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Dear John

Thank you for your email to the Attorney General, to which I am replying because its subject matter lies within my departmental responsibility. The Attorney has seen this letter and will be replying separately to confirm that he agrees with its content.

I am particularly grateful to you for allowing me a further opportunity to explain the Withdrawal Agreement, because your email exhibits many fundamental misconceptions about its meaning, which might well inadvertently mislead its readers.

First, the Withdrawal Agreement does not, as you suggest, "stop us leaving the EU". On the contrary, Article 50 of the Treaty on European Union (TEU) provides that we will leave the EU and *legally cease to be a member* on the entry into force of the Agreement. Therefore, the Agreement is a certain, and by far the most orderly, means of our departure from its political and institutional structures. We could only then re-join them by means of a lengthy and no doubt difficult accession procedure under Article 49 TEU when the terms of our membership would have to be negotiated anew. It is normal for a new member state to be required to adopt the Euro as its currency. Indeed it is no doubt because the Withdrawal Agreement ensures we legally cease to be a member, and the impediments to subsequently re-joining, that many of those who wish to remain and support a second referendum voted with you to oppose it.

The Implementation Period

You are, of course, quite right that the implementation period could last up to December 2022 if the United Kingdom sought to extend its end date beyond 31 December 2020. During this period, we will be subject to existing and new EU rules as if we were members and thus, if a rule were to be adopted with which we did not agree, we would be obliged to implement it for the remaining duration of the implementation period.

The duty of good faith prohibits the *deliberate* exploitation of the implementation period to damage British interests. More importantly, since such rules take many months or more to draft, consult upon, and promulgate, it is unlikely that they would have entered into force much before the end even of an extended implementation period, when, of course, **we could reverse them**. For this reason, the length of time during which any such new rule would be likely to be in force would be short, while if we remain a member, we would be bound to implement them in perpetuity.

As you know, it has been an important request from businesses in the UK that we have an implementation period during which we are subject to the same rules, minimizing disruption and allowing time to adjust gradually to changes in our status. This also enables legal agreements for our future relationship to be negotiated and enter into force so that there can be a smooth and graduated alteration in the trading rules affecting them.

The Northern Ireland Protocol

You next comment that, at the end of the implementation period, "*the UK will need to stay in the customs union and accept* all single market rules and laws, *unless the EU relented over the alleged Irish border issue*." This, I imagine, refers to the Northern Ireland Protocol (NIP), of which it represents a fundamental misunderstanding.

The NIP, if it ever came into operation, does not require the UK to *"accept all single market rules and laws"*. Northern Ireland would only apply those regulations strictly necessary to allow free circulation of goods into the EU single market and the operation of the single electricity market on the island of Ireland. The EU rules applying in Northern Ireland would be a small fraction of those applying today and all other regulatory areas would return to domestic control. Furthermore, under the Agreement, the EU Institutions, including the Court of Justice of the EU (the Court), would have no jurisdiction in and over Great Britain's regulatory framework, which would once again be within the exclusive control of Parliament.

It is true that the NIP provides for a single customs territory between the UK and the EU. It would mean the **whole of the UK having quota and tariff-free access to the EU market with no contributions to the EU budget, no guaranteed access to UK fishing waters, and control once again of our immigration, environmental, and agricultural policies as well as, for example, all of the laws and regulations affecting services and the City of London.**

You are concerned that this arrangement would be so advantageous to the EU that they would strive to keep us within it. Yet it creates an obvious potential problem in the shape of access to the single market for NI goods without the usual obligations of EU membership. Additionally, legal commitments have been made by both parties to aim to replace the backstop with alternative arrangements by December 2020, and that they do not need to replicate the provisions of the backstop in any respect. The EU has also agreed to set up a joint working group immediately upon the ratification of the Agreement to develop alternative administrative, technical and other arrangements that might help to replace the customs and

goods provisions of the NIP. Domestically, the Government are establishing three working groups to support these negotiations, making available £20m of funding for their development.

