

Select Committee on the European Union

Internal Market Sub-Committee

Corrected oral evidence: Brexit: competition

Thursday 12 October 2017

10.10 am

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Members present: Lord Whitty (The Chairman); Lord Aberdare; Baroness Donaghy; Lord German; Lord Liddle; Baroness McGregor-Smith; Baroness Noakes; Baroness Randerson; Lord Rees of Ludlow.

Evidence Session No. 2

Heard in Public

Questions 20 - 37

Witnesses

I: Professor Richard Whish QC, King's College London; Professor Eyad Maher Dabbah, Queen Mary University of London; Professor Pinar Akman, University of Leeds; Professor Sir John Vickers, Oxford University.

II: Ms Isabel Taylor, Slaughter and May; Mr Alan Davis, Pinsent Masons; Mr George Peretz QC, Monckton Chambers.

Examination of witnesses

Professor Richard Whish, Professor Eyad Maher Dabbah, Professor Pinar Akman and Professor Sir John Vickers.

Q20 **The Chairman:** Thank you for waiting. Welcome, everybody. I remind everyone that this session is in public. You will receive a transcript after the session that you can correct, within reason. In this inquiry we are addressing the overall approach to competition, the mergers policy and state aid policy. It might be useful, given that you are such eminent authorities in this area, if you each kicked off with a short statement about your assessment of the situation and where you think there might be opportunities and pitfalls, pressures for change and pressure for continuity. Perhaps, Sir John, you could kick off.

Professor Sir John Vickers: My involvement with these issues in the past year or so has been as chair of the Brexit Competition Law Working Group. But many years ago, from 2000 to 2005, I was director-general of fair trading, and in that five-year period I saw the bedding-down of the competition law and policy framework that we now have in the UK. I suppose the two headline points from the work done by the working group were, first, that competition law and policy in the UK in the last decade or two has got us to a sensible place. It coheres with competition law and policy internationally, especially in the rest of the EU. We think it is very important to maintain the aspects that are working pretty well. Secondly, Brexit gives rise to some formidable practical challenges, partly of transition but also with regard to how, in the future steady state, so to speak, the system will work. We are not recommending radical changes to the regime. Our recommendations are directed mainly at how to keep a reasonably well-working system continuing to function effectively.

Professor Pinar Akman: I am a Professor of Law specialising in competition law at the University of Leeds. I have been following developments as an academic observer. As Sir John has said, the UK competition regime is quite well settled and has been working very well in line with the regime in the EU, and the CMA is a very respectable authority among its international peers. As the National Audit Office has said, it could do more by way of enforcement, but it is still a very respectable authority. As we will discuss later today, currently the domestic competition rules are also fully aligned with European competition rules. This leads to consistency, certainty and a reduction in the costs of compliance for business, which is admirable. With Brexit there will be potential issues with the loss of that consistency. In the transitional period there might be issues relating to certainty, and in future there is a danger that the UK, whose influence has been very positive on the development of EU competition law, might lose that influential position. So there will be many formidable issues to be debated and decided in this process.

Professor Richard Whish: I agree with what has been said so far in terms of the substantive law of the UK. Broadly speaking, it mirrors EU competition law anyway; when Articles 101 and 102 fall away in the merger regulation, I think we have perfectly adequate provisions in place, so I do not think anything significant has to happen substantively. There are certainly transitional matters that will get quite complicated, some of which get very detailed indeed. I would distinguish between what happens to mergers and what happens to investigations for breaches of Articles 101 and 102. Mergers are a one-off transaction and transitionally they will pass through the system relatively quickly, but you have anti-trust investigations that go on for a very long period into the future and may relate to conduct quite a long way into the past, so the transition problems may be greater there.

We will cease to be a member of the European Competition Network, within which we co-operate very closely with the EU and its member states. Presumably that system will fall away, and it is going to be quite

complicated to put in place the future international co-operation arrangements that we will need to ensure that the system continues to function adequately. Lastly, Brexit and competition policy will have significant implications for the resources of the CMA because it is going to have a lot more work to do post-Brexit than pre-Brexit. Some of the new cases that come into the new jurisdiction will be very big cases indeed, so we cannot underestimate the resource issues that lie ahead.

Professor Eyad Maher Dabbah: I certainly agree with my colleagues about the various issues that they have raised. From my own perspective, Brexit brings both opportunities and challenges for the UK in the field of competition law, particularly for the CMA. One challenge is how to manage the relationship between UK and EU competition law. That is a major question, but from my own perspective I do not see it as the biggest of challenges. Rather, looking at things in a wider context in terms of trade and industrial policy, I wonder to what extent the commitment to effective competition enforcement will remain if the overall broader context will be that of trade policy as well as building an industrial strategy in that respect.

In terms of the opportunities, what has been achieved in the UK is admirable. I have always been a supporter of the harmony that has been created and the convergence between the UK and EU systems. Nonetheless, this kind of harmony and convergence meant constraints for the enforcement of the UK competition law. A number of those constraints will fall away as Brexit takes effect, so there is a real opportunity for the UK Competition and Markets Authority to engage in greater and more effective competition enforcement, not just necessarily competition advocacy.

- Q21 **The Chairman:** Thank you. You have largely answered the question relating to the principles, because you all seem to be in favour of the existing European principles of competition policy as they are reflected within the UK, and of there being a degree of continuity. Do you see any of those principles being under challenge post-Brexit, or do you think the issues are really of procedure co-ordination across Europe, workload and resources, rather than of the principles being in any way queried or changed?

Professor Richard Whish: In terms of the substantive rules, Article 101 prevents anti-competitive agreements, as you know, and Chapter 1 of the Competition Act does the same. The rules that we have are good rules and I see no reason for them to change. There is an interesting issue around Article 102 and the use of dominance. Some people would suggest that EU law is perhaps a little too strict in certain circumstances. As a result of Brexit, if the UK so wishes, its law can diverge over a period of time from the standards of EU law. My own feeling is that there is no need for a radical divergence at this stage—broadly speaking, we are in a good position—but the jurisprudence can develop over the years ahead, and there will be no constraints on the UK going in a different direction if it so wishes. But the broad principles that we have are fine.

Professor Pinar Akman: There is of course the single market imperative, which has been the driving force behind some of the decisions of the European Court of Justice. With the UK coming out of the EU, perhaps in the area of vertical restraints in particular, the UK will not need to follow case law that has been built upon the imperative of building a united single market. So we may see that in the area of vertical restraints the UK courts will choose to go down a different route. Again, as Professor Whish said, in the area of dominance we see, for example, that the US takes a distinctively different approach from that of the EU in this area. It is possible that the UK may choose to follow the route taken by the US in that area when the linkage with the EU is broken.

Professor Sir John Vickers: I agree with everything that has been said in response to the question. It is important to stress, though, that these are evolutionary changes, not revolutionary ones. It would be a great mistake for anyone to take the great uncertainty and upheaval that Brexit will undoubtedly present as a reason to throw up in the air the fundamental principles and institutional framework for competition policy. I personally would want to resist such moves and keep those fundamentals in place. As has been said, though, there will be scope for the evolution of the interpretation of the law into the future, which I see as a healthy thing.

Professor Eyad Maher Dabbah: A number of principles are in place that must continue to be in place, whether transparency, good administration and governance. But above all, in the present context, it must be the key principle of continuity and a smooth transition from the pre- to post-March 2019 period. Overall, I simply believe that the CMA in particular and the UK as a whole ought to look towards three things. First, the protection of the process of competition leading to consumer benefit. Secondly, a healthy and vibrant environment for businesses to flourish, which is a key point from my own perspective and thirdly, to make a contribution to the growth and development of the UK economy. That very much reflects the slogan that the CMA has been putting forward, which is to enforce competition law in a way that makes markets work well for consumers, businesses and the economy, which is, of course, different from some time ago, when the slogan used to be "making markets work well for consumers" only.

Q22 **Baroness Donaghy:** The Competition and Markets Authority has told us that after Brexit the UK should continue to take into account EU competition law. As Sir John has just said, the Brexit Competition Law Working Group concluded pretty well the same thing. However, as you all mentioned, there are quite differing political views, which might attempt to smash this consensus. Could you give some examples of how, "taking into account" would work in practice? How would you defend that consensus? What would be the advantages and disadvantages of that approach?

Professor Richard Whish: Within Articles 101 and 102 there are some quite complicated conceptual issues. For example, what is a concerted

practice between competitors? This is quite a fluid concept. There is jurisprudence in the Court of Justice that goes back to 1973—the so-called dyestuffs case. Over the years, there have been many subsequent judgments that have developed our understanding of the concept. It is still developing to this day. It would be rather bizarre if the United Kingdom were now to say that we do not want to have access to this resource. It is a very rich jurisprudence, so why should one not, at the very least, have regard to it or take it into account? There are different linguistic formulations that one could use, but it seems to me that it would be rather foolish to abandon all that history. I could discuss others, but this is one concept that will go on developing in the future. For example, in the competition law community nowadays, a lot of people are worried about artificial intelligence and the extent to which it might be possible to manipulate markets, not through human actions but through digital interactions. I have no doubt that over the years ahead the Court of Justice in Luxembourg will be asked, inevitably at some point, to consider this phenomenon and how it works within the concept of a concerted practice. If that court has considered this case in the circumstances of the particular set of facts, would we want to deprive ourselves of taking into account or having regard to that jurisprudence? It seems to me that it would be a waste, quite frankly.

Baroness Noakes: Does that mean that, for ever and a day, you will be having regard to the evolving European jurisprudence? There are other legal systems where we would just as equally want to look. Why would we want to have special regard for the development of jurisprudence in Europe?

Professor Richard Whish: One point is that, apart from anything, our markets are deeply integrated with the markets of the other member states. I am sure that a lot of British businesses are transacting substantial business across the EU. For that reason alone, it seems that retaining continuity and consistency with case law is a desirable idea. I would add that having regard to, or taking into account, EU jurisprudence does not mean being bound by it. It is always possible on the facts of a particular case to go in a different direction.

