



The Select Committee on the European Union

Uncorrected oral evidence: Brexit: parliamentary scrutiny

Tuesday 6 September 2016

3.20 pm

Watch the meeting

Members present: Lord Boswell of Aynho (The Chairman); Baroness Armstrong of Hill Top; Baroness Browning; Lord Green of Hurstpierpoint; Lord Jay of Ewelme; Earl of Kinnoull; Lord Liddle; Baroness Prashar; Lord Selkirk of Douglas; Lord Teverson; Lord Whitty; Baroness Wilcox.

Evidence Session No. 1

Heard in Public

Questions 1 - 11

Witnesses

I: Ms Jill Barrett, Senior Research Fellow in Public International Law, British Institute of International and Comparative Law, Lord Kerr of Kinlochard GCMG and Professor Derrick Wyatt QC, Emeritus Professor of Law, Oxford University, Brick Court Chambers.

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Examination of witnesses

Ms Jill Barrett, Lord Kerr of Kinlochard GCMG and Professor Derrick Wyatt QC.

Q1 The Chairman: I welcome our witnesses on behalf of the Select Committee. At least two of them are well known to the Committee and to colleagues—one perhaps less so. She is sitting in the middle. I would like first to welcome Jill Barrett, who has a distinguished career as a public lawyer, both in the academic sector and in public service. If I am right, you led the Bill team on CRAG.

Ms Jill Barrett: Yes.

The Chairman: You will provide an invaluable perspective on how the public service needs to approach these issues. You are very welcome.

Ms Jill Barrett: Thank you.

The Chairman: On your left—my right—is John Kerr, Lord Kerr of Kinlochard. He is a Member of this House, has an immensely distinguished international career in public service and is the author of Article 50. At least, in a world of uncertainty, we have a person who knows what they are talking about.

Thirdly, we have Professor Derrick Wyatt, who has assisted us greatly this year on a report on Article 50. I notice that the business of cross-citation is now taking place; in evidence that you very kindly offered to us in draft, you referred to some of our report, which is always reassuring. The written work you let us have sight of has been very helpful in forming our ideas.

I do not wish in any sense to resort to my tendency to flippancy, but we find ourselves—the nation, the public services and the public administration—at a time of uncertainty. I am always minded of the advice of the person who was referred to a conference and returned to debrief his referrer, who asked, “How was it for you?” He said, “I went confused, and I am still confused, but at a somewhat higher level”. In a sense, perhaps that is a minimum requirement for us, but it will be immensely helpful to have your wisdom and application on these issues.

You will all, for one reason or another, be familiar with the rules of engagement. This will be webcast, so it is on the record. Members of the Committee should declare their interest, if it is relevant to the specific issue. We will send you a transcript for any corrections of a factual nature. We are very much in the market for any continuing dialogue as to thoughts, afterthoughts and points either that we may wish to develop—not least because of the exigencies of time—or that you may want to offer to us.

If you are happy to start on that basis, we will kick straight off. I will ask the first question of John Kerr, but others can, of course, participate. It is about Article 50. Can you explain how you anticipate that it will operate once the UK Government trigger it, and what are the implications of the



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statement by the Prime Minister that she will not trigger it by the end of 2016?

That spills on to the question about the implications—referred to in the report that we published earlier this year, which I have already mentioned—of the challenge of completing negotiations within two years, and/or whether you need to extend that, and the length of the withdrawal process. What was the purpose of the two-year deadline under Article 50? Is extension of the formal negotiations beyond two years feasible? Is it likely? What I am feeling after is a sense of your take on the pattern of the negotiations, based on what has appeared in the treaty, what the Prime Minister has said and your experience of other member states in reacting to what is, for all of us, a new situation.

Lord Kerr of Kinlochard: Thank you for asking me. It is the first time for 15 years that I have been on this side of the table, rather than an interrogator. It has been very unpleasant to come back—

The Chairman: We will make it as painless as we can.

Lord Kerr of Kinlochard: This is the pen that wrote Article 50, but do not expect me to tell you how I anticipate that it will work. I do not have the faintest idea. There are no precedents. Anything could happen.

The Committee's report in July was absolutely right in drawing attention to Clause 2 of Article 50 and the framework. It is a legal obligation on the Article 50 negotiators at least to have seen and to take account of the framework for the future relationship between the exiting state and the residual European Union, in addition to a discussion about divorce.

The discussion about the divorce will be nasty and brutish—all money negotiations are—but short. Two years is ample time for a discussion about the budget, acquired rights, pensions, properties and institutions—where the European Medicines Agency, the European Banking Authority and the other institutions that are based in this country will go. It is the assumption in Brussels that that can all be disposed of well ahead of the 2019 European Parliament election, because it would be tidy not to be electing British MEPs in 2019.

If you look at it purely in terms of the Article 50 negotiation, strictly speaking, that is perfectly reasonable—nasty, brutish, but quite short. Money negotiations are horrible. Negotiations about sites of institutions are horrible. It will be very unpleasant, but it will not take for ever. However, in my view, the framework negotiation is a much more interesting and complex negotiation. They are legally obliged to have the framework in front of them as they conclude the divorce. Nobody knows what that means. Do not ask me what it means. Presumably, the framework is, as a minimum, principles that will define how close the relationship is between the UK that has left and the EU. Will it be, sector by sector, a commitment to consult, a commitment to inform, a commitment to co-ordinate or no commitment at all—a complete divorce?



