of Northern Ireland's constitutional status: to identify themselves and be accepted as British or Irish or both, as they may so choose; to [enjoy] equal treatment irrespective of their choice; and to hold both British and Irish citizenship.

It invites the EU to continue funding the PEACE programme, renewing it after 2020 when the current programme runs out, while separating this request from "any wider policy positions on the financial settlement as a whole".

It argues that the provisions of the Common Travel Area should continue; and that they should be seen as independent of EU free movement and associated rights. It goes on to argue that

Wider questions about the UK's...controls for EEA nationals (other than Irish nationals) can only be addressed as part of the future relationship between the UK and the EU, and further highlights the need to move to this next phase of negotiations as quickly as possible.

In avoiding a hard border, the paper notes that

...there are a number of examples of where the EU has set aside the normal regulations and codes set out in EU law in order to recognise the circumstances of certain border areas. Devising a way forward on the Irish side of the land border will also require a flexible and imaginative approach that goes beyond current EU frameworks...

It then calls for a

...focus in particular on the issues most critical to delivering as frictionless and seamless a border as possible: customs arrangements; and checks and processes on particular goods, such as Sanitary and Phytosanitary measures or agri-food.⁷

The paper then reverts to the alternatives set out in its paper on Future customs arrangements, before turning to detailed proposals for sanitary and phytosanitary measures and electricity generation and distribution.

This paper gave rise to the explosive responses from the EU described above: on 26 August the *Financial Times* reported that EU officials had

...warned Britain against using the Northern Ireland peace process as a "bargaining chip" to secure a UK-EU trade deal, dismissing London's "magical thinking" on how to manage Brexit.⁸

The EU's undiplomatic words complain that the UK has gone too far in using something universally cherished, the maintenance of the Irish peace process, to serve its objectives in the squabble about the negotiating process on trade. These would be pressing for the next stage of talks, serving as a stalking horse for the UK's customs proposals, and obtaining

7 This means measures protecting the health of animals and plants in agricultural processes.

8 *Financial Times*, 26 August 2017, *EU warns UK against using Irish peace as Brexit 'bargaining chip'*, Alex Barker and George Parker. <https://www.ft.com/content/bc26de5e-89ae-11e7-bf50-e1c239b45787>. Accessed 14 September 2019.

special treatment of the UK-Irish border. But as may be seen below, the UK's paper has had some effect.

On 6 September, the EU published five pages of Guiding principles for Dialogue on Ireland/N Ireland, which declared that

The onus to propose solutions which overcome the challenges created on the island of Ireland by the United Kingdom's withdrawal from the European Union and its decision to leave the customs union and the internal market remains on the United Kingdom.

Nonetheless, the paper reflected much of the UK's thinking, for example

- The United Kingdom and the Union need to honour their commitments [to the PEACE programme].
- In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required to avoid a hard border...
- These challenges will require a unique solution which cannot serve to preconfigure solutions in the context of the wider discussions on the future relationship between the EU and the UK.
- The continued operation of the Common Travel Area is fundamental to...underpin[ning] the peace process and the provisions of the Good Friday Agreement.

It should be no surprise that the paper also stated that

...solutions must respect the proper functioning of the internal market and of the Customs Union as well the integrity and effectiveness of the Union legal order.

All in all, the paper may be seen as responding positively to several of the UK's requests, while failing to rise to the bait of its most ambitious proposals.

Nuclear materials

On 22 June, the EU followed the 22 May Directives, with its four-page Position paper - Essential principles - Nuclear materials and equipment safeguards, which presented proposals for the UK's withdrawal from Euratom. On their face, these were matter of fact but the wording was at pains to protect the rights of the Commission after Brexit. On 13 July, the UK published its six-page Position paper, Nuclear materials and safeguards issues, which accepted certain of the matter of fact elements in the EU's paper, but was silent on the Commission.