Professor Sir John Vickers: Another very important point to my mind is that we are talking about the anti-trust provisions—the Chapter I, Chapter II, Articles 101 and 102—where the wording of our statute mirrors the wording of the English version of the EU treaty provision. Whereas the situation in relation to the Sherman Act in the US is very different. The language, the history, the inherited case law—all these fundamental issues having been sorted out—that is in common.

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On the merger side, this question does not arise in the same way. Our statute uses the American concept of substantial lessening of competition rather than the EU one. On the working group, this question, which focuses on Section 60 of the Act, was the one that we spent most time on. In some sense it was hardest. Our view, as Professor Whish has

summarised it, was that we cannot carry on post-Brexit with Section 60 as now because then the meaning of the UK statute would be governed by judges from an entirely different court. Starting from scratch has all the drawbacks that we have described, whereas “have regard” allows for departures, but they have to be reasoned departures. That seems common sense. There is scope to evolve and change but with reasons being given. The reasons given by Professor Akman having to do with the single market imperative are perfectly good and simple reasons that would take no more than a paragraph or two to set out in a particular case.

Professor Pinar Akman: This is a very complex and technical legal issue linked to policy implications. I admire the objective of staying connected to European competition law, not least because the UK rules are based on those but also because so much of UK’s trade with the EU. There are also some potential complications of having a duty that would be worded along the lines that the court or the CMA “must have regard” to European case law. In particular, I have in mind those situations that will occur post-Brexit, as has been mentioned, maybe 20 years from now where we will be obliging the UK courts and the CMA to have regard to a body of case law that has developed without, for example, a UK judge on that court and without the UK courts having had the opportunity to ask that court about the interpretation of EU law in any given context. Any such duty has to be worded very carefully, and we should not straitjacket the UK courts, which will consume their resources as well in trying to stay in line or look up to a body of case law that they have had no impact in developing. The other point that I want to make is that, whatever duty we might include, we would have to distinguish between the Court of Justice case law and the European Commission decisions. Even as we currently have it, Section 60 stipulates that the courts in the UK and the CMA must only have regard to Commission decisions. Post-Brexit it is unimaginable to keep that part of the duty as it is with regard to the Commission decisions. Whatever duty there might be, we would have to distinguish between any duty or any connection to the Court of Justice case law and any duty to have regard to the Commission decisions.

The Chairman: Yes, except that the issue “have regard to” arises in relation to ECJ decisions as well. Indeed, it has been challenged by the former Chief Justice. With regard to the ECJ, the Government have already said that any decision of the ECJ up until the point of departure—which may be a movable feast with transition periods—will continue to be binding. In relation to the Commission decisions, that is not so clear, but the same form of wording is apparently being used. It is the degree to which you take things into account, or “have regard to”. You are right to distinguish between Commission decisions and ECJ decisions. In essence, the same problem arises.

Professor Eyad Maher Dabbah: I agree. It ought to be recognised that there is no perfect solution as far as Section 60 is concerned. One could easily have a debate on whether in relation to “having regard to” it should be about “may have regard” as opposed to “should have regard”

because, frankly, in relation to “should have regard” one should realise that there are no doubt advantages, in terms of what has been said earlier, but there are also drawbacks

This would certainly facilitate the continuity that we have spoken about. That can be good for legal certainty and of course for predictability, but in terms of drawbacks there is in the longer term the consequence that UK and EU competition law could be tied together infinitely. There could be a challenge here, or a hurdle, in the shape of UK competition law developing autonomously as an independent regime, because obviously post-Brexit we are going to be in a completely different situation where the two systems are not linked together.

One ought to take into account the stance of the judiciary. The question is to what extent judges will feel comfortable about being told they “must have regard”, taking into account the litigation and contention that could arise about parties claiming that appropriate or sufficient regard was or was not given. A balancing exercise therefore needs to be conducted and a decision will follow from that.

Professor Richard Whish: I would like to add one thing that may be helpful. In the report of the Brexit working group, when we were discussing the possibility of a “have regard to” provision, in paragraph 2.9 we specifically said we do not think the duty to have regard should be an onerous one. We do not want a situation where a judge in a court has to spend a huge amount of time explaining his or her reason for departure. There is some case law in administrative law that suggests that in certain circumstances there has to be a full explanation for the departure. We would not want it to be as onerous as that. We said that we hope that parliamentary counsel might be able to come up a form of words or, alternatively, that there could be a Statement to Parliament by the Secretary of State to this effect.

The Chairman: The public and political dimension might be the opposite: that the judge has had regard to but does not depart, which then gets represented in the *Daily Mail* as kowtowing to the Eurocrats.

Q23 **Baroness Noakes:** We could talk about that all morning, I suspect. Moving on to block exemptions, I would like to explore how the current UK block exemptions should continue to be treated under UK law and what the future is. We see how you could carry them on day one, but how should they be treated in future? Is there scope for a UK variant of block exemptions?

Professor Richard Whish: Again, we dealt with block exemptions in our report. To pick up your question, one can distinguish existing block exemptions from future ones. As far as existing exemptions are concerned, they are immensely helpful to business—for example, there is a block exemption for vertical agreements. I would think that hundreds of thousands of agreements are consistent with that block exemption, and that is a great comfort zone for people. So we propose that those block exemptions be maintained in force. How one does that technically is a

matter to be decided, but we would propose that they be maintained in force. They are all time-limited. Each block exemption has an expiry date. So we then come to your next point: what about future block exemptions? The UK already has capacity under the Competition Act to adopt its own block exemptions, so our proposal would be that future block exemptions of the EU do not automatically have the force of law in the UK, but that the UK—the adoption of a block exemption is a matter for the Secretary of State—would look at initiatives in Brussels and decide whether to adopt that legislation, or indeed whether to adopt it with adaptations for the purposes of UK market.

Baroness Noakes: Would divergence between the UK and the EU be problematic?

Professor Richard Whish: Professor Akman might be the one to answer that. She has pointed out that we do not necessarily wish to pursue single-market principles, and certainly the verticals regime and the technology transfer are very much motivated by that.

Professor Pinar Akman: Indeed. The block exemption regulations are very useful for ensuring certainty for businesses. If we consider the fact that many of these vertical contracts between suppliers, distributors and so on might be taking place in situations where the distributor might be in, let us say, Germany, while the manufacturer might be in the UK, it is advisable for the agreement to be subject to the same competition rules in both the UK and the EU. So if the UK does not align its position with the block exemption regulations as they exist in the EU in future, there is a possibility that the very same contract will be subject to different competition rules.

I should point out that the block exemption regulations apply only to the agreements that are on balance beneficial, so there is not really any interest in spending resources, both of the enforcers and of the parties, on proving that these agreements are indeed beneficial. In the EU, for example, with the vertical restraints block exemption regulation, if the contract fits within the block exemption regulation then it is deemed to be on balance pro-competitive, so there is no need to debate further. Obviously the benefit of the block exemption can be withdrawn but, provided that that is not the case, there is no need to debate further whether it is a good agreement for competition or a bad one. Therefore, for such essentially beneficial agreements it would be highly advisable to have a regime that would cover any cross-border agreements and apply the same rules to that agreement.

When I mentioned the single market, my reference was more to the case law of the Court of Justice, but the block exemption regulation is based on modern and sound economic principles. It will be beneficial for the UK to continue monitoring development in the EU after the time of exit, but there might also be circumstances in which the UK might want to apply different rules because, for example, the size of the UK market is different from the size of the European market. The current block exemptions generally have a market-share rule in them, but obviously

the EU is a much larger market, so 30% of the EU market is not going to be equivalent to 30% of the UK market. So there may be instances where the UK might want to depart from the EU rules, but consistency would be beneficial because these are overall beneficial agreements.

Professor Sir John Vickers: I will add one small footnote: a related issue concerns Schedule 3 to the Competition Act, which exempts certain categories of agreement from the UK rules. It seems quite likely that Brexit will affect the logic of some of those. For example, one relates to agricultural products in the common agricultural policy and, depending on how the trade negotiations go, one imagines that that would fall away.

Professor Richard Whish: One point about block exemptions is that we would be autonomous and, should we wish to do so, we could be influenced at the very least by an EU block exemption. There are examples of other jurisdictions modelling their block exemptions on EU ones. I am thinking specifically of international maritime transport, where the EU has a block exemption and the laws respectively of Malaysia, Hong Kong and Singapore are closely modelled on Articles 101 and 102. Each of them has a block exemption system and each of their block exemptions in that sector is highly influenced by the EU model.

Baroness Noakes: That would be one of the things that would influence the degree to which we would want to keep alignment.

Professor Eyad Maher Dabbah: I feel that the issue of the block exemption is only a temporary one because the current block exemptions have an expiry date. I believe there is overall consensus that future block exemptions on the EU side should not be applicable to the UK market because that simply does not make sense. However, there may be an argument in favour of not even necessarily having to wait for the expiry date of the current block exemptions but rather to agree that they should be applicable up to a certain time. It all depends on the CMA's preparation, stance and point of view and whether it is willing and planning to adopt its own block exemption regime. Personally, I can report—in my capacity not as an academic but as a practitioner—a very positive experience with the EU block exemptions, and I believe that this is a view shared by many people who have used them in practice. As Professor Whish said, globally there has been a trend of following the EU block exemptions. As far as the internal market is concerned, when you look at the block exemptions it is not really the centre of gravity; it is more in the guidelines, decisions and practice, and therefore there can comfortably be modelling in the UK on the basis of the EU block exemptions.

The Chairman: Excuse my ignorance on this, but what, broadly, is the average time for an expiry date, and am I right in saying that normally they get reviewed?

Professor Richard Whish: Normally they last for about 15 years. I think that the current block exemption for vertical agreements was 15 years. The first block exemptions were in 1967, and there has been a

renewal progressively over that period of time and increasing sophistication each time there is a renewal.

The Chairman: Thank you. Can we move on to mergers and acquisitions?