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I can think of some areas where all parties—the UK and all the others—will be anxious to see a rather close relationship. In the area of security—internal security, counterterrorism, anti-drugs, Prüm, the European arrest warrant and intelligence—you can see that both sides are likely to want the UK to be in the anteroom, quite close to the Council, and the UK's views to be sought and taken into account. I hope that that would be the UK's view, too, and that it would want that.

If you take foreign policy—including sanctions, international security, development aid and emergency aid—the same is probably true of most of that area. If you take research and the universities, it is certainly true that the British research sector would very much hope to be extremely close. That is probably the case on the other side as well, although as we do so well out of European research programmes there might be divided counsels on the EU side. It is possible that on the environment, climate change, energy policy and energy interconnection of networks there would also be a common interest in keeping close, so the principles that you derived applying to those areas might be quite binding. It is possible that there are other areas I have not thought of, such as the co-ordination of international economic policy positions in the Bretton Woods institutions and UN agencies.

There is another category where our EU partners will be extremely interested to know what the future policy of the British Government is. I refer to areas such as state aid and competition policy, consumer protection, the right of establishment—remember that free movement of persons applies not just to physical persons but to legal persons—health and safety at work and labour laws.

If you spend time talking to, say, the French left, you discover that it believes that the future policies of the British Government will be along the lines that Professor Minford or Mr Gove recommended, that Mr Hannan recommends or that our in-house Hayek, Lord Lawson of Blaby, recommended last week in the *Times*—that we are heading for another big bout of deregulation and that we want not different subsidies replacing an EU subsidy regime, but an end to subsidies for agriculture and manufacturing. We would go back to a very light touch in the City, reduce workers' rights in order to get labour costs down and have lower taxes. That is quite widely believed on the continent to be what we mean when we say that we want to take back control. We want to do the full Singapore, and to be a libertarian, hard-driving, totally free-market Hong Kong offshore.

If that were our position, we could expect the trade negotiation to go much worse than if our position were the one that I would personally expect, a position closer to the kind of attitudes that Mrs May expressed in her speech on the steps of No. 10; but it would be highly desirable that the UK should make clear to our continental friends before the three negotiations are complete what we are going to do when we take back control—where we are going. If we were going for the full Singapore, the



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trade regime that we could expect to negotiate would be much harsher than if we were going for elements of co-operation and greater consistency with present practice.

What I am really saying is that this is a three-ring circus. Your report was completely correct to point to the importance of the framework negotiation. It has to cover all the areas that I have just mentioned. The third is trade, which will take much longer. Trade is not the most difficult; the most difficult is the first one, which will be nasty, brutish and short. In my view, the second one—the framework negotiation—is much the most important. Being clear about where the framework is going is crucial to success in the third one, the trade negotiation.

Do I think all that can be done in two years? I do not know. The first bit can. Trade certainly cannot. The second bit possibly can. Do I think that it is impossible to extend the two years? No. It is assumed now that we will come under negotiating pressure as the two-year deadline comes to an end. I do not see that. It seems to me that everybody comes under pressure. You need unanimity if you are agreeing on a treaty. You need unanimity to extend the period in which you try to agree on a treaty. It is the same either way around.

When we invented Article 50 in the convention, the idea of the two years was a reassurance to sceptics that you were not tied to your oar for ever. If you want to get out with no agreement with the EU, if you want just to abrogate the treaty and repeal the Act, you can. That is fine. However, nobody in his senses is arguing that that is what we should do. It would not be in the interests of our continental friends any more than it would be in ours. It seems to me that the idea that the time pressure is on us is a false idea. Of course, it would depend on where you were going. The atmosphere would be affected by what you revealed in the framework negotiation about what the future policies of the UK Government would be.

The Chairman: Thank you, John. That is very helpful and comprehensive. Given the exigencies of time, I will not unpack it further. I might ask Derrick Wyatt to come in a bit; first, on what you might call the legal complexities. I do not mean for a moment to suggest that you in any way minimised those, but is it possible that in this business of sorting out acquired rights, which I am probably a little less agitated about than I was in July, you would find some kinds of formulae that enabled you to say, “If not resolved, these will be the principles under which it will be resolved”, or that there would be a safeguard clause or whatever to deal with any overlooked case? That is just to try to get a handle on whether or not there is any qualification, from Derrick’s side, to the general scene that John has painted. Secondly, perhaps he could give his take on the business of negotiating the framework agreement. Is there anything you want to add, Derrick? Maybe you do not.

Professor Derrick Wyatt: Yes. I agree that the two-year period is likely to be enough for the withdrawal agreement, but it may well not be enough for the future trade relations agreement.



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I would like to link this with the implications of the Prime Minister's statement that she will not trigger Article 50 before the end of 2016. One implication is that the UK has a time period within which to engage in bilateral contacts with the Governments of member states. These are not negotiations, but they are talks about negotiations. One of the Government's aims might be to influence friendly national Governments—of course, all the national Governments in the EU are friendly, but I mean those friendly to particular points—and to persuade them to take a particular line as regards the negotiating mandate for the Commission and the line that the national Governments will take vis-à-vis the monitoring of the Commission negotiations, via a Council committee.