On 28 July, the UK issued a two-page technical note on Existing contracts for the supply of nuclear material, which did no more than call for both sides to "...work together to minimise uncertainty". Also On 28 August, the UK published a second two-page technical note on Existing contracts for the supply of nuclear material, addressing the thornier issue of spent fuel and radioactive waste, seeking

...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. The UK would also value certainty on the means by which this legal responsibility will remain enforceable once the UK has exited Euratom.

This draws out the equally thorny issue of enforcement mechanisms, discussed above.

On 6 September, the UK published a 16-page Future partnership paper on Collaboration on science and innovation. This drew attention to the UK's leading record in science and collaboration with EU member-states, pledged the country to continue to do so, and noted specific programmes, under EU auspices and outside them, of which several are open to third parties if they are self-funding and abjure participation in decision-making. The paper concluded by stating that the UK "will seek to agree a far-reaching science and innovation agreement with the EU that establishes a framework for future collaboration".

The scientific collaboration paper may be seen as seeking to mollify the domestic academic community, which has been notably fretful about Brexit. Despite its length, the paper contains no substantive proposals. It hints that the UK is qualified to participate in EU scientific projects throughout on the basis of "excellence", but fails to offer specifics as to funding or participation in decision-making.

Finally on 12-September, the UK published a 24-page Future partnership paper on Foreign policy, defence and development. This draws attention to the UK's defence and defence-industrial capacity, the shared values of both sides and the threats and challenges they face in common. It goes on to offer

...a future relationship that is deeper than any current third country partnership and that reflects our shared interests, values and the importance of a strong and prosperous Europe. This future partnership should be unprecedented in its breadth, taking in cooperation on foreign policy, defence and security, and development, and in the degree of engagement that we envisage.

It would be rash to see the UK's paper on Foreign policy etc. as a reversal of the hints in the February White paper, that its defence contribution should not be taken for granted. In the first place, everything in the paper occurs explicitly within the context of the UK's ambition for a "new, deep and special partnership with the European Union", repeated at the beginning of the paper as in all "Future partnership papers". This tells us that the UK is holding out this co-operation in the same conditional spirit as the EU's hints of eventual progress in services in its Negotiating directives. Second, the offer comes with a strong reminder of the UK's place in European joint-ventures to supply military equipment, stating

The European defence industry sector is closely integrated with leading companies having a presence across several European nations, including the UK... Open markets and customs arrangements that are as frictionless as possible are important

to the continued success of this sector and to ensure that British and European Armed Forces can access the best war-fighting capability to keep us safe.⁹

The paper is couched in such emollient language as to serve as the final example of the UK's emerging programme of guile: in this instance, the diplomacy of accentuating the positive to draw attention to its opposite.

This takes us to the last topic of this note: what we might expect to see, but do not.

Lacunae

The UK has made no public response to the EU's paper on a financial settlement. This is undoubtedly tactical, with the UK hanging back, possibly to undermine the EU's negotiating team when it reports back to the Council in October. Such tactics seem to contradict the widespread view that the timetable favours the EU and we will simply have to see how it goes. Otherwise, nothing hangs on the other matters raised by one party but neglected by the other, as these occur only in recently issued papers. These include the UK's papers on Collaboration on science and innovation and on Foreign policy, defence and development (respectively 6 and 16 September); plus the EU's papers on Intellectual property rights and Public procurement (both 6 September).

It is of the essence of the negotiations that there has been no substantive exchange on future trade in goods or services, save where introduced through the back door - largely by the UK in its papers on Ongoing union judicial and administrative proceedings, Future customs arrangements and Northern Ireland, but in at least one case by the EU in its paper on Public procurement. At time of writing, moreover, the UK has not fulfilled media speculation about a paper on financial services. Nor has there been paperwork dedicated to an implementation or transition period, though this has been prefigured from the outset, for example in May's Lancaster House speech and the EU's negotiating directives.

Finally on this score, although the EU's paperwork is unequivocal in recognising that the UK is to leave the EU, there has been nothing about the implications of Brexit upon what the EU calls its "Flanking policies". This is its term for the *acquis* as it bears upon competition, social, consumer and environmental policy; plus company law and the Common Agricultural and Fisheries Policies. At present, all apply to the UK, subject to opt-outs from Schengen, the Euro, and (in some senses) the Charter of Fundamental Rights and the Area of Freedom Security and Justice.