Q24 **Baroness McGregor-Smith:** Does Brexit provide an opportunity for the UK to review the national interest criteria on mergers and acquisitions? We are interested in your views on that and what you see as the advantages and disadvantages.

Professor Sir John Vickers: There is little, if any, direct connection between Brexit and the substance of UK merger law. The law that we have is in slightly different language from EU merger law, but seeks to do exactly the same thing, which is to stop mergers that lessen competition in a substantial way. I would say that there is a global consensus on this—it is transatlantic as well. The national interest is best served by a merger policy that is strongly focused on competition. In other words, when a merger comes along, the public policy question is, is it likely to lessen competition or not? In the great majority of cases, that should be the determinative question. We have exceptions. One is for national security where clearly one could imagine a merger that does not lessen competition but would mean acquisition of a state-controlled company by a hostile power or whatever. Clearly, there needs to be a safeguard. We also have media plurality—another very sensible thing—in that sector. And the financial stability leg was added about a decade ago, in the crisis. In the European merger regulation you see almost mirror images of that so that it meshes in a perfectly sensible way. For all those reasons, I see no direct implications of Brexit for the substance of the law. The challenge is how to make merger policy work effectively in the transition and into the future regime. If the list of non-competition issues were extended, there would be risks of going back to the pre-existing system 20-plus years ago, which was much more politicised. The nature of debate, including in the press and otherwise, brought in all sorts of other considerations in an, I believe, overall unsatisfactory way. When I was at the OFT, I saw the tail end of that. It was a very good thing to get the merger policy on the institutional basis that we now have, depoliticised and with the independent authority subject to the courts.

Baroness McGregor-Smith: Can you see any examples of where, over the last decade things have not worked in this area? Is there anything that we can learn from the last decade about what we could improve going forward post Brexit?

Professor Sir John Vickers: It is easy to say with hindsight, but there was the waiver of the Lloyds-HBOS acquisition. At the time, a number of people questioned it. With hindsight, that was probably negative for financial stability and those were the grounds on which the special exemption from the normal competition rules were given. However, it is easier to say that in hindsight than in the very difficult circumstances at the time.

The Chairman: There is, of course, in parallel with this a heightened emphasis on industrial strategy, with varying degrees of emphasis. If the merger or a potential acquisition were to threaten or advance that industrial strategy, do you see pressure on the competition authority changing back to the pre-1960 or 1990 Competition Act provisions? There is the additional question that industrial strategy is not just a UK one; it is also the ambition of the devolved Administrations to intervene to maintain places and avoid market dominance within their own areas. Do you see a potential conflict between the industrial strategy and competition policy?

Professor Richard Whish: The competition authority will apply the law that it is asked to apply. The law at the moment asks the competition authority whether the merger will substantially lessen competition. Unless and until there is a change in the law, that is what it will continue to do. Of course, the CMA is an independent authority.

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The Chairman: It can define the markets and the market could be Scotland.

Professor Richard Whish: The relevant market in any particular case is something that is determined by reference to well-known criteria. It is objectively ascertained.

Baroness McGregor-Smith: What about foreign ownership of any national critical infrastructure? Can you ever see a case where that might be looked at?

Professor Sir John Vickers: Where national security is concerned, yes, but the law already provides for that.

Baroness McGregor-Smith: Should there be any change to that? Should there be any amendment to the way that it is done at the moment?

Professor Pinar Akman: I think that the law provides the scope for adding these interests, as and, when relevant by decision of the Secretary the State, as was done in the case of Lloyds/HBOS. There is already the potential for that in the Act. I do not see any particular reason why Brexit might make that a more pressing situation. At least where we are now there is no reason as far as I am concerned to think that we should expand that list of non-competition interests to take into account when deciding whether a merger or acquisition should go ahead. The law already provides the scope to do that, should it be necessary in a given situation.

Professor Eyad Maher Dabbah: The question that was asked is as direct and as wide in its form as it is possible to be. Is there an opportunity to review the public interest grounds and public interest cases? Certainly, there is that opportunity, but should it be taken? That is the key question. Probably not, and probably not now at least. There is

no doubt that if you look at the Enterprise Act, as Sir John said, the grounds are sufficiently wide to cater for the kind of cases that ought to be considered as public interest cases. To widen them to go towards grounds such as essential infrastructure or something similar, there can be disadvantages as far as competition policy is concerned. Other than marginalisation, it can be politicisation of the whole decision-making process. There are certainly advantages, but they are all outside the field of competition law. The Government have already set a destination that they want to create a truly global Britain that can easily fit within that. There is already a paper on building our industrial strategy that can further that, but as far as competition policy is concerned, there is a risk and Sir John was right to refer to Lloyds/HBOS. It ought to be remembered that at that time the OFT did object to that merger on competition grounds. The OFT was overruled in rather dramatic circumstances, and we all know the outcome of that and how the healthy bank has been pulled down by a rather ill one.

The Chairman: Good point. Can we move on?

Q25 **Baroness Randerson:** My question relates to an issue that Professor Whish referred to in his introduction. In relation to transition issues, what is your view on who should have jurisdiction over UK aspects on EU anti-trust cases or merger reviews that are still live at the point of the UK's exit from the EU? Who should enforce UK aspects of anti-trust or merger control directions or commitments that are made prior to Brexit that require ongoing monitoring or review?

Professor Richard Whish: I would distinguish merger cases from anti-trust cases. There is a big difference. The merger is a single event. The parties are proposing to merge and at some stage they will notify the merger and then there are time limits within which any investigation must take place.

Obviously there will be mergers in contemplation prior to Brexit in relation to which the decision will not be taken until after Brexit. It seems to me, as a starting principle, that in so far as the decision is post-Brexit it should be for the CMA to consider what effects the merger is likely to have on the UK market because that is no longer of interest to the European Commission. So in principle the CMA should look into those issues. In so far as remedies of some kind are needed, it would be for the CMA to determine those remedies and then implement them.

Anti-trust investigations are different, because one could imagine a cartel in existence now that started eight years ago which violates Article 101. In fairness to the European Commission, it has an interest in investigating current breaches of competition law. These investigations can take a long time and it would not be unusual for an investigation now not to be concluded until, say, 2020. That is perfectly possible. My understanding is that if the Commission is already conducting an investigation, that excludes the competence of the United Kingdom, and it would be for the Commission to bring that case to fruition.

There are lots of variables in all of this and we examine some of them in our report. But it would be for the CMA to carry out fresh investigations.

The Chairman: That rather overlaps with Lord German's question.

Q26 **Lord German:** Shall I pursue that now? In the working group report, in paragraphs 5.5 to 5.7 concerning the issue with anti-trust cases where it is the UK affecting the EU and the EU affecting the UK—it could be in either direction—you propose that the Government agree transitional arrangements with the EU as a priority. What sort of transitional arrangements are you talking about and how long would they need to be for to cover the extended time period you have just told us about?

Professor Richard Whish: We are particularly concerned with the problem of information-sharing. If there were parallel investigations going on in the UK and the EU, with the CMA looking into the UK interests and the EU looking into the EU interests, you would have two authorities examining, each in possession of information that could be highly useful to the other. One then gets into the real complexity of the extent to which under relevant law I can transfer information to you and you can transfer information to me. This is complicated stuff and not to be underestimated.

Lord German: It is the complication that we have to address. Perhaps you could elaborate, in as simplified a way as possible, on what the complications might be, especially when the question also relates to breaches of behaviour which have occurred pre-Brexit that are beginning to be investigated post-Brexit. When we have left the European Union, the EU will still have an interest, will it not? We will have an interest in the EU as well.

Professor Richard Whish: A lot of these things come down to future co-operation arrangements. This is complicated stuff. In an ideal world, if it would be possible to achieve it, I would like to see in these kinds of cases the possibility for the CMA to transmit information to the Commission and vice versa, but currently there are formidable legal obstacles to this happening. Clearly, in so far as any change to hard law is necessary, I seriously doubt whether it would be possible to effect changes to hard law between now and whatever the relevant date is going to be. It might be possible to put in place less formal co-operation arrangements but of course one then gets into the political question of who is allowed to agree what with whom at this stage.

Lord German: Could you just describe hard law to me? I want to be absolutely clear what you mean by hard law.

Professor Richard Whish: Hard law would be if there was a law saying to an authority, "You cannot disclose this information to a third party", one would need to change that law to make it possible to do so.

Lord Liddle: Can we talk about a practical example: the Commission's recent actions against the big platform companies—Mrs Vestager's judgment on Google and all that? Are you saying that if that case had

started after Brexit, the British and EU authorities would not have been able to work together effectively in order to nail Google, as it were?

Professor Richard Whish: There would be nothing to prevent one authority from discussing a case with another.

Lord Liddle: But you said that we could not pass information.

Professor Richard Whish: This is what I was going to come on to. One discusses cases in principle, but the actual execution of investigations is highly dependent on evidence. It is all about evidence, and there would be restrictions on one authority passing evidence obtained under its law to another authority.

Lord Liddle: Can you speculate about how serious that constraint might be in such an investigation?

Professor Richard Whish: It could be very serious indeed. Gathering information is enormously onerous. I understand the data obtained by the Commission in the Google case are absolutely vast and it takes years to analyse them all. Absent any information-exchange arrangements, the CMA would have to undertake its own investigations and obtain that information itself and then analyse it.

Lord Liddle: That would be the CMA and the EU trying to collect exactly the same information but not being able to pass it to each other?

Professor Richard Whish: That is what I am suggesting, yes.

Lord Liddle: Is that not a very big blow to the capacity of public authorities to hold these people to account?

Professor Richard Whish: Absolutely, yes, and our report makes it clear that we think that suitable, adequate co-operation arrangements will be absolutely essential. I think one of your questions asks about the existing EU co-operation agreements, which might be interesting to look at as a model for our purposes. There are five of these agreements in place at the moment with the United States, Canada, Korea, Japan and, most recently, Switzerland. The distinctive feature of the EU-Swiss co-operation agreement is that for the first time it contains provisions on the exchange of information.