That period, which, hopefully, will also be a period of tempers cooling a little, will be one in which the UK can talk to national Governments about the likely need for an extension of the two-year period, in order to accommodate the future trade relations agreement. I note that on 27 June Taoiseach Enda Kenny was already talking about a short extension of the two-year period.

Would the other member states be amenable to that extension, which, I emphasise, will probably be necessary for the future trade agreement? I am still betting that it is likely that there will be an extension of the period. I agree with what Lord Kerr has just said. I doubt that the Government want to take a Minford track of simply disarming in international trade against the world and saying, "Come one, come all. We do not care if we do not have access to other markets". That is hardly a sellable proposition to the public or to British business. That will not be the way it will go. The UK will want an ambitious and comprehensive free trade agreement.

It will not suit us suddenly to have to bounce into WTO terms. Will it suit Germany? Will it really suit France? The dislocation to trade would be considerable, in motor cars, in agricultural products and in services, which would particularly hurt the UK. In addition, there will be the attraction of the UK continuing to pay its £8 billion net contribution to the EU. When we stop doing that, rearrangements of a significant kind will have to be made.

For all those reasons, I still incline to say that an extension is likely. I am aware that some commentators have argued that we might have an interim trading regime. I cannot rule that out or say that it is a bad thing. My only doubt about it is whether one would end up taking as long to negotiate the interim trade regime as one would take continuing with the main exercise. I am not sure about that.

The Chairman: Or, reading your mind, even finding that the interim arrangement collapsed into the permanent arrangement because it was difficult enough to achieve in the first place.

Professor Derrick Wyatt: Indeed.

The Chairman: I will ask Lord Jay to come in. Jill, if you have a thought at the end, you can add it.



- Q2 **Lord Jay of Ewelme:** This follows very much from what has just been said. It is really a question for John Kerr, following what he said. It seems to me that the arguments on both the EU side and the UK side for a withdrawal within two years of invoking Article 50—by spring 2019, let us say—are quite strong, both because of the EU elections and because of the forthcoming UK elections. I wonder whether you can envisage an outcome in which we leave formally within two years of invoking Article 50 with enough certainty about the final arrangements for bilateral trade negotiations with third countries to take place, but none the less with quite a lot of detailed work still to be done on the relations between the UK and the EU on trade matters. Is that a way of squaring the rather difficult circle of a political need to get out by 2019 and the complexity of the trade negotiations?

The Chairman: Could you make your point, Lord Liddle?

- Q3 **Lord Liddle:** Will freedom of movement, which is obviously the most politically sensitive thing, be dealt with as part of the withdrawal agreement or as part of the trade agreement? Which bit do you think that the future arrangements for freedom of movement will come into?

The Chairman: Jill, do you want to come in on that first?

Ms Jill Barrett: As I understand Article 50 and the situation, there could be at least five categories of negotiations to be carried out. One is the withdrawal agreement. Another is the framework on future relations. Then, as Professor Wyatt has just said, there is the possibility that we would need a transitional agreement to tide us over until we had the detailed agreement on future relations with the EU. Then we would have the agreement or sets of agreements on future relations with the EU with all the details in them. Finally, we would need to sort out all our agreements with third states and international organisations.

The Chairman: May I interpose on that? Some people have asked about having to divvy up the existing tariff-free quotas. Would that have to be sorted out even before we could contemplate rejoining the WTO, for example?

Ms Jill Barrett: Article 50 itself refers only to the first two categories of things to be agreed: the withdrawal agreement and the framework for future relations. The point of that is that, although you could exit after two years without detailed agreements on future relations, you need a framework. To me, that is something different from the detailed treaties. The framework may not even be legally binding; it is an outline. It could be a political agreement. You need to know what the framework is going to be because that could affect what you put in the withdrawal agreement, for the sort of reason that you have just suggested.

The Chairman: Would you be comfortable with a situation where there was a framework agreement in place of the nature that you have described, which, as you said, might not even be legally binding? This is an area where, frankly, the Committee does not have expertise, with



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regard to the World Trade Organisation, for example. If you have not done a deal that is enshrined in a treaty, are you at risk of counter-litigation from affected or aggrieved parties under WTO terms when you are no longer within the Union?

Ms Jill Barrett: Yes; certainly, if we do not have a transitional agreement on our future trade relations, that is a problem. As I see it, Article 50 does not assume that it will be possible to have the future trade relations agreement in place in all the detail that is needed within the two years. It may only be the framework.

Lord Kerr of Kinlochard: What Lord Jay described is a perfectly plausible outcome: withdrawal would be not an event but a process, and it might happen over a considerable period. It is also perfectly plausible to envisage a complete withdrawal agreement, but that the dates of things phasing out would be different sector by sector.

I think you need the framework agreement before you finish the Article 50 discussion. The paradigm case is the point I made about research. The link between the budget and whether UK research institutions and universities will still have access to Horizon 2020 and its successors is pretty obvious. If we have stopped contributing to the budget, the odds are that we will not be getting very much out of it. You need to be clear as to what sort of research partnership you can build going forward. Am I right in thinking that there will be a common interest in trying to do that before you do the nasty, brutish and short discussion about the budget?