Financial obligations

You refer to the provisions on our financial obligations under the Withdrawal Agreement. It is important to state that these obligations are those we have incurred under EU Law **while we have been a member**. Since those obligations were created under EU laws and regulations, which is also our own law until we leave, it is hard to see how they could be assessed and calculated save by the application of that law. We would, of course, have the right to dispute the assessment and calculation of our obligations and entitlements according to the rules. You are right that any litigation of such a dispute would during the implementation period be before the CJEU, just as it would have been in respect of those obligations had the UK remained a member state.

However, after the implementation period, Article 160 allows for the Commission to bring infraction proceedings and for UK courts to make preliminary references to the CJEU with respect to the EU law which is applicable under Articles 136(1) or 136(2) and 138(1) or 138(2) of the financial settlement. These articles provide for the continued application of the EU budgetary framework to the payments and receipts due under the financial provisions of the Withdrawal Agreement, **but only in respect of the financial years up to the end of 2020** or to programmes and activities committed under the Multiannual Financial Framework 2014-2020.

Other issues relating to outstanding financial obligations after the implementation period would be resolved by the independent arbitral tribunal set up under the Agreement. The tribunal would refer a disputed or doubtful point of interpretation of EU law to the CJEU, but the final decision and its precise application to the individual facts and circumstances of a particular case would be for the independent tribunal. Once our financial obligations are exhausted, these parts of the Agreement would become redundant.

As you say, £35 to 39 billion is an estimate of these obligations. That sum would be payable over some years and is a net assessment of the mutual commitments and liabilities under the financial settlement. It represents less than three years of the gross annual contributions the UK would otherwise be forecast to make as a Member State, of on average £16.7 billion per year[1]. The gross *annual* expenditure of the government is approximately £800 billion. Frankly, you do not want to leave the EU as much as I do if you think this sum is a reason to justify not leaving the EU when set against both the opportunities for the UK outside of the EU and when put in the context of our gross annual expenditure.

[1] OBR Economic and Fiscal Outlook March 2019: average annual gross contribution forecast between 2019/20 and 2023/24 (no-referendum counterfactual)

Citizens' Rights

You refer to the provisions on citizens' rights and suggest that they create a class of "super citizens" who will have access to benefits guaranteed in a way that others will not.

In fact, access to benefits for EU citizens in the UK will be subject to future domestic policy changes in just the same way as UK nationals provided they do not amount to discrimination. EU citizens in the UK and **UK nationals in the EU** at the end of the implementation period, and their family members, will be entitled to **equal treatment with their host state nationals**. This means that they are generally entitled to the same benefits that are available to citizens of the host state.

The Agreement also protects rights in respect of social security coordination for those in scope of the relevant section of the agreement. The EU rules on social security coordination coordinate but do not harmonise social security systems. These rules in no way affect the structure of the benefits system and what benefits the UK provides but will ensure, for example, that workers (and their employer) will only pay into one social security system at a time, and that those in scope will continue to have the right to aggregate contributions and periods of insured residence for the purposes of meeting different states' benefit entitlement conditions. Since these rules apply to protect our own citizens in the EU, it is odd that you object to them.

If you mean that in future, those not covered by the Withdrawal Agreement who go to work and live in an EU member state will not, unless it is agreed in due course, have the ability to aggregate contributions in that country with those they have paid in the UK, that is surely an inevitable consequence of leaving. But it seems reasonable to protect those millions of UK nationals as well as EU citizens who will have made important prior decisions, such as a long period of contributions in another member state, based on the availability of such a right.

You then enumerate a list of articles of the Agreement with short, often one-line, commentaries, which are at risk of giving a substantially misleading impression of their nature and effect.

For example, you say that Article 5 *"reintroduces the powers of the European Court and enforces "sincere co-operation" on us as they do not want us impeding their plans for economic, monetary and political union."*

This is a surprising assertion because the Agreement contains a reciprocal legal obligation on both parties to act in good faith, which is a normal requirement of any international treaty. The duty of good faith is a basic principle of customary international law and does not need to be expressly stated in the Agreement to be effective. Furthermore, it does not "*reintroduce the powers of the European Court*", as you put it; it has no effect at all on those powers.

"Article 31 imposes social security coordination on us".