9 Specific joint ventures include Eurofighter, embracing BAe Systems, EADS (Germany) and Alenia (Italy), as well as satellites embracing BAe Systems and EADS ; and engine gearboxes embracing Rolls Royce and Liebherr (Germany).

4. CONCLUSION

Over the last four months the two sides have issued 36 negotiation documents. Their sequence demonstrates the emergence of a strategy of “snares and lures” on the part of the UK, attempting to draw the EU into matters excluded by its own directives. The UK has combined this with the absence of a money offer and - apparently since the election, though the timing may be a coincidence - an accumulating policy of delay. This is a high-risk strategy and it would be pleasant to believe that the UK team believes it has a realistic chance at correspondingly high rewards. In any event, the EU team has been frustrated, sometimes exasperated. Nonetheless, so far they have had little difficulty in resisting the UK’s approach and the net effect is deadlock, leaving the exchanges fairly to be characterised as shadow-boxing. This takes us to Theresa May’s forthcoming speech, expected to set out the UK’s stance on alignment with EU regulations over an implementation or transition period and beyond; together with possible hints of the UK’s “plan B” should negotiations get nowhere.

Appendix 1: Sequence of documents

Smoke-signals went up well before the paperwork explicitly addressing the negotiation process, with Theresa May's [Lancaster House speech](#) on 17 January 2017 and Philip Hammond's [Davos speech](#) two days later. There then followed two British White Papers: on 2 February, HMG published the country's [Terms of Reference](#) for Article 50 negotiations; and on 30 March (ie, the day following the formal notice of the UK's intent to leave the EU) it published details of the [Great Repeal Bill](#) to address the domestic legislation arising. The EU then engaged in high-profile internal negotiations, at first leading to the [European Council's guidelines](#) on 29 April.

This culminated on 22 May in its [Directives for negotiation](#), which begin table one. Two days later, the EU published a couple of preliminary drafts of Position papers on the most sensitive topics, [Citizens' rights](#) and [Financial settlement](#). From 12 to 28 June, it published its agenda and nine papers on Essential principles, including final drafts of the first two.

On 29 June, the UK published its [White paper on Citizens' rights](#). On 13 July it published seven documents (plus ten Factsheets about the Great Repeal Bill, not included in the analysis in this paper), and four Position papers. From 15 August to 6 September, it published six notes and five Future partnership papers.

On 6 September, the EU published its Guiding principles on Northern Ireland and four further position papers.

On the following day, the UK issued a full set of revisions to the Factsheets and suchlike addressing the Great Repeal Bill. On 12 September it published its Future partnership paper on Foreign policy, defence and development.