I cannot answer Lord Liddle's question. Free movement of persons, legal or physical, is a framework issue; I think it is part of the framework discussion. As he said, it appears that there is a very clear political link—at least in UK minds—to the trade discussion. I do not know what the answer is. Possibly the answer is the European Council. I have the strong impression that Mrs May will end up looking across all three baskets. Perhaps one should look at it like that, ~~—as a three-basket negotiation, rather than a three-ring circus. As with like~~ the CSCE 40 years ago, ~~T~~the European Council will be in charge. The Commission may say, "No, no, no". The treaty says that, under Article 50, the Commission is negotiating with us, and of course it will be, on what I have referred to as narrow Article 50—on the budget and that sort of thing. On a lot of other things—including, for example, foreign policy and security, internal and international—it is clear that the Commission will not be the negotiator. The negotiator will come from the Council of Ministers. Mr Tusk will be running that, whatever the Commission says.

The Commission may tell us that we are not allowed to talk to anybody until we trigger Article 50 and that then we can talk only to it. That can be ignored and will be ignored by all parties. The outcome could well be all three baskets coming together at a European Council meeting, with the free movement of persons link to future trade arrangements being extremely clear and being negotiated at the highest level. That is a perfectly plausible outcome, too.



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The Chairman: I would like Lord Teverson to put a question, initially to Jill Barrett.

Q4 **Lord Teverson:** As Lord Kerr mentioned that part of the negotiations will be about pension institutions, I ought to declare that I am a recipient of pensions from the European Parliament.

As parliamentarians, we all know that treaties are normally negotiated under prerogative powers and that parliamentary involvement is limited to formal ratification. The process changed in 2010, under CRAG. Should we change that for the negotiations on withdrawing from the EU and our new relationship with it? What would be the rationale for giving Parliament an enhanced role?

To move things along quite rapidly, could I ask at the same time what the impediments to giving Parliament an enhanced role might be? My question is about both sides of the equation, if you like.

The Chairman: I will ask both Jill and Derrick Wyatt to deal with that. I think that Derrick had a point on the last question that was left hanging.

Ms Jill Barrett: Yes, there is a need for enhanced arrangements for parliamentary scrutiny of treaties in general, not just in relation to Brexit. That is because the CRAG 2010 reform was only a partial reform. It was led by the Government and covered the parts of the process the Government are in control of—in other words, the Government's obligation to lay the treaty before Parliament and wait, and then, if a resolution is passed opposing ratification, the Government's obligation not to ratify. However, it left a big hole in the middle, which is the parliamentary procedure and the parliamentary institutions that scrutinise treaties. That was left for Parliament to do. As far as I am aware, Parliament has not reformed its institutions in response to that.

It is a good idea to look at it anyway, but it will certainly need reform for the Brexit process. A number of arguments could be made for that. One, of course, is the fact that this is the most substantial constitutional upheaval for a long time. Given that there is no written constitution to set out how the national consensus should be built and given that we have parliamentary sovereignty, Parliament has the responsibility to ensure that that happens.

Another important point is that the various treaties needed for the UK's withdrawal will require a parliamentary procedure before ratification. The withdrawal agreement may need an Act of Parliament under Section 2 of the European Union Act 2011, if it amends the Treaty on European Union or the Treaty on the Functioning of the European Union. There will need to be that amendment of those EU treaties, but I do not know whether it will go into the withdrawal agreement or be done in some other way. If it goes into the withdrawal agreement, an Act of Parliament will be needed to empower the Government to ratify that agreement. If that is not the case, CRAG will apply.



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I suppose that CRAG will also apply to the various other treaties on future relations with the EU and to all the treaties that we will need to review and deal with in relation to third states and international organisations. There will be much greater need for parliamentary scrutiny of treaties and, therefore, enhanced procedures, resources and institutions to do that.

Professor Derrick Wyatt: I have a brief response to Lord Jay's point about leaving with the trade agreement unsettled, and to the Chairman's point about WTO complications. It would be an extraordinarily bad outcome to leave with the trade agreement unsettled. The most likely thing would be to trade on WTO terms, with the UK adopting the same tariff-bound levels currently applied as part of the common external tariff against third countries.

To give a very relevant example, that would mean a 10% tariff on UK cars going to Europe. Last year, the UK made more passenger cars than France, but we exported 80%-plus of them, and most of those went to Europe. We really would not want a solution where we had a 10% tariff, particularly if profit margins for the manufacturers are about 5%, as I read the other day they are for some of our inwardly investing foreign car manufacturers. Equally, the German Government and the German car industry would not be relaxed about that. It is true that the EU is a much bigger market for us than we are for the EU, but the EU is made up of countries. For some countries, such as Ireland, UK trade is of enormous importance. For other countries, UK trade is of significant importance and the parts of the economy affected by UK trade have political clout.

I will leave that, if I may, and deal with the case for constitutional change. I very strongly believe that there is a strong case for constitutional change as regards scrutiny of the Brexit negotiations. Under the current arrangements, Parliament is presented with a *fait accompli*—a done deal. All that Parliament can do is accept or reject the package, or object to it, in the case of the House of Lords. There is no opportunity for Parliament to review and seek to influence the process by which the treaty is negotiated, including the consultation of interested parties. There is no opportunity to review and seek to influence the content of the treaty in successive stages of negotiation. That is the case no matter how important the content of the treaty for UK vital national interests.