Your statement might be read to imply that the UK is obliged in future to coordinate its whole social security system with the EU's own regulations but that is *not* the case as I have explained. It has nothing to do with the substantive benefits that Parliament decides should be available at any particular time. I have dealt above with the way in which social security coordination is preserved for those who have previously relied on its existence.

"Article 39 gives special protection to EU citizens currently living in the UK from changes to social security for the whole of their lives, protection which the rest of us do not enjoy."

As I have explained above, EU citizens in the UK will not be protected from domestic changes to social security; access to benefits will be subject to any future domestic policy changes that apply to UK nationals so long as they do not amount to discrimination. It also provides that EU citizens in scope will have the ability, to coordinate their social security contributions here with periods in their home country or another EU country in which they have lived and contributed in the manner I have explained.

"Article 51 applies parts of the VAT regime for an additional 5 years after the long transition envisaged in the Treaty."

All that this provision achieves is to give the trader 5 years from the end of the implementation period to account for and claim VAT rights or fulfill obligations in respect of a *cross-border* transaction that took place *before that date* and thus was legally subject to the EU regime then implemented in the UK. It imposes no new duties and has no effect on any transactions that take place *after* the end of the implementation period.

"Articles 92-3 imposes the EU state aids regime on the UK for 4 years beyond transition."

Again, this statement is likely to give a false impression. The EU state aid regime is *not* imposed on the UK for 4 years beyond the implementation period. It applies only in specific and restricted circumstances to aid that was granted **prior to our withdrawal** from the EU.

This Article applies to any proceedings that have already been commenced (including by British citizens) for non-compliance with competition or state aid rules and that were continuing **before the end of the implementation period when at the time we were subject to EU Law**, which allows such proceedings to be concluded and any legal obligations or rights to be determined. Secondly, it preserves the EU rules in respect of aid that was granted before the end of the implementation period for a period of four years following the end of the implementation period. This simply allows time for cases of non-compliance to be detected and a complaint considered, which otherwise would escape

without sanction, and seems fair and reasonable because we are legally bound to comply up to that date. In any case, I had previously understood that you were opposed to state aid.

"Article 95 imposes binding decisions by EU quangos and bodies for 4 years beyond transition."

Again, this is correct only in respect of EU administrative decisions in proceedings relating to state aid and anti-fraud (Article 93) in respect of aid granted or instances of fraud that took place **before the end of the implementation period.** New cases relating to such matters occurring before the end of the implementation period can be initiated up to four years after the implementation period. These bodies have no jurisdiction at all over any events or matters that only occur after the end of that period. This allows a reasonable time to ensure that non-compliance and unlawful behaviour can be detected and properly dealt with.

"Article 99 requires us to pay for access to records to handle issues over indirect tax where the EU keeps powers for 4 years beyond transition."

After the implementation period, the UK will need, for its own VAT and excise purposes, to find out information about cross-border transactions that took place **before the end of the implementation period** so that, for example, it can ensure the appropriate taxes have been paid to the UK Treasury. To the extent some of the information we will need is maintained in and by the EU in its databases and systems, and since we will no longer be members, we undertake to pay **the actual costs incurred** by the EU in providing us with access. This seems reasonable.

"Article 127 applies the whole panoply of EU law throughout transition, including the right to legislate in any way they wish against our interests and enforce it on us via the ECJ."

I have dealt with this point above. I would observe that the whole purpose of the implementation period is to create a phased winding down of our membership for the benefit of thousands of businesses in the United Kingdom, while a new relationship is agreed and readied for implementation. That implies the continued application of the same rules for an implementation period.

"Article 130 prevents us taking back control of our fish any time soon. Doubtless more of our fishing rights would be given away trying to get an exit deal."

Article 130 applies only to the implementation period and does not prevent the UK from taking back control of its fishing grounds once that period has ended and we are no longer subject to the Common Fisheries Policy. It simply confirms that during the implementation

period the EU are compelled to consult the UK on the annual fishing opportunities negotiations and ensures the UK cannot receive a lower quota share than it currently receives. The UK will take back control of its fishing grounds at the end of the implementation period when we shall become an independent coastal state with full control over our territorial waters. It is important to note that this is so even if the NI Backstop is implemented, during which, for example, French fishing vessels will no longer have the right to access UK waters.