The Chairman: Lord Aberdare, does that cover your question, do you think?

Lord Aberdare: I was desperately hoping I was going to be left a little bit of the supplementary; namely, what do existing agreements cover? You have just shot that one. I think I will gracefully withdraw.

Professor Sir John Vickers: May I add a couple of points? First, perhaps even sharper than Lord Liddle's example is that of an international cartel, where the case is essentially all about evidence, or 99% about evidence. So if these problems are not solved, public policy

would be greatly frustrated in that area. Secondly, not only are there implications of Brexit for how the CMA works with the other European authorities in Brussels but there are effects on how we can and cannot work with the US authorities and all the rest. The implications run very wide.

The Chairman: These examples of Korea and Switzerland and so on would need to be written in to—whatever we are calling it—a deep, comprehensive and bold free trade agreement.

Lord German: And presumably some hard law as well.

Professor Richard Whish: There is a range of possibilities. Is this something agreed with the EU in an agreement there? Separately, of course, the UK will have its own capacity to enter into agreements with other authorities but let us not underestimate how long it would take to achieve that. There are many significant competition authorities in the world today, many of which we would want to have some sort of co-operative relationship with.

Professor Eyad Maher Dabbah: If you look at the landscape globally in relation to competition law and policy, it is not necessarily always the case that authorities must be bound by a formal process in order to be able to co-operate. Many competition authorities do that on a de facto basis as extensively as they do on a formal basis. So the absence or presence of an agreement is not necessarily the key; it is about how you use the agreement and whether you have the will for co-operation. I believe there is a valid assumption, indeed a presumption, to be made here: because of the kind of relationship that the UK has with the EU as a member state, some kind of framework ought to be put in place post-Brexit.

In relation to the cases that we discussed earlier, a distinction ought to be made between live cases and future cases. Future cases should be taken up by the CMA. In respect of the live cases, first, one ought to ascertain the stance of the European Commission. It is not just about the CMA but also about the European Commission and whether it would want to continue with its own investigations that have a UK element. I feel that the situation is manageable as far as the anti-trust branch is concerned, because this is primarily only enforcement of Article 101 in relation to cartels and in relation to abuse of dominance under Article 102, so we would not be talking about many live cases at that time. In relation to merger control, that is obviously something that can be handled only through guidance. This is in the nature of merger control. The CMA and the European Commission—but the CMA in particular—ought to put in place guidance about those kinds of cases that will be caught in the transition period.

The Chairman: May we jump to Baroness Noakes's question, because it also impinges on this area, I think.

Q27 **Baroness Noakes:** This question is on changes that the CMA might need

to make for its merger review process—for example, what streamlining or harmonisation would be necessary in order to co-ordinate with other national competition authorities and the Commission?

Professor Pinar Akman: Currently, the timeframes for the EU merger control and UK merger control regimes are significantly different in terms of how they look on paper, but I should add that the European Commission has the power to 'stop the clock' in these investigations and uses that power quite regularly. In practice, the actual time spent in assessing a merger might not be so different between the two regimes.

However, in terms of co-ordination between the two regimes, it would be advisable to have a harmonised timeframe. If they were able to share information with each other at key decision stages within the life of a merger control procedure, it would help both authorities. So, in an ideal world, the timeframes would be a bit more aligned so that information sharing and co-operation between different authorities would be easier but, even if that is not possible, it might still be possible if the right framework is in place to share important information about the transaction between two authorities, even if they are working within different timeframes.

Baroness Noakes: What would need to be put in place to allow information to be shared?

Professor Pinar Akman: The EU, for example, has an agreement with the US specifically about co-operation in merger cases. It stipulates that, once a party is looking at a merger that might impact the interests of the other party, they will notify each other of the merger and identify the key stages in that decision.

Baroness Noakes: Is there a process to share confidential information?

Professor Richard Whish: There is an important point that we should make, which is that, in the cases of a merger, the merging parties all have an interest in getting the transaction cleared, so it is perfectly normal to ask the parties to waive their rights of confidentiality. That is commonplace. Nobody is going to waive rights of confidentiality where they are contesting a cartel case, so the two things are vastly different

Q28 **Baroness Randerson:** Various references have been made to agreements that the EU has made with other countries. We are obviously part of that agreement of co-operation with other countries, as a member of the EU. Do you see any major problems to us then having to recreate and replicate those agreements upon leaving the EU?

Professor Eyad Maher Dabbah: The whole issue of co-operation agreements between countries is something that I have been looking at for many years. In principle, I see no difficulty. It is a lot of hard work, there is no doubt about that. Ultimately it depends on the route that you take. If you take the formal route, it is not necessarily going to be an agreement between two competition authorities. In this case, it will be an agreement between two different jurisdictions—two different countries—

which means that there are channels that ought to be followed. In some countries, it will be about the Ministry of Justice or the Ministry of Foreign Affairs becoming involved. There is that kind of task to be fulfilled, but if you look at the standing of the UK competition authority and at the UK economy and the place that it has in the world, I find it difficult to believe that, in principle, there would be any difficulty in the CMA convincing other competition authorities to co-operate with it. As it is, that is the position.

The Chairman: Can we touch on one separate issue? Lord Rees.

Q29 **Lord Rees of Ludlow:** How might Brexit affect the balance of competition law enforcement between the CMA and private damages action? We understand that, now, EU infringement decisions can be the basis for follow-up actions in UK courts. Secondly, what impact might Brexit have on criminal law sanctions against anti-competitive behaviour?

Professor Pinar Akman: In terms of private enforcement, the UK is currently perhaps the most popular jurisdiction in Europe for these actions. It has certain rules that facilitate these actions quite well, to the extent that the damages directive adopted by the EU draws on many of the principles that apply to the UK courts and the procedures in front of the UK courts.

It is possible that after Brexit we might see that litigants are a bit less keen to bring their private actions in front of UK courts, if the rules that currently enable and facilitate these actions either change or fall away as a result of leaving the EU. It is possible that they might have fewer incentives to bring these cases in UK courts and might go, for example, to the Netherlands or Germany, which are the other two major jurisdictions for these actions.

Technically it is possible to retain the binding effect of the European Commission's final decisions regarding infringements of EU competition law. If such a provision was made, it would more or less preserve the status quo in terms of infringements of EU competition law, which would preserve the current scenario that we have in terms of private actions in the UK.

Lord Rees of Ludlow: What about criminal prosecutions?

Professor Eyad Maher Dabbah: There are a couple of points in relation to criminal prosecution. If we look at the record of the CMA, it has not been as promising or as good as one would have expected it to be. There have been a number of issues in that respect. Obviously, a legislative change was put in place recently, with the removal of the requirement of dishonesty in order to prove whether somebody is guilty of cartel behaviour.

The detachment from the EU, one could argue, should put the UK and the CMA in a position to pursue criminal investigations more than previously, because of the constraint that used to exist—indeed, still exists at this point in time—about whether you can go for a stricter approach in

relation to certain matters under Article 101 or in relation to agreements. Of course, that constraint will go away but, ultimately, it will depend on the efforts of the CMA. Criminal cases require a particular way to deal with them, but one can certainly say that it should facilitate greater criminal enforcement.

Professor Sir John Vickers: May I add one short point on that? At a general level, public enforcement and private enforcement go together. They are complements, not substitutes. I would not see Brexit tilting the balance by itself. However, to pick up an important point made by Professor Whish in his opening remarks, if the CMA is not properly resourced to do a much bigger task, that could unbalance things in a way that would be undesirable for all sorts of reasons. That is very important.

The Chairman: We are reaching the end of our time. Thank you very much for your wisdom and your words on this. However, we have got slightly below the surface, but not that far below. If there is any supplementary information that you feel you could supply us with, it would be very welcome. You have certainly kicked us off to a good start today. Thank you very much indeed.

We will move on to the next session in a moment, so I ask the other witnesses to come forward and Lord Aberdare to take over the Chair. Thank you very much.

Examination of witnesses

Ms Isabel Taylor, Mr Alan Davis and Mr George Peretz.

Q30 **The Chairman:** Good morning and welcome. I am Lord Aberdare. I am standing in for Lord Whitty for this session. Thank you very much for coming to give evidence to our “Brexit: competition” inquiry. In addition to the committee members and the Clerk beside me, we have our Specialist Adviser, Professor Erika Szyszczak, and our Legal Adviser, Alex Horne, with us. As you know, the session is public. It is being broadcast—I assume—and it will be transcribed. The focus for this session is state aid. I think you have received an outline of the sorts of questions we would like to ask you, but before we go into the questions would any of you like to make any brief introductory remarks or shall we go straight into the questions?

Mr George Peretz: I think we are prepared to go straight into the questions. I am sure you have had the opportunity to read the written evidence that Isabel and I, along with Kelyn Bacon QC, put in. That can probably stand as our opening remarks.

The Chairman: Excellent. Mr Davis, are you going to go with that strategy as well?

Mr Alan Davis: Yes, I am happy to.

Q31 **The Chairman:** Let us go straight in with a relatively broad, introductory

question. What are the implications of Brexit for the regulation and control of state aid in the UK? Will it require a domestic state aid authority, and who might fulfil that function?

Ms Isabel Taylor: I will have a go but will try to keep it quick and we can come back if you want more detail. Other things being equal, the prohibition on state aid applies to member states, so if the UK leaves the EU, it will cease to be a member state and cease to be subject to the prohibitions on state aid in the treaty. We will continue to have to consider the WTO rules on subsidies, which in some ways are conceptually quite similar, but there are at least two big differences. One of these is the scope—they really apply only to goods—and the other is the manner of enforcement, which is entirely different. The other factor to overlay would be the provisions of the withdrawal Bill, which in its current form would preserve some aspects of the state aid regime. It would preserve the prohibition and the standstill because those are directly affected provisions but it would not, absent further measures, preserve the exemption regime.