The case for increased parliamentary scrutiny is that the status quo does not provide scrutiny commensurate with the importance of that which would be scrutinised hardly at all under the status quo. When I say "important", what do I mean? I mean important for individual rights, important for the economic and political interests of the population and important for the governmental interest of the devolved Administrations and other public authorities, including Gibraltar and the Channel Islands. For example, the withdrawal agreement will deal with the rights of 4 million EU nationals, some living in the UK and some UK nationals living in other member states. I would argue that it is just not good enough for such rights to be determined behind closed doors and then presented to



the UK Parliament on a take it or leave it basis. That would not be open government and it would not be accountable government.

The same can be said for the future relations treaty. It will be impossible to dissociate trade access rights from key questions of domestic policy. Deciding the former—the trade access rights—can have the effect of foreclosing elements of the latter. Trade access rights agreed can foreclose domestic policy issues. For example, some aspects of the single market have at times proved politically problematic in the UK. Whether the UK would seek to replicate each and every one of those aspects is, of course, a matter of public interest. It should be a matter of debate in this Parliament.

One example was raised recently by the Prime Minister. She referred to the power of government to block unwelcome foreign takeover bids. That is not possible vis-à-vis EU companies within the EU framework, but that option could be reserved in a future agreement. The point is not that I am arguing for that, but that this is a matter of legitimate public interest and public debate, and public debate it should have. Choices made via the negotiating process could have long-term effects for the management of the UK economy, yet the idea is that this would appear, done and dusted, for the UK Parliament to say, “We object to it”, or, “We reject it”.

There is a further, final consideration at this point, from my point of view. In my previous evidence, I suggested to the Committee that cross-party consensus should be sought when negotiating the Brexit treaties. That is easier said than done, but if cross-party consensus is lacking, there is a risk that the UK’s negotiating position could be undermined even before the treaties are concluded, or that the viability of the Brexit treaties could be called into question when there is a change of government. Whatever the difficulties, cross-party consensus is an ideal and should be sought. It is more likely to be achieved in the context of comprehensive parliamentary scrutiny of the negotiating process than in a possibly heated take it or leave it debate on the final text and in debate on the enabling legislation that will be needed to give effect to that final text.

Q5 The Chairman: Thank you. I think it is quite important to articulate the argument as it develops, so I will briefly summarise what I hear from the two contributions to date. Jill gave a series of what one might call legal arguments, on matters of process. I do not mean that in any sense disreputably. She spoke about things that would need to be done and why they would have to be done by Parliament. Derrick went on to the wider constitutional questions about engaging people’s rights. Those are two mutually complementary approaches; I just wanted to be clear on that.

Can I reflect for a moment on Derrick’s comments? One point that has been put to me is that we all have an interest in this—perhaps we should all declare an interest in it—because at the moment we are all citizens of the European Union and, presumably, a withdrawal agreement will strip us of our citizenship. You might say that that is a purely fictional



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consideration, but it might be of some interest to some people. Is that not the sort of thing that you have in mind, at least, when you say that this should be confronted by a parliamentary process?

Ms Jill Barrett: Yes.

Professor Derrick Wyatt: Absolutely.

The Chairman: John, do you want to add something?

Lord Kerr of Kinlochard: I am a bit torn about this. I used to be a Sir Humphrey, as you know. It used to be wonderful in the Foreign Office; you could negotiate treaties and there was very little parliamentary scrutiny of them and I liked that very much.

The answer is that there are treaties and treaties. This is not the Montreux Convention or the Antarctic Treaty. We are talking about something that, as you have just said, will affect almost every area of public life in this country. How we come out will affect how the world sees us and it will show how we see ourselves in the world. Vast areas of domestic policy will be affected, and policy choices possibly foreclosed—as Professor Wyatt would say—by this negotiation. Therefore, it follows that this is a treaty where there absolutely needs to be very full parliamentary scrutiny.

Nobody has answered Lord Teverson's point about impediments. I was a Sir Humphrey. There is absolutely no doubt that the chief impediment will be Her Majesty's Government. They will move seamlessly from saying, "I am sorry. We cannot tell you what our position is, because we do not yet have a position"—the unripe time defence, very popular in Whitehall—to national security, "I am sorry. We cannot tell you what our position is because we are now in a negotiation. We cannot give our hand away". The chief impediment will be Her Majesty's Government.

The Chairman: May I gloss on that? We are so much enjoying the way you tell it. The third stage is presumably when they come back and say, "It is now too late to alter anything because it is a done deal". That is just to complete the triplet.

Lord Kerr of Kinlochard: The Government will be in some difficulty, because we are talking about such an unusual set of treaties. The European Parliament will have access to all the negotiating documents. In the TTIP context, after a long battle, it secured a promise from the Commission that it will be shown everything, at every stage. It will be quite difficult for the Government to say, "I am sorry. We cannot tell you anything about what is going on. It would destroy our negotiating hand", if Mr Farage—if he bothers to pop across—can drop in at the European Parliament building and read all the documents. This Parliament will be able to argue quite forcefully that it is entitled to know as much about the negotiation as the European Parliament knows.