"Article 135 allows them to send extra bills up to the end of 2028. Article 140 imposes on us financial liabilities up to December 2020 and carry over into 2021"

Article 135 does not have the effect you describe. The UK will contribute to the EU budget in the usual way during the implementation period in 2019 and 2020, up to the end of the current Multiannual Financial Framework (Article 135(1)). The UK's contributions will be determined essentially as if it had remained a Member State, in accordance with the relevant EU legislation including the Multiannual Financial Framework Regulation and the Own Resources Decision. However, amendments made to these pieces of legislation on or after the date of the entry into force of the Agreement will not apply to the UK in so far as the amendments affect the UK's financial obligations (see Article 135(2)). Correspondingly, the UK will benefit from EU receipts from programmes under the 2014-20 Multiannual Financial Framework until their conclusion.

Your reference to 2028, I assume, refers either to Article 136(3)e, which provides for technical corrections to the UK's VAT and Gross National Income (GNI) based contributions in respect of decisions made no later than 31 December 2028, or to the provisions of Article 140 pursuant to which the UK will be liable for its share of the EU's budgetary commitments outstanding as at the end of 2020 where they result in payments.

Member States' contributions to the EU budget are calculated on the basis of economic fundamentals, including their GNI and the size of their VAT base. Contributions are retrospectively adjusted to account for technical revisions to underlying statistics to ensure that Member States' contributions are calculated fairly. Article 136(3)e extends this process to the UK up to 31 December 2028, ensuring that payments made for the 2019 and 2020 EU budgets are calculated accurately – a process which is as likely to result in a decrease in payments the UK makes as it is an increase.

Article 140(5) gives to the UK the right to demand a *final* account of all payments still due or arising in respect of these liabilities by 31 December 2028. This is because there are often accounting adjustments to these liabilities, for example where commitments have not been followed through, some years after the year in which they arose. **However, the account relates to, and the UK is liable only for, commitments outstanding at the end of 2020.**

These provisions are a means of winding down the UK's financial commitments and ensuring they have been accurately calculated and accounted for.

"Articles 144 and 150 prevent us getting back accumulated reserves and profits from our European Investment Fund and EIB shareholdings."

The **UK will receive from the EU a share of certain assets**, including a share of fines levied by the Union (Article 141), and the UK's paid-in capital of the ECB (Article 149). The EU will also pay the UK's paid-in capital of the EIB (Article 150(4)). The UK will also get a share of the associated pre-paid guarantee funds and reflows from the financial operations (Articles 143(7) and 144(3)). The UK will also receive its share of the net assets of the European Coal and Steel Community in liquidation as at the end of 2020 (Article 145), as well as its share of the Union's investment in the paid-in capital of the European Investment Fund as at the same time (Article 146).

The UK will cease to be a member of the EIB (Article 151) and will be liable, on equal terms as the Member States, for an amount up to its share of subscribed capital as it stood on exit day in **respect only of the EIB's financial operations that were approved before exit day** (Articles 150 and 151). These liabilities decrease as those operations conclude or reduce. The UK will also be liable for a share of the EU's contingent liabilities, but only those entered into up to the date of withdrawal (Articles 143 and 144), except for legal cases related to the budget and linked policies and programmes, where the cut-off point is the end of 2020 (Article 147).

These arrangements strike a fair balance overall between the UK and the EU and take proper account of our legal rights in the various contexts. The number of organizations and funds these articles relate to further illustrates how the Withdrawal Agreement ensures the UK is leaving from the complex EU entanglements built up over forty years.

"Article 143 imposes adverse conditions on us over pension and loan liabilities of the Union."

Article 143 requires the UK to assume responsibility for its share of contingent financial liabilities from financial operations (loans) undertaken by the EU *before* the Withdrawal Agreement entered into force. However, those provisions are fair and reasonable, and I do not recognise your reference, without further explanation, to the imposition of "*adverse conditions*". Article 142 provides that the UK is liable for a proportionate share of the EU's pension liabilities *accrued as at the end of 2020*, which includes those of UK nationals who have worked for the EU's institutions.