Beyond those kinds of considerations, whether the UK continues to have any form of domestic state aid control and what state aid control it has is fundamentally a matter for the UK, but obviously you would need to factor in the possible terms of any trade deal that the UK reached with the EU. Whether you need a domestic state aid authority depends on what assumptions you make about the nature of the state aid regime you might be implementing. But if we assume for present purposes that we are talking about something that works in a similar way to the EU model—of which the key factors I would pick out are that it has a discretionary exemption regime and rights of enforcement for third parties—you would need some kind of agency to enforce that. From a third-party perspective, enforcement by the Government that is subject to the rules is unlikely to be credible. The other main option would be to have a court-based system, but, where you are applying discretionary judgments about whether something should or should not be exempted, the courts do not seem the natural authorities to do that.

The obvious candidate to be the authority would be the CMA because it has the expertise in the UK on competition issues generally and the skillset is to some extent transferable to state aid. It should be recognised that the CMA does not currently have any responsibility for state aid. It does not have state aid experts. To echo the points made in the earlier session, there would be a resources implication because the CMA, even absent a state aid function, has a potential resourcing issue going forward and state aid would be a whole new bit of work for it.

The Chairman: There is presumably another potential implication in the role of the CMA being not quite so purely functional but having a political dimension as well.

Mr George Peretz: That is certainly right. State aid decisions can be of major importance politically and certainly to Ministers. One thinks, for example, of the decision taken by the Commission in relation to the

Hinkley Point project. That is plainly a very important decision. State aid decisions may also arise in relation to, for example, policies of the Scottish Government, who might decide to create a particular type of tax regime using their now-devolved tax powers, which could raise state aid issues. There clearly are certain political sensitivities about any body which happens to be based in London—although it is a UK-wide body—intervening or interfering with what would be in that situation a decision of the Scottish Parliament. State aid brings you into politically more tricky territory than competition law of the sort that you were considering earlier typically does. It is probably a difference of degree rather than kind, but there certainly is quite a large difference of degree.

The Chairman: I suspect we will come back to issues of enforcement and devolution. Mr Davis, do you have any comment to make?

Mr Alan Davis: Yes, it is a more general point from a practitioner's point of view. If you are at the coalface, advising local authorities, regional government and so on, on their ability to spend public money, having a state aid framework in place for domestic regulators is incredibly desirable, from both the legal predictability side and the legal certainty side. From the perspective of the local authorities which are spending the money, they want to make sure that they are getting value for money for the public purse. The recipients of aid also want the legal certainty that it is going to be compliant with domestic and international anti-subsidy rules—that they will not face having that clawed back or being subject to some sort of countervailing measures if they are exporting goods abroad. Having that framework in place but also a domestic regulator that would be able to provide the guidance, support, clarity and legal certainty is incredibly important.

Mr George Peretz: There is a danger in regarding state aid rules as a sort of unfortunate imposition that we have to accept as the price of a trade agreement. The state aid rules have virtues of their own, one of which, as Alan alluded to, is that they are a way of ensuring that the United Kingdom meets what are bound to be its continuing obligations in the WTO in relation to subsidies. State aid rules play an important part of our public expenditure control, particularly by local government and the devolved Administrations—central government can to some extent control its own expenditure—and can provide a mechanism, of course along with others, of controlling public expenditure and ensuring value for money. The state aid rules should not be regarded entirely as a nasty burden that we might have to bear as the price for a trade agreement.

The Chairman: That was one of the points that came through very well in your paper.

Q32 **Baroness Noakes:** You partly covered this question when you referred to the connection between any trade agreement with the EU. How important do you think that the preservation of a state aid regime in the UK will be as part of that agreement? Will it be a red line for the EU? I do not think that it has set a red line on this—or on anything at the moment—but is it likely to be essential that we have a national state aid

authority?

Ms Isabel Taylor: I think it has said that any agreement should ensure a level playing field in terms of competition and state aid. I think the EU has signalled that this is important to it; whether it is being dogmatic about the form is, perhaps, a different point. Some form of commitment on state aid is likely to be an important part of any agreement, if it is going to be a comprehensive agreement.

For those reasons, and the broader idea that the remaining member states will have to turn to their own constituencies and explain why the UK is suddenly going to be allowed to trade on different terms, there is pressure on them from that perspective. Empirically, if you look at the trade deals the EU has done, at least with other European jurisdictions in recent times, they have included provisions on state aid. Those at the comprehensive end of the spectrum have included specific requirements for an independent state aid authority. I do not think that the EU has been dogmatic beyond that about the form that it takes.

Mr Alan Davis: I would add that I would expect something that is substantively similar to the current set of rules in terms of what the concept of a subsidy might be and the nature of exemptions and so on, particularly with regard to certain sectors. There is a stricter European approach to certain sectors, such as steel, whereas support for the agricultural sector is excluded from the state aid rules, because it is funded by the central European budget.

Baroness Noakes: So it is interested in the rules. Is it also interested in the mechanism?

Mr George Peretz: We are in danger of moving on to the next question that we were sent. In terms of the precedents that there are—leaving aside the EEA model, which we will certainly talk about—if you move to a model that perhaps comes closest to the deep and comprehensive trade agreement that is currently being floated, it is perhaps the Ukraine agreement. If you look at the state aid provisions from around Article 262 onwards in the Ukraine-EU agreement, you see a requirement on Ukraine to set up a state aid authority. The state aid rules set out in the agreement are effectively taken word for word from the EU treaty.

There might be some scope for differentiating ourselves from Ukraine in that that model very much ties Ukraine down, administratively, to following the decisions and policies of the European Commission. That might be something on which the UK may want a slightly freer hand. If you look at the Ukraine-EU agreement, it does not look like a relationship of equals; it is clear who is following whom. That might not be appropriate for the UK for a variety of reasons. The United Kingdom and Ukraine obviously have very different economies, but the UK has also been faithfully applying the state aid rules for a very long time. For Ukraine, it is all entirely brand new. And, of course, Ukraine comes from a completely different economic history, which also raises all sorts of other issues. It might well be that we could get something that looks a

little less uneven than the Ukraine agreement in terms of development and application of policy.

The Chairman: We move on to Baroness Randerson's question, which I think has been slightly modified.

Q33 **Baroness Randerson:** It has already been touched on. Following on from the Ukraine example, can you give any other examples of where state aid matters have been dealt with in free trade agreements between the EU and third countries? Maybe an example where the balance of power is slightly more equal, or where the history matches slightly more. Are there any existing trade agreements that could provide a useful precedent for us? From your perspective, what would a good deal on state aid look like for the future of the EU-British trade relationship?

Mr George Peretz: Yes, we have already talked about the Ukraine arrangement, which I suspect might be the closest precedent, bearing in mind the very different history of the UK and Ukraine in terms of membership and economic development. At one end of the spectrum is the EEA arrangement, which is certainly a relationship of equals. If you look at the way that the EEA agreement is structured, the EFTA court and EFTA surveillance authority apply identical state aid rules but have co-ordinate status to the European Court of Justice and the European Commission.

The EFTA surveillance authority has tended to follow the practice of the European Commission, no doubt partly because the three EEA-EFTA states are, in two cases, very small indeed and the other case is Norway—not so small, but still nothing like the size of the United Kingdom. Inevitably, when there is that imbalance in size, the very much smaller jurisdiction will tend to follow the larger. As far as the court is concerned, though, the president of the EFTA court, Carl Baudenbacher, has made various speeches recently and is very keen to emphasise—with some justification—that the EFTA court regards itself as entirely co-equal with the European Court of Justice and does not necessarily automatically follow what it says on state aid.

That is one model. Obviously UK membership of the EEA is a much more vast question, but the possibility has certainly been floated that, at least for state aid and other purposes, the UK could “dock in” to the EEA membership. Carl Baudenbacher has floated that possibility. If that court is adopted, many of the difficulties of the domestic state aid regime vanish. It is a very elegant solution, but it requires agreement of the other EFTA states of the EU and may be politically difficult.

Looking at other types of trade agreements, you have the Canada and Singapore models, which tend to be based on the WTO anti-subsidisation rules, with a few bells and whistles on top about consultation and so on. Singapore is interesting because it extends the WTO regime to services, which are not covered generally under WTO rules or in the Canada agreement. That is no doubt because services are perhaps the key part of Singapore's economy and probably the main element of EU-Singapore

trade. Switzerland, as we set out in our paper, should be regarded with extreme caution, because the relevant agreements were negotiated a very long time ago and, apart from air transport, there are no solid commitments by the Swiss in relation to state aid. The EU has already expressed its extreme unhappiness with that position and it is slightly unclear how long Switzerland can survive in that system. It is very unlikely that the EU would extend that historical accident to us.

Those are the main models. There is a whole series of EU association agreements with, for example, Serbia, Montenegro and Albania, but they tend to follow the Ukraine model and, in any event, they are all negotiated with a view to those countries becoming members of the EU in the foreseeable future, which is plainly not our position.

I would add—we may touch on this issue later—that there is the relationship between the state aid rules and the provisions on trade defence instruments. Countervailing measures in particular are the weapon used at WTO level when countries are rather dissatisfied with the subsidies being granted by other countries having an adverse effect on their own industries. The EEA agreement is interesting, because it contains a sort of multilateral disarmament in terms of TDIs, so that both sides agree never to impose either anti-dumping duties or countervailing measures, which are the response to subsidisation concerns. So both sides agree not to impose those on each other. The Ukraine agreement does not have that feature: both sides are allowed to impose trade defence instruments on each other. Clearly, if you have a working arrangement on state aid, the likelihood of countervailing measures becomes much lower. In that situation, although it was not done in the EU-Ukraine agreement, it may well be right to agree simply never to impose on each other.

Baroness Randerson: What would a good deal look like from our perspective, then? You have touched on the fact that aspects of those various agreements would not suit us. What should we concentrate on as a country, in terms of a good deal on this?