The Chairman: We are under considerable time constraints, but I note briefly that that is exactly consistent and consonant with the argument



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that you developed in your paper, Derrick. Within this, there is an equality of arms issue about the European Parliament vis-à-vis the Commission, as one party, and ourselves vis-à-vis HMG, on the other hand.

Professor Derrick Wyatt: Perhaps I might add one point about the importance of the treaties. There is no doubt of the paramount special importance of the Brexit treaties. Apropos what Lord Kerr just said, trade agreements have moved on. They used to be mainly about tariffs, but now they are relatively little about tariffs. They are about non-tariff barriers and harmonisation of regulatory standards. They reach deep into the domestic policy-making sphere. That is why TTIP went right up the agenda. Judicial settlement of disputes became and still is a very hot issue with regard to TTIP and its acceptability. The arrangements for arbitration were fundamentally changed because of the groundswell of popular opinion in some member states against it. My only reservation is that I think there is a strong argument to be made for the scrutiny of all international trade agreements that affect domestic decision-making.

The Chairman: We will now have to talk in telegraph, if you will forgive us. I invite Lord Liddle and Lord Green to come in on this point.

Lord Liddle: My point was about the European Parliament. It has just been covered.

The Chairman: That is resolved. Lord Green?

Q6 **Lord Green of Hurstpierpoint:** It is just to clarify a point. What Lord Kerr was saying has the ring of truth. It is inconceivable that the Government would do a complete negotiation and present the finished package to Parliament, for all sorts of reasons. Nevertheless, there is a difference at the end of the day between keeping Parliament informed as the negotiations proceed, and seeking parliamentary approval for specific mandates on particular negotiating positions in advance of the negotiation of those parts of the deal. Presumably, you are saying that we should reasonably expect the former, rather than the latter. To move to parliamentary pre-approval of individual negotiating stances is impractical and would raise significant constitutional issues.

The Chairman: John, do you want to say anything about that?

Lord Kerr of Kinlochard: The presumption is correct in my case, but I was a Sir Humphrey. I argue that the aid to transparency that this House can provide in scrutinising what the Government are doing, and in assessing the views from across the country on what they should be doing, is of the essence in an exercise that is going so deep into so many areas of national life.

I stop short of mandating—maybe because I was a Sir Humphrey. It seems to me that one needs to be able to promise the Government that one can keep confidential particular kinds of confidential information. The Government should have no respectable argument against transparency,



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provided there is a confidentiality let-out, which will not apply to very many areas of the negotiation. It might apply to the budgetary bit.

The Chairman: Because of time and because both our other witnesses want to engage, I suggest that Lord Selkirk's question about the devolved Administrations has been swept up, in a sense. If I remember correctly, John said something about the importance of engaging with them. I will take a nod as including them in our concerns. James, do you want to gloss on that briefly? I will then ask Baroness Prashar to come in on her point, as it fits quite well with our immediate discussion.

Q7 **Lord Selkirk of Douglas:** May I sum up the question in a few brief words? Will consultation with the devolved Administrations be an obligation, a courtesy or both?

The Chairman: Can we get in Baroness Prashar's question as well?

Q8 **Baroness Prashar:** My question is about what you think the principal objectives of the parliamentary scrutiny of the negotiation should be. What would you warn us against?

The Chairman: Jill, you look as if you would like to start on those.

Ms Jill Barrett: Yes. I heard the Secretary of State for Exiting the EU say yesterday that his aims were to make sure that the Government "take the time" necessary "to get it right" and "to build a national consensus" for the terms of exit. It seems to me that those are quite good objectives for parliamentary scrutiny as well, not only to hold the Government to account for doing that, but to help to ensure that the Government get it right and build national consensus.

To do that, it is important that the scrutiny should start at the pre-signature stage. The CRAG statutory procedures will not be enough for that because, as has been mentioned already, they come in when the treaty is already negotiated and signed and it is too late to change it. The existing EU scrutiny procedures also tend to be too late, because they operate on documents that have been initiated by institutions of the EU as proposals. Here the UK Government are a negotiating party, so they have the ability to initiate proposals. Therefore, Parliament ought to be engaged at the stage of the Government drawing up their negotiating plan. Of course, the problem is that the Government cannot give away all their negotiating strategy and bottom lines, but they could certainly disclose their negotiating plan, as they have already done for some negotiations, such as the Paris agreement on climate change.

The Chairman: To save time, are you in a position to give us a considered note on some other examples of that by correspondence?

Ms Jill Barrett: I can certainly try.

The Chairman: It would be helpful to have it.



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Professor Derrick Wyatt: I will try to answer both questions at once. First, what should scrutiny do? It is important to address what it should not do. It should not seek to micromanage the negotiations in a way that would deprive Government of room for manoeuvre. This may sound paradoxical, but an overarching objective of scrutiny of the Brexit negotiations should be achievement of a successful outcome to the negotiations, including an ambitious and comprehensive free trade agreement.

Scrutiny should increase transparency and accountability to the nation, through accountability to Parliament. It should have a procedural aspect and a substantive aspect. The procedural aspect is: who are the Government talking to? Are they consulting the right people? Are they consulting them in the right way? Are they keeping lobbyists in the right place? Scrutiny should give a public voice to those seeking to be heard by the Government in the negotiations—businesses, trade unions, the devolved Administrations, Gibraltar and the Channel Islands.

