

# Select Committee on Exiting the European Union

## Oral evidence: The European Union (Withdrawal) Bill, HC 373

Wednesday 18 October 2017

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Members present: Hilary Benn (Chair); Mr Peter Bone; Joanna Cherry; Mr Christopher Chope; Mr Jonathan Djanogly; Richard Graham; Peter Grant; Wera Hobhouse; Stephen Kinnock; Jeremy Lefroy; Mr Pat McFadden; Craig Mackinlay; Seema Malhotra; Mr Jacob Rees-Mogg; Stephen Timms; Hywel Williams; Sammy Wilson.

Questions 110-156

### Witnesses

Andrew Bryce, Co-Chair Brexit Task Force, UK Environmental Law Association; Professor Alan Neal, University of Warwick; Steve Elliot, Chief Executive, Chemical Industries Association; Caroline Normand, Director of Policy, Which?.

### Examination of Witnesses

Andrew Bryce, Professor Alan Neal, Steve Elliot and Caroline Normand

Q110 **Chair:** Good morning. I will begin by welcoming very warmly our witnesses today to this meeting of the Exiting the EU Select Committee: Professor Alan Neal from the University of Warwick, Andrew Bryce, co-chair of the Brexit Task Force—there are quite a few of those about—from the UK Environmental Law Association, Steve Elliot, chief executive of the Chemical Industries Association, and Caroline Normand, director of policy with Which? You are all very welcome. We have a lot of ground to cover. It will not be necessary for all of you to answer all the questions that are posed by me and my colleagues. If you could keep your answers as succinct as possible so we can get through all of the ground, that would be really helpful.

My first question is there is still a debate going on about whether it is okay if we leave the European Union with no deal. It would be helpful for the Committee if you could set out, from your organisation's point of view, what you think the consequences of there being no deal will be in



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the area that you have expertise in and responsibility for.

**Caroline Normand:** I will just say something very briefly about Which?. We are the biggest consumer organisation in the UK. We have 1.5 million supporters and members, and we are wholly self-funded, apolitical and working on behalf of UK consumers. We are really keen to make sure that consumers get the best deal on leaving the EU. They spend £100 billion a month. Their interests range across everything that consumers buy, including sectors like telecoms, energy, travel, financial services and food.

What I would say is that a lot of the consumer acquis, if you like—the traditional consumer rules that we know and love—are already in UK law. This includes things around the Consumer Rights Act unfair contract terms. There is a lot that is already there. However, there is also quite a lot that is not there. There are at least two areas of issues that we would need to think about if we fell out of the EU.

There are those consumer rights that we have relied on, from roaming, to airline compensation, to the way that judicial decisions are made across the piece, which depend upon cross-border arrangements. Consumers care about these. Those would fall away without anything in place. We would need to think rapidly about what to do about them.

There are then the bits of the rules that consumers rely on that are currently enforced or carried out by EU organisations, or by the EU on behalf of the UK. Those range across the piece, from many of the safety and security issues with food, through agencies like the European Food Safety Authority, medicines, chemicals, airline safety and so on. All of these would not exist unless we got to the place where we had, because we would not have the institutions in place. They would then not work.

There are then all the discussions that we can have about customs and how trade would work at borders, but I am not going to go there.

Q111 **Chair:** Would it be correct to say that in the areas you have mentioned consumers would notice a difference that was not to their benefit?

**Caroline Normand:** Absolutely, yes. We need to be very clear: are we talking about circumstances in which we fall out with no deal, without these things and other bits put in place, or are we talking about falling out with those things put in place? They are two different scenarios. There is a lot to put in place.

**Steve Elliot:** Good morning, Chair. Good morning, everybody. Like Caroline, I will just say a quick word about my organisation and the sector it represents. The Chemical Industries Association represents UK chemical and pharmaceutical manufacturing businesses. That sector combined is the largest exporter of manufactured goods in the UK, with annual exports of around £50 billion. We are a foundation industry, so from the moment you got up this morning, when you brushed your teeth, washed your hair, the water you drank, you were using products of our



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industry. We are key for many of those much better known industries, like aerospace, life sciences and automotive. We are also our own industries' biggest customer.

To answer the specific question, 60% of all chemical exports from the UK are destined for the EU27. 75% of all chemical imports originate from the EU27. There is a commercial imperative for us around market access. In particular, if we end up in a position of no deal then the biggest issues for us will include what that means in terms of moving to a WTO regime around tariffs.

More importantly than the tariffs in isolation is what that means for all the non-tariff barriers, in terms of documents having to precede goods. We have very complex supply chains, as you may have heard from other sectors. Typically, they are crossing the channel four, five or six times from building block to finished article. That is a significant issue.

There are many issues around access to skilled people, but I will not repeat those, because you probably already know those and have heard those from other sectors. More specific to today's discussion is the need for regulatory consistency and the way that Caroline has described some of her world and issues for consumers. For us, the biggest regulatory compliance piece we have is REACH. That is probably the largest single piece of EU environmental regulation. If there is no market access, no deal, then we would either be significantly disadvantaged in the way that Caroline described, or we would have to do as Caroline has described as the alternative, and establish those mirror structures. However, that would still