Mr George Peretz: In terms of state aid, as I said, it will be part of a larger picture anyway. I think UK interests are in avoiding battles of the Bombardier sort. It is certainly in the UK's interests not to have trade defence instrument wars between us and the EU, given the volume of trade between us and them. It seems to me that a necessary element in any form of multilateral disarmament on that front would be an acceptance of state aid. It is also an important interest for UK industry that the EU state aid regime continues to work, and for UK businesses to have full rights to complain when the EU breaches its side of the agreement. The United Kingdom Government have been at the forefront of developing state aid policy in the EU. One thinks particularly of the airline sector: the UK has been at the forefront of concerns about subsidising national champions in that sector and has contributed to the current situation where, by and large, that sort of thing was brought to

an end. So we have an interest in state aid remaining an important element of EU policy.

Ms Isabel Taylor: If you drill down on that to the actual substance of what a state aid regime might be, my view is that there is not much to be gained from change for change's sake. Having a regime that is broadly modelled on the EU one would introduce less friction cost for business—and maybe less work for lawyers. If we are to depart, there should be a reason for that rather than just trying to invent a new regime from scratch that would ultimately impose more costs. But within that, there is a specific issue about central EU funds. The way the state aid regime works is that it controls spend by member states, broadly speaking. If EU funds are dispensed at the discretion of an EU institution, those would not be considered state resources within the scope of the state aid regime. This means that in a world where you have the EU on the one hand and the UK on the other, if the UK wants to replicate in the UK the equivalent of funding regimes which exist at the EU level, they may be considered as state resources in the UK where they would not be in the EU. It is very specific but in terms of equality of treatment, there may be an issue there.

Mr Alan Davis: The general point is that it works both ways in terms of protecting UK businesses against subsidised imports and subsidised businesses carrying out activities in the UK. The ability for them to challenge and complain, and to participate in a mechanism which allows that, is incredibly important. But, as George has mentioned, it is also the case that whatever happens the UK will have to have some sort of mechanism and set of rules to enable it to comply with its obligations under the WTO anti-subsidy regime. That has some slightly different concepts in its approach to what subsidies are. It has a slightly wider concept of that but there are also many other similarities. Another key element that would need to be addressed is the fact that the WTO regime covers only goods, not services.

The Chairman: I want to ask a couple of specific questions. In your written submission, you mention the possibility of borrowing the EEA approach. Is that a realistic option?

Mr George Peretz: As I said, that idea has been floated by Carl Baudenbacher, the president of the EFTA court. It would require a treaty to do that. It is not possible under the way in which the EFTA court and EFTA Surveillance Authority are currently set up, but you can do anything by treaty if you want to and everybody agrees. It would be at least possible, in principle, for the United Kingdom and the three EEA/EFTA states that are currently party to the EFTA court and EFTA Surveillance Authority agreements to agree among themselves that those institutions would have the role in relation to state aid, and possibly to anything else that anyone wanted to add in, which they currently exercise in relation to the three EEA states.

One would imagine that in a situation where there was a state aid issue, a UK judge would sit with the three existing EFTA court judges and deal

with it. So you would have a UK judge sitting at least some of the time on the EFTA court, although not on things that were outside the scope of the agreement as it applied to the UK. It is hard to see why in principle the EFTA states would object to that, not least because the UK would presumably have to agree to contribute to funding the EFTA court as part of the quid pro quo. That would relieve some of the financial burden on Norway, which for obvious reasons bears the bulk of the expenditure now.

The Chairman: My other question is: have any of you had any indication from the Government about what they are considering as a future UK framework for state aid?

Mr George Peretz: Publicly, very little has been said about it. It would be more accurate to say that nothing has been said about it at all—a silence that may, like the dog that did not bark in the night, tell you something. Our paper mentions, and Isabel has already mentioned, that if you look at the Explanatory Notes to the European Union (Withdrawal) Bill, it is slipped in among the list of treaty provisions which it is envisaged would continue to have direct effect and therefore, under the Bill, to apply post-Brexit. Article 108(3) is, as Isabel called it, the standstill provision: a provision that prohibits the grant of aid which has not been notified to and cleared by the Commission, and creates rights on third parties to obtain damages from the member state concerned if they do such a thing. As Isabel said, on its own it is not a sensible regime to have that and nothing else. It would clearly be a case, to use the term in the withdrawal Bill, of a “deficiency” that would need to be addressed one way or another. But it was interesting that it was put in and one can read a number of things from that.

Mr Alan Davis: I would add that the Government published their White Paper on trade policy a couple of days ago, in which they refer to the need to ensure a level playing field. As I think we may mention later on, it also refers to their intention to implement their obligations under the WTO regime relating to public procurement, for example by acceding to the Government Procurement Agreement, which is a plurilateral agreement under the WTO framework relating to government contracts.

Mr George Peretz: It also says that power will be taken to impose countervailing measures, which is the WTO-permitted response to state aid “subsidies”, to use the WTO term, granted by other countries. But nothing is said in the White Paper about how the UK intends to ensure that it complies with its WTO obligations in relation to subsidies. Again, that silence may be significant.

Baroness McGregor-Smith: Just to continue the conversation, what could the implications be for UK-EU trade if any future trade agreements do not include state aid controls? Could you give us some specific examples of what could or could not happen?

Mr Alan Davis: To an extent, we have covered that. Isabel referred to “friction” and I think the objective we have heard from the Government is

to ensure a frictionless trade relationship between the EU and the UK going forward in whatever trade agreement is reached. As we have probably discussed quite a lot, we find it difficult to envisage that a deep and comprehensive trade agreement could be achieved with the EU in the absence of an agreement on our side to implement equivalent state aid controls with respect to subsidies to UK business. In any event, the UK's hands are tied to a certain extent by the fact that it will have to comply with its obligations under the WTO anti-subsidy regime. But, theoretically, in the absence of state aid controls, we are faced with a situation where, if it is perceived by other member state Governments in the EU that UK businesses have received unlawful or illegal subsidies, those would be considered illegal subsidies under the EU rules and could be subject to countervailing measures under the WTO regime, or other actions. I suppose in those circumstances, if we are to be an export economy, that situation will create uncertainty for UK businesses and cause difficulties for those businesses in terms of getting a speedy resolution to resolving a dispute over whether or not a subsidy is unlawful. If we think about an alternative circumstance where the UK can turn around and say, "We have given a subsidy to this particular business in the UK but it has been exempted under an equivalent provision, or a similar provision to that which prevails under the EU state aid regime", we already have a strong argument to make. However, in the absence of some sort of proper state aid controls within the UK, I think that UK businesses will face some difficulties.

Baroness McGregor-Smith: Does that mean that you do not see a trade agreement being reached, if that is the case?

Mr Alan Davis: That comes back to the question of whether or not it will be a red line. I think the EU has already indicated that it probably would be if it does not achieve a level playing field.

Q34 **Lord Liddle:** This question is about our trade relations outside the EU with non-EU countries. One of the things that has come up in the last few weeks is the Bombardier affair. What does that tell us about trade relations with non-EU countries? As an observation, the United States has felt able to make these provisional rulings, as it were—it has not actually imposed them yet—which could have potentially very adverse effects on Bombardier. If you compare that with the long-running dispute between Boeing and Airbus, which has gone on for years, because the EU has lots of power, that dispute has never reached the point where the United States has dared to try to impose penalties of that nature. So does that tell us that we will be more vulnerable and does it mean that we have to have a more aggressive trade defence policy of our own outside the EU? In the Commission, where I worked in the trade department for a while, there are something like 200 or 300 people working on trade defence instruments. Does that mean we would have to do something along the same lines in Britain in order to have that countervailing power?

Mr George Peretz: I would make three points. I think we have already made the point that one argument for maintaining some form of state aid regime inside the UK is the need for us to comply with our WTO

obligations. We do not want to breach the WTO subsidisation rules and get ourselves into a situation where there is legitimate complaint from countries such as the United States. Moving slightly away from the topic of state aid and more into the topic of trade defence instruments, the second point—I think this picks up on a point already made—is that one has to be slightly careful about drawing too many conclusions from Bombardier. The United States very much prides itself on having a trade defence regime that is objective and under which trade defence instruments will be applied if the criteria are met and there is a complainant who can demonstrate sufficient injury. It does not, at least on the face of the legislation, have a type of public interest criterion that the EU has on the face of its legislation and which, according to the trade White Paper published on Monday, we will have on the face of ours. So I want us to be slightly cautious about attributing the Bombardier decision to the Trump Administration because it is, in US law, at least supposed to be an objective process. One ought to be slightly cynical about that because one knows that as one gets into the details of calculations on subsidisation and dumping measures, there is endless scope for judgment and genuine difference of opinion, and in that sort of situation it is always possible for political tweaking to go on. The third point was more related to trade defence instruments and whether we are going to take our own powers to impose countervailing measures or anti-dumping duties. The White Paper tells us that we are and an independent body will take the lead in dealing with that, although there is slight ambiguity in the White Paper about who will actually take the decisions. A key point is that it refers to the independent body making recommendations. I am not entirely clear to whom or on what basis those recommendations could be changed. Presumably, they would be political decisions.

Lord Liddle: They are political decisions in the Commission, which the Commissioner takes with the College.

Mr George Peretz: Indeed they are, although there is a wide public interest test. However, the default position—to put it that way—under the public interest test is that the trade defence instrument remedy will be imposed if the conditions are made out. There is then a possibility not to do so if there are countervailing EU interests which suggest that this measure should not be imposed. Most obviously, there may be an industry that is delighted that it is getting a lot of cheap imports, or indeed consumers may be delighted that they are getting something or other cheap. Their interests should properly be taken into account, so it is sensible to have a public interest test. I think we are moving to a slightly different field from state aid, albeit a very interesting one. To publicise my own work, I have just written a blog post on the UK trade forum blog which goes through some of these issues. I could give you the reference if you are interested.

Ms Isabel Taylor: To bring this back to state aid, the other point you could draw out from these comparisons is the difference that the different enforcement mechanisms make. Enforcement under the WTO is inevitably a state-to-state confrontation. It would not be true to say that

under the state aid rules that is never the case but it is not necessarily the case because a business that has an issue with a state aid case is free to take it up with the Commission and the member state in question. The UK Government does not necessarily have to get involved in that process, so that is the difference in terms of enforcement.