On the point about the devolved Administrations, it is for a Committee scrutinising the negotiations to say to Government, “What have you said to the devolved Administrations? What are you learning from them?”, and to say to the devolved Administrations, “Have you been listened to? What do you want to say about the interests of your Administrations and your parts of the world as regards these negotiations?”

Scrutiny should also be substantive. It should offer fact-based, constructive criticism of the Government’s conduct of the negotiations and invite the Government to think outside the box and to test their internal advice. Indeed, scrutiny should itself test the Government’s internal advice.

Scrutiny should remind the Government that the referendum result has placed limits on their negotiating position. It should influence the negotiations in the way that reliable information and high-quality policy analysis will always influence a wise and prudent negotiator.

I come to the earlier point about whether or not there should be ongoing scrutiny of positions that the Government are about to take. I refer to the current practice at the European Parliament and the Commission. The Commission undertakes, and, as far as I know, fulfils the undertaking, to let the European Parliament know what it is proposing and to give that information to the European Parliament in good time for the Parliament to come back to the Commission and for the Commission to act upon that comeback, should the Commission decide that it is appropriate. That is a kind of scrutiny reserve principle, and it is in paragraph 24 of the 2010 framework agreement between the Commission and the European Parliament.

I have a final point about what scrutiny should aim to do. If Parliament thinks that some outcomes could prejudice Parliament’s ultimate



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acceptance of the Brexit agreements, it should warn the Government about that.

Lord Kerr of Kinlochard: Can I add a footnote on the devolved Administrations? I agree with Professor Wyatt's point. It will be the case that we take back control of areas where in the United Kingdom policy-making is devolved. Take agriculture, for example. Presumably, the control that will be taken back in those areas will be exercised by the devolved Administrations and Parliaments. It follows that the positions that the Government will adopt in negotiations concerning those areas ought to be developed in close collaboration with the devolved Administrations, and that the devolved Parliaments should have as much say in the scrutiny of those areas as we have. It seems to me that there is a strong case for saying that it is a responsibility of the House of Lords to ensure that scrutiny involving the devolved Administrations is effective.

Q9 **The Chairman:** This is what I am going to do; if it is helpful, I can signal it to the Committee in a moment. We have a number of points that all bear on the question, which we have started to explore, of the nuts and bolts of how we should do scrutiny and the areas and ground rules for that. That will be very helpful. I propose that we put our last four questions as a clutch, so that you can comment on them or take them away, reflect and drop us a line, if you wish.

Before we do that, I would like to take up a point that Derrick Wyatt made. In the paper that he sent us, he expressed it at some length. We do not need to go into the area now, but it is about the question of parliamentary diplomacy. Presumably, if we picked up evidence from third parties—I am not talking about the negotiating position of their Government or the Commission—through our links with counterpart Committees through COSAC, for example, or bilaterally, or through friendship groups or otherwise, it would be an obligation on us and a useful convenience for government for that to be fed into government as part of this process. I may be misinstructing myself, but my impression is that in the past, sometimes HMG have been rather blind to the interests or concerns of others in presenting their own position. Is that a fair formulation? I do not want to open up that whole chapter, but you might give us a couple of sentences on it.

Professor Derrick Wyatt: My comment was about parliamentary diplomacy, by which we mean a kind of external face to scrutiny. The House of Lords might take evidence from the German motor car industry, for example, on the impact of coming to the end of the two-year period without a trade agreement. That is information that would be interesting to our Government, but it would be very interesting to talk to the German Parliament about it. My conviction is that there is a huge common interest in a non-recriminatory, close economic relationship with Europe, based on a comprehensive and ambitious free trade agreement. That may become lost, at times, when negotiations at intergovernmental level become heated. I am sorry if I have not dealt directly with your point, Lord Chairman.



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The Chairman: That is fine. The sensible way to proceed is for us to bulk these questions. If there is anything you wish to pick out and respond to, please do so. If there is anything you wish to reflect on and come back to us, please do so. I will ask them seriatim. Lord Whitty will put his question. Then I will put a question to the Committee. Then there are two others to tidy up. The Irish Ambassador has now joined us, I am pleased to see. He will follow on in a few minutes. We have a feast this afternoon.

- Q10 **Lord Whitty:** We may have already mentioned one role for the Lords specifically. We have been talking about parliamentary scrutiny. We need to decide ourselves whether there is a particular role for the House of Lords, given its history in this scrutiny. Lord Kerr has just mentioned the relationship with the devolved Administrations. Are there other areas where our guests think that the House of Lords specifically is in a good position to pursue aspects of scrutiny? The slightly more antagonistic atmosphere of the House of Commons and the fact that, at the end of the day, the House of Commons has a veto on the treaty—at least theoretically, under CRAG—means that we are in a different relationship with the Government. Do you have any tips on what we specifically should do?

Professor Derrick Wyatt: I would respond to that by emphasising constructive, critical assessment of the line of the Government's negotiation, not trying to box the Government into a corner, but trying to say, "Let's test these propositions. Let's check your policy arithmetic, and let's take evidence of our own to put next to your evidence. At the end of the day, we are both trying to do the same thing, which is to get the best possible outcome for the UK in these negotiations". That may be a slightly different flavour from the way in which things are handled in the House of Commons.