"Article 155 requires the UK to make continuing payments to Turkey under an EU programme after we have left."

As the Article states, these payments relate to commitments made by the UK (before the entry into force of the Withdrawal Agreement) to the "European Union Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa" and to the "Facility for Refugees in Turkey". The UK is committed to

supporting the efforts of Turkey in responding to the refugee crisis resulting from the conflict in Syria. These are commitments it is reasonable and in our interests to honour.

"Article 158 gives the European Court continuing power for 8 years after transition."

Once again, this implies that the Court would have *general* jurisdiction within the UK for 8 years. But this Article applies **only to the citizens' rights provisions** and allows reference to the CJEU only with the permission of the UK courts. The CJEU will be able to rule on a disputed interpretation of Part II of the Withdrawal Agreement for 8 years from the end of the implementation period only **when a UK court decides** to refer the point of interpretation to it. The period of 8 years will ensure that any fundamental issues about how the agreement should be interpreted are resolved as these would generally arise as the new system is applied. This makes perfectly good sense because British citizens living in the EU will also rely on the terms of the Withdrawal Agreement to protect their rights in the courts of those countries, ultimately interpreted by the CJEU, and it is important and desirable that the rights be bindingly interpreted in the same way and have consistent and equal scope for both protected sets of citizens. There is nothing objectionable in this sensible and equitable provision.

"Article 164 makes a Joint Committee an effective legislator and government over us."

Again, this is a mischaracterisation of the Joint Committee's role. Since the Joint Committee can only act or decide with the approval of the UK Government, it will be for Parliament to exercise close scrutiny of the policy of the Government in connection with those acts and decisions in the normal way. Parliament scrutinizes the actions of the executive in its participation in multiple international bodies and institutions whose decisions affect citizens of the UK and there is nothing in principle different about the Joint Committee's operation of the terms and provisions of the Withdrawal Agreement.

"Article 174 requires any arbitration to be governed by ECJ judgements on the application of law in disputes."

I have dealt with this point above. It is **only where a point or concept of EU law** is relevant to a dispute over the operation of the terms of the Withdrawal Agreement that the point will be referred to the CJEU. The tribunal will then apply the ruling to the facts and decide the dispute. It is important to note that, with the exception of the NIP, all of the obligations under the Agreement are **inherently time limited** and the CJEU's limited role in connection with the Agreement will expire with them.

"The Protocol on Northern Ireland will require us to stay in the Customs Union with regulatory and legal alignment with the single market or split off a separate place called UK (NI) which will be governed differently to the rest of the UK on an island of Ireland basis."

I have dealt with this point above. The NIP does not require Northern Ireland to align with the whole of the EU single market regulatory framework but with the small fraction of those rules relating to the free circulation of goods within the single market so that those goods can pass unimpeded over the land border with Ireland as they do now. The adoption of those rules does not remotely imply that NI will be "*governed differently… on an island of Ireland basis*". It will be open to the UK Government, as it has committed, to ensure that for the duration of the NIP, GB keeps pace with NI in respect of these rules and that divergences and the need for different treatment of goods passing from GB to NI are minimised. In all other respects, the government of NI will be subject to the laws and regulations passed in Westminster or Stormont. Any new areas of law proposed to be added to the scope of the backstop, which are considered to be required for the free circulation of goods is subject to the agreement of the UK in the Joint Committee set up by the Withdrawal Agreement; the Government retains the right to reject any new areas being added.

I hope this provides you with the answers you requested as well as clarifying some of the significant confusions and misunderstandings your email evinces, such as about the social security provisions of the WA, the nature and extent of the Northern Ireland Protocol's requirements of alignment with the single market and the extent of the EU institutions' involvement in the UK after the implementation period.

I would urge you to correct these errors of legal interpretation in your future public pronouncements so that those who circulate your email may have the accurate facts on which to base their judgments of the overall merits of the Withdrawal Agreement.

Yours ever

The Rt Hon Steve Barclay MP

Secretary of State for Exiting the European Union