- Q35 **Lord German:** Notwithstanding the need to respond to the WTO's regulations and to be aware of what the EU's state aid framework is like, if you put some of these things aside, you might say that we will have some new freedoms in this area. What would you say are the things we might like to change and what are the things we might like to import? Perhaps you could reflect on the €200,000 de minimis limit for state aid over three consecutive years, which some people think is too low.

Mr Alan Davis: The starting point, certainly in my view, is that the current EU state aid regime has been modernised over recent years. It has become a much more honed instrument in terms of providing the legal certainty and predictability to which I referred earlier. The overall objective here is about identifying what good aid looks like in terms not just of achieving value for money for the public purse but also what the good aid can achieve in stimulating regeneration, economic development, research and development and progress in the economy. That is the sort of good aid that the EU rules have been honed to focus on and target: only permitting good aid. That is the way the rules are designed.

The aid should also be necessary and proportionate to the market failure it is designed to address and, linking in with the overall benefits of competition in the economy, whatever aid is given should not unduly restrict competition in the economy. That is our starting point and we certainly want to be able to have a regime that continues to focus on good aid, in terms of research, development, regeneration and restructuring businesses that are in difficulty but have the prospect of being remediated through some limited and timely support.

A lot of those rules at EU level are contained within the General Block Exemption Regulation, which as part of the modernisation of EU state aid law has resulted in a very effective and useful framework. Certainly, if we look at the sort of advice that we are regularly giving to local authorities, regional government and so on, in most cases that is the instrument on which we rely most. It is rarely the case that we have situations or projects that simply cannot go ahead because they do not fit within the confines of the block exemption regulation.

It is also important to bear in mind that the way the block exemption works provides a degree of rigour to how local authorities and government assess the aid: it provides a degree of objectivity in terms of how you assess whether the aid should be given or not and whether it is offering good value for money. There are a number of other concepts from the state aid rules that are very useful in practice and that have developed or evolved through the principles of state aid law over the years—the market economy investor principle, for example—establishing that there is not actually aid at all, because the state is acting in the

same way that a rational, private investor would in putting money into a company in which it is a shareholder, or the way it deals with its land banks.

That sort of principle has been extremely useful in the context, for example, of recent years of austerity, when local authorities had land banks but they did not have cash. The way they could utilise their assets under the market economy investor principle was to work with the private sector to achieve regeneration and so on in those sectors. We would definitely want to see some of those principles enshrined in any domestic state aid regime.

Lord German: You have not said anything about what you would change.

Mr Alan Davis: That is a very good point. I do have a few points on that. One that is identified by Isabel and George in the paper they submitted—they may want to pick that up further—is the extent to which the state aid regime at EU level is perceived by some to have been used as a tool for extending the boundaries of the law into other policy areas, such as the discretionary use in the tax field in relation to tax rulings, for example. I know that is a question we will come on to and George may want to pick it up.

The other point is a general observation that perhaps, certainly historically, the assessment of aid by the European institutions and courts may not have been subject to the same level of economic rigour: the economic assessment has not been as rigorous as it is, for example, under the general competition rules, when it comes to things such as merger control. If we had a domestic state aid regime that was regulated by an institution like the CMA, which is very economics focused and applies great rigour to its work, we might expect to see a more rigorous economic assessment.

We might also want to see greater participation by the beneficiaries of aid. Under the current state aid regime the beneficiaries do not really have standing, in terms of intervening in the administrative procedure before the European Commission and the European courts, because it is a state enforcement mechanism, albeit they have some rights before the national courts. We may want to improve the right of the beneficiaries of aid as well.

Mr George Peretz: I suppose there may be three principal criticisms of the state aid rules. One, which I think Alan has dealt with, is the criticism of them as preventing industrial development. My own view of that criticism is perhaps best illustrated by having had to sit and listen to a politician—I genuinely do not remember who it was, so I will not name the person—complain that EU state aid rules prevented us having a German-style industrial policy, which seems to be, logically, quite a difficult case to make.

Another criticism you hear from Secretaries of State as a daily complaint is that state aid rules can be put forward as a problem in relation to all sorts of what one might call ministerial pet projects or suggestions, along with the public procurement rules. I remember one civil servant telling me at one stage that those bits of EU laws that gave them most grief on a day-to-day level when dealing with Ministers were procurement rules and state aid rules. That is partly because with the state aid rules, if something does not fit within the block exemptions, it may be a great idea but the only way of dealing with it is to notify it to the European Commission and get it cleared. That takes time and also involves dealing with the Commission, which people do not necessarily want to do.

That is an even more serious problem once you get outside Whitehall and start talking to local government, where the difficulty is in two stages: if the advice is that they are going to have to notify this, they first have to talk to central government and get them to notify, because that is a matter for central government to do, and then, having overcome that burden, they then have to deal with Brussels, and the time that takes. We might hope to speed that up if we had a domestic regime. At least one would not have the intermediate stage to deal with. It is not a criticism of BEIS; it is just that they inevitably have an important position in the notification framework. They cannot sensibly notify something to the Commission until they are clear themselves what is going on and are satisfied that it is an appropriate thing to do. That inevitably takes time.

Ms Isabel Taylor: I am not going to repeat what others have said, other than to repeat the point about the block exemption. I think it is really important in the state aid context not to underestimate the significance of the block exemption post modernisation. This may be part of the answer to your point about the de minimis regulation: the point about whether the thresholds are too low is probably a fair one, but to the extent that cases of “good” aid go over that threshold they will in most cases be picked up by the block exemption regulation. In the last statistic I could find from the Commission, it thinks that currently 90% of aid cases—this is by number of cases, not by value—go under the block exemption now.

Q36 Baroness McGregor-Smith: Does the recent Commission ruling on Amazon and the back taxes of £250 million have any implication for the UK’s approach to state aid after Brexit?

Ms Isabel Taylor: If I am honest, I am not sure that it does. The cases are very controversial, but a lot of the controversy is about the facts of the case—what did and did not happen. The allegations in the Amazon case and the series of tax cases are all about whether extraordinary tax concessions were given to an individual company. So perhaps the first point to make is that those cases are about the individual tax affairs of a particular company. Generally speaking, if it is about a tax regime that applies generally to everybody, the state aid rules do not have very much to say about that.

I see the Amazon case as being an issue about the arrangements that were made for royalty payments between two Luxembourg companies.

The Commission is essentially saying that the level of payments that appear to have been agreed for those royalties, and signed off by the relevant tax authority, are out of line with what anyone could ever sensibly have thought was the transfer price or approvable rate for that payment. The member states and the companies concerned presumably take a different view on the facts. So you can look at it and ask, "Is that or is that not a fair price?" - some of the tax cases are going to appeal, so we may get an answer - but the controversy in these cases lies around that question: are these correctly characterised as cases of going beyond the normal boundaries of discretion, or as cases where the Commission is second-guessing the judgment of the member state? I see them as turning on their facts, rather than raising a broader policy issue.

Mr George Peretz: I agree with that. One caution is that the main public document that one can read is the Commission decision, which of course wants to present the case in a favourable way to itself. I do not think the Amazon decision is published yet but the Apple decision, taken about a year ago, is now published and one can see that there were a number of communications between the Irish Government and Apple at the time. But as a lawyer who knows about the field but has not been involved in the case, one reads them with a certain raised eyebrow as to quite what was going on. No doubt the lawyers for Apple and Ireland are busy putting those emails in an appropriate context, but one raises one's eyebrows to some extent. But I entirely agree with Isabel that those are factual cases and one should not draw too many conclusions.

There is a particular concern among the tax community, because these cases are very much about how one assesses transfer pricing and the appropriate value that one attributes to transfers within a multinational company. Tax lawyers understandably get excited about this sort of issue; it is difficult and can involve large amounts of money. But there is a concern in the tax community that the EU's approach goes a bit beyond saying that the member state concerned did not apply its own rules and veers a little into the territory of saying that the rules applied by the member state were not the right rules and it should have applied slightly different ones. The extent to which that is so, however, is deeply controversial and I would hold fire on drawing any policy conclusions from any of that until we get the general court judgment. There is just not the amount of material out there yet to take an entirely informed view on those issues.

Ms Isabel Taylor: There are some complexities around how you apply recovery in those cases as well. That gets into the interstate arrangements and around whether other states should be asking for increased tax payment, rather than the member state in question recovering it all. Those are genuinely difficult issues, but I am not sure whether they necessarily tell us anything about Brexit.

The Chairman: I am anxious to cover devolution and procurement in the very little time we have left.

Q37 **Lord German:** I am old enough to remember the regional aid system

that operated before we joined the European Union, where the UK Government made decisions about the UK. Of course we now have a completely different arrangement and the integrity of the UK's internal market may have its own implications for the state aid regime. The UK Government clearly cannot legislate in this area, under the Sewel convention, without the consent of the three other Administrations. So I wonder, first, what is the experience of Spain and Germany, which have a similar issue in how they manage their internal markets? Secondly, you say in your paper that this raises significant political and constitutional issues. How significant are they and do they need to be dealt with so that, at the point of exit, we would have a regime in the United Kingdom that works for our own internal market?

Mr George Peretz: To take first the question of how it works in Germany or Spain, I should emphasise that I am no expert in how either of those countries are run. But having had conversations with state aid lawyers from those countries, my understanding is that Germany has no internal state aid regime at all; it relies on EU state aid law to do the job that needs to be done. In Spain, as I understand it, the Spanish competition authority has the power to report and make recommendations if it feels that a regional authority has granted improper state aid, but there is no prohibition on its doing so on top of the EU state aid rules—although one imagines that if the Spanish competition authority published a report saying that the Government of Andalucia have given state aid that is contrary to those rules, something might happen as a result. But I do not know enough about the system as it works in Spain to know that.