- Q11 **The Chairman:** It is always difficult to manage these things, and we are breaking them down gently into categories. Before you respond, Jill, you might want to think about your experience of the CRAG Act. The Commons has in effect—although never exercised—the power of veto. The Lords has a more advisory role. Does that affect things?

That is one consideration, under that tier. Can I ask two specific questions? There will be round-ups in a moment. The first is partly for Professor Wyatt. Is it your recommendation that, leading up to the parliamentary scrutiny of the negotiations, they should be set out in a formal resolution, akin to, but not identical to, the existing scrutiny reserve resolution? Do we need a new version of that? What are the principles?

There is a second question, which may be more for Jill's side of the house. Should we have a formal code of practice for the conduct of the negotiations, supplementing the existing Osmotherly rules on relations with parliamentary Committees? Do we need to bind the Government through a scrutiny reserve focused specifically on Brexit and to have better ground rules for the conduct of the negotiations, as two ways of



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influencing that? Jill may want to start with that. Perhaps Derrick could follow.

Ms Jill Barrett: I certainly see a need for the terms of reference or the scrutiny reserve resolution to be more explicit about what this Committee requires from the Government. At the moment, the scrutiny reserve applies only to proposals made by European institutions that the Government then place before Parliament. It would need to be made explicit that the Committee wants to be involved at an earlier stage and wants to know government plans for negotiations before they get to the point of having a draft treaty to look at.

I am not familiar with the Osmotherly rules, so I had better pass on that part of the question.

The Chairman: I am not sure that many of us are. If you have thoughts on that subsequently—

Ms Jill Barrett: In my role on CRAG, it seemed to me that there has always been greater interest in the Lords in the principle of treaty scrutiny. The Commons' preference seemed to be to leave it to the subject Select Committees to deal with only where there was a policy priority. Therefore, a number of treaties may slip through the net.

With the Brexit process, there will be an awful lot of treaties to deal with going forward. If the Lords now feel that it is right to establish a treaty scrutiny Committee to look at things immediately they come in, perhaps with a view to co-ordinating and making sure that they are looked at by the right Committee and that the Government are bound to a delay, where an inquiry is considered to be necessary—in other words, that the treaties are sifted and prioritised into ones that need an inquiry and ones that do not—that could be a very valuable role.

Professor Derrick Wyatt: The scrutiny reserve will not work for some aspects of the negotiations. It will not work for the bilaterals—the government-to-government contacts. To say it will not work is too defensive; it is unlikely to work. That is partly because confidentiality issues are so pressing. If the UK Government talk to another EU Government about how they should be prodding the Commission in the negotiations, that Government will not thank the UK Government for indicating what has transpired between the two.

The Chairman: Traditionally, those are always conversations that have not taken place.

Professor Derrick Wyatt: Absolutely. I am sure that the House and this Committee would accept that. I would advocate that information and negotiating positions be put before the House's Committee in advance, with appropriate guarantees of confidentiality, and that there be a principle of reserve, similar to that set out in paragraph 24 of the 2010 framework agreement between the European Parliament and the Commission.



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As regards ground rules, the main point I would make is that a code of practice is probably premature. A code of practice is something that is more likely profitably to evolve from the practice than to be dreamed up now, with the practice evolving from it. A few key principles might be recorded—principles that acknowledge the balance between scrutiny and the Executive's needs.

Parliamentary scrutiny is a new departure as regards negotiations. It might be said that it is essential because of the importance of the negotiations to the future economic and political well-being of the UK, but while it is designed to increase transparency and accountability, it is also to support the Government in their conduct of negotiations in the national interest. Scrutiny would have due regard to confidentiality and the need for flexibility on the part of the Government in their dealings with the EU and its member states. Statements of principle of that ilk, which would signal both the determination of the House to fulfil its constitutional function in scrutinising negotiations and its commitment to the negotiating process and respect for the Executive's role in that, could be salutary right at the beginning.

The Chairman: We would like to reflect on that, if we may. It leaves two ends hanging; I am grateful to colleagues for their interest. You are aware of our interest in the practical and procedural challenges of effective parliamentary engagement. That is extending on the issue of confidentiality. There is also the question of precedents. Derrick talked about the Commission/European Parliament nexus. There are issues such as the Convention on the Future of Europe, which I am sure John will be able to help us with, and others you may reflect on. Could we leave it that you might respond to those in due course by correspondence?

This afternoon, in particular, I would feel extremely derelict in my duty if I did not thank you on behalf of the Committee. These are extremely complex issues. You have brought very good analysis and good sense to them and have given us a lot to reflect on with regard to how we can, in effect, take on our responsibilities. I thank you, and I remind you that we will send you a transcript of what we have done. We would like to keep this as a living dialogue. If you have further thoughts or contributions, particularly as things develop, we will be more than pleased to hear from you again, but we would like to record our appreciation. Thank you very much.

No one needs to withdraw from the gallery, but I suggest to the Committee that we recess informally for a couple of minutes, if people want a breather or at least to move from their seat, before we resume with the ambassador.