Table one. Date of negotiation papers

22-May	EU	Directives	Directives for negotiation	18
12-Jun	EU	Position paper - Essential principles	Citizens' rights	5
12-Jun	EU	Position paper - Essential principles	Financial settlement	11
19-Jun	EU	Agenda	Agenda for article50 negotiations	1
19-Jun	Joint	Terms of reference	Article 50 negotiations between the UK and the EU	2
22-Jun	EU	Position paper - Essential principles	Nuclear materials and equipment safeguards	4
28-Jun	EU	Position paper - Essential principles	Functioning of the Institutions Agencies and Bodies	3
28-Jun	EU	Position paper - Essential principles	Goods	4
28-Jun	EU	Position paper - Essential principles	Governance	4
28-Jun	EU	Position paper - Essential principles	Judicial cooperation in civil and commercial matters	3
28-Jun	EU	Position paper - Essential principles	Ongoing police and judicial cooperation.	3
28-Jun	EU	Position paper - Essential principles	Ongoing union judicial and administrative procedures	3
29-Jun	UK	White paper	Safeguarding the position of EU citizens	24
13-Jul	UK	Position paper	Nuclear materials and safeguards issues	6
13-Jul	UK	Position paper	Ongoing Union judicial and administrative proceedings	6
13-Jul	UK	Position paper	Privileges and immunities	4
13-Jul	UK	Technical note	Implementing the withdrawal agreement	3
11-Aug	Joint	Technical note	Comparison of EU-UK positions on citizens' rights (1)	11
15-Aug	UK	Future partnership paper	Customs arrangements	16
16-Aug	UK	Position paper	Northern Ireland and Ireland	30
21-Aug	UK	Future partnership paper	Providing a cross-border civil judicial cooperation framework	13
21-Aug	UK	Position paper	Confidentiality and access to documents	4
21-Aug	UK	Position paper	Continuity in the availability of goods for the EU and the UK	11
23-Aug	UK	Future partnership paper	Enforcement and dispute resolution	14
24-Aug	UK	Future partnership paper	The exchange and protection of personal data	15
28-Aug	UK	Technical note	Existing contracts for the supply of nuclear material	2
28-Aug	UK	Technical note	Functionality and protocol	3
28-Aug	UK	Technical note	Spent fuel and radioactive waste	2
31-Aug	Joint	Technical note	Comparison of EU-UK positions on citizens' rights (2)	16
06-Sep	UK	Future partnership paper	Collaboration on science and innovation	16
06-Sep	EU	Guiding principles	Dialogue on N Ireland	5
06-Sep	EU	Position paper	Customs related matters	4
06-Sep	EU	Position paper	Intellectual property rights	5
06-Sep	EU	Position paper	Public procurement	4
06-Sep	EU	Position paper	Use of data	4
12-Sep	UK	Future partnership paper	Foreign policy, defence and development	24

Appendix 2: Volume of documents

If we disregard duplicates and subsequent drafts, the EU has issued 16 papers totalling 81 pages; the UK 17 papers totalling 193 pages. In addition the two sides have issued three joint papers: the terms of reference for the negotiations; and two issues of a technical note comparing stances on the rights of citizens. Quantity may not equate to quality but on their face these figures dispel complaints of a paper trail from an unengaged or unprepared home side.

This is, however, less interesting than an attempt to gauge what really matters to the two sides. Let's try this in the crudest way - a simple count of pages. Quantity may be no definitive test of importance, but it is certainly a helpful clue. Table two shows that the EU has committed five pages or more to just four topics.

Table two: Count of pages devoted to topics in EU papers

Position paper - Essential principles	Financial settlement	11
Position paper - Essential principles	Citizens' rights	5
Guiding principles	Dialogue on N Ireland	5
Position paper	Intellectual property rights	5

The four topics commanding the attention of the EU appear to be money and the topics (variously crucial, inflammatory or mischievous, according to your point of view) of Citizens' rights, Northern Ireland, and Intellectual property. Table three uses the same test - a count of over five pages - to tease out the matters most animating the UK.

Table three: Count of pages devoted to topics in UK papers

Position paper	Northern Ireland and Ireland	30
Future partnership paper	Foreign policy, defence and development	24
White paper	Safeguarding the position of EU citizens	24
Future partnership paper	Customs arrangements	16
Future partnership paper	Collaboration on science and innovation	16
Future partnership paper	The exchange and protection of personal data	15
Future partnership paper	Enforcement and dispute resolution	14
Future partnership paper	Cross-border civil judicial cooperation	13
Position paper	Continuity in the availability of goods	11
Position paper	Nuclear materials and safeguards issues	6
Position paper	Ongoing judicial and administrative proceedings	6

This turns up eleven papers, showing that the UK joins with the EU in its concern about Northern Ireland and Citizen's rights, but otherwise is focussed on trade (Customs and continuity in the supply of goods), sovereignty (Enforcement etc., Judicial co-operation etc.), plus a couple of scientific topics (nuclear and collaboration), plus a shot across the bows on Foreign policy etc. All six of its "Future partnership papers" meet the "five pages or more" test, confirming that the UK is pressing to crack on with future relations.

Finally, the disparity in pages published by each side reflects the character of the UK's "Future partnership papers", which are extensive and argumentative. By contrast, the EU's paperwork has been terse throughout, particularly of late where it has been concerned to narrow discussion.



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