Turning to our own position, as you rightly say, the question of what happens to EU powers that are repatriated to London—do they stop there or go back to Edinburgh, Belfast or Cardiff?—is a deeply political one on which the Scottish and Welsh Governments have made their views extremely clear. The state aid decision forms part of that overall context and one has to look at it in conjunction with other areas such as fisheries and agriculture. It has the same sets of problems, in that all those three areas share a characteristic of being important for the maintenance of the UK internal market. If the Welsh Government decide to give large amounts of money to their lamb hill-farmers in the Brecon Beacons, you will get pressure from people farming lamb in the Peak District to have equivalent subsidies and complaints about cheap lamb going across Offa's Dyke. Nobody has yet suggested, as I understand it, customs posts on Offa's Dyke, but one has to resolve this sort of situation. State aid raises similar problems over everything, not just agriculture. All three areas also have international trade implications because they can generate complaints from our trading partners, not just in the EU but elsewhere, so again something will have to be done at a UK level to avoid inadvertently breaching the UK's international obligations. There are common characteristics but, clearly, also huge political questions.

Lord German: And does it need internal UK legislation at the point of exit?

Mr George Peretz: I would have thought so because, until that is done, one would have potential problems. We wait to see what our trade deal with the EU will require; we will obviously have to implement that at the time it comes into force. In relation to our own internal market, I would have thought we want something in place pretty soon—partly to ensure compliance with our international obligations, which will apply immediately as of Brexit day.

As I said, state aid raises particular constitutional difficulties. Although, as Isabel said, a general tax rule would not create state aid issues and even a regionally selective decision, such as one by the Scottish Government to reduce a tax generally in Scotland, would not normally have any implications for state aid, the position is a little more complicated once one gets into tax regimes beginning to treat different operators differently, as tax regimes can. That is when you get into problems. Our paper mentions the problem that there was with the aggregates levy: some types of aggregate were subject to tax and others were not. A long time ago, there was also an issue with differential treatment of travel insurance, depending on who sold it, which generated litigation leading up to the case of Lunn Poly. There are references in the paper to that. So once Chancellors, or Ministers of Finance sitting in Edinburgh, start wanting to tinker a bit with the regime, you can get state aid problems. Because it is about tax, in our system that becomes constitutionally sensitive because people in this building and in equivalent buildings in Scotland—

Lord German: And of course in Wales as well.

Mr George Peretz: Yes, and in Cardiff. They feel strongly about their rights to set tax policy, so there is a bit of a constitutional issue there.

Mr Alan Davis: I think the experience of the US, although I am not an expert on what happens there, is that, as we understand it, many of the states offer very significant subsidies to attract companies to set up manufacturing facilities and so on. We have to think that the US is competing in a much larger market compared to the UK, so the negative effects of that sort of competition between Governments using subsidies, aid and tax breaks and so on would be magnified and cause larger and more significant problems than it does in a much larger internal market like the US.

Lord German: Again, do you think we need legislation on the stocks immediately?

Mr Alan Davis: That is my view, yes.

Lord Rees of Ludlow: As a follow-up to this, if a future Government wanted to use public procurements to promote industrial policy or regional policy, to what extent would their freedom to do that change after Brexit?

Mr Alan Davis: First, as matters stand EU public procurement rules obviously apply to open up the UK market to competition for public and government contracts above a certain value. Also, the reverse applies, so that UK businesses have the opportunity to access contracts and work right across the EU. It is important to bear in mind that those rules are enshrined in the Public Contracts Regulations 2015 in the UK, but those regulations also implement the relevant provisions of the GPA, the Government Procurement Agreement at WTO level. The UK Government, in their Trade White Paper, have already indicated that they want to accede as an independent member of the GPA. So whatever happens, we are likely, from an external point of view, to want to have access to what has been valued as a £1.3 trillion market, in terms of value, for UK businesses which want to be able to trade and do business across the world. That is the first point.

The second general point is very similar to the state aid discussions we have had to date: public procurement is all about getting value for money and ensuring that there is a proper, rigorous procedure which allows for public contracts to be awarded, which achieves that but also avoids such things as corruption and so on, particularly at a more regional level, where there may be favouritism to local companies and so on.

What the UK Government are likely to be able to do, or will want to do, is probably quite limited, in terms of changing the scope of public procurement rules.

Lord Rees of Ludlow: So it might depend on the Government.

Mr Alan Davis: It might depend on the Government; exactly.

Baroness McGregor-Smith: But is that logical? Much is said about public procurement and regulation and the fact that, post Brexit, it would be quite exciting for Britain to be able to do something about procurement practices we have been frustrated about within Europe. If you are saying that nothing can really change, I am a bit surprised. A lot of public procurement practices are incredibly frustrating for companies to go through, they are incredibly overregulated; is there really no opportunity to do anything to free ourselves of the burden of so much regulation?

Mr Alan Davis: My argument would be that the risk, if the UK does not implement a fairly equivalent type of regulated procurement regime in the UK and favours British businesses, is that there will be retaliation from European member states which will say, "Well, we are not prepared to open up our markets to UK businesses to bid on an equal basis with EU companies". We want to be a nation that is outwardly focused in terms of trading and doing business abroad; otherwise we will become a closed internal market, which will not be good for UK business. We have got to be outward-facing and to have access to those markets and we can only do that by equally having an open economy which allows access to our own goods. To do that, you need a proper regime that properly regulates the way public contracts are awarded.

There is a link with state aid here as well. A properly regulated contract will generally exclude the possibility that there is state aid as well, so there is a link with the discussion we had on state aid.

Ms Isabel Taylor: We should possibly distinguish here between the principles and the specifics of the regime. To the extent that the complaint about the current regime is not that it is about achieving a level playing field, in transparency and advertising, that kind of thing, but about the specifics—you must advertise by putting this kind of notice in the official journal and wait X number of days, then publish this and wait Y number of days—this is slightly beyond my expertise, but my understanding is that the GPA potentially allows a bit of flexibility to change the way the principles are achieved. There may be scope for improvement from a process point of view, but in terms of its fundamental objectives, it is perhaps not that different.

Baroness Noakes: Does that apply to the threshold as well? Would the threshold be sacrosanct?

Mr Alan Davis: Yes; there are thresholds in the GPA as well. As Isabel rightly points out, there may be some scope for modifying some of the details, but broadly the rules are going to have to be equivalent if we are to have reciprocity of access.

One example you might be thinking about is something like the stand-still period after a contract is awarded: the authority has to allow a period of time, almost like a waiting period, to allow third parties which have not succeeded in winning the contract to bring a challenge. In our experience, while that may be considered to be inconvenient, it achieves a very good balance, recognising the rights of those who are involved in the procurement procedure to be able to consider their position before the contract is actually implemented and money changes hands and so on: it allows a period of reflection and an opportunity for them to bring a legitimate challenge. So it is important from the bidders' point of view, the business community's point of view, but equally, from the authorities' point of view, at least they know where they stand: they can proceed with their procurement once that stand-still period has expired.

Baroness McGregor-Smith: I am actually quite relaxed about things like stand-still periods. I was thinking about smaller companies trying to go through the myriad legislation to bid for public sector contracts, which is nearly impossible for many of them, and the horrendous cost that comes with it. Are you saying that, because of how this system operates, we cannot open that up more and more to our SME market?

Mr Alan Davis: As George said, there is scope potentially to simplify some of the basic procedural rules to address that sort of thing.

Mr George Peretz: There is always a tension in setting out a framework of prescriptive rules in that everyone then complains that the prescriptive rules do not apply sensibly in their case. You have to look up great big volumes of law and it takes a while to read. That has its evident

disadvantages. However, if you open things up with flexible terms such as “reasonable period” and reasonable this and reasonable that, people then complain that they do not understand where that leaves them and that different authorities are behaving in different ways and they do not understand why one authority is doing one thing and another is doing something completely different. You also then get litigation because there is an argument about whether such and such is reasonable, whereas if you just have a legislative provision saying that there is a certain number of days’ wait, everyone knows where they stand. However, if you introduce a reasonable period, there are arguments about what that is. This tension can be quite difficult to resolve as regards getting the balance right between something which is too prescriptive and something which is not prescriptive enough and creates litigation on all sorts of questions. It leaves people in genuine doubt about what the appropriate rules are. There is scope for detailed discussion about the rules and I am sure that one could adjust the balance in various ways if we had a slightly freer hand. Probably any deal that we reached with the EU that involved a commitment would leave us with a bit more flexibility, but I think one would emerge with something that is pretty close to what we have.

The Chairman: Before I close the meeting, do you want to add any, preferably brief, points on areas that we have not covered, or points that you wanted to make but have not done so?

Mr George Peretz: I would make one point about the injunction one gets from Ministers these days, particularly if one is an expert qualified in EU law, to try to think of some positives. If we do end up designing our own state aid regime to some extent, I think there is scope to develop one that enables the UK to play a role in developing thought on the control of subsidisation, which is not just an EU concern but is becoming an international concern. The UK has a very distinguished record in thinking about these sorts of issues. A lot of state aid practitioners and a lot of economic thinkers are here. We have scope in the UK to make our own contribution. We have made it within the EU as one of the leading players in the EU state aid pool. Outside the EU we can perhaps do it in our own way. I referred in the paper to the fact that even the Chinese Government are apparently thinking of creating a state aid system. I am no expert on precisely what they are proposing but that illustrates that there is a global tendency to think more seriously about this. There is scope within the UK, if we have our own state aid regime, for us to play a global leadership role in that endeavour.

The Chairman: Thank you very much indeed. You have given us a great deal of food for thought. On some of the issues a lot more thought will be needed—for example, on the devolution front. We did not cover much about services, which is another area of interest. If there are issues that you have further thoughts on, or which we have not covered as fully as you might like, we would be very happy to receive further written input. Your paper was extremely helpful for preparing for this session. You will be sent a transcript shortly to correct any, I hope, minor errors. With that, we can bring the meeting to a close. Thank you very much indeed

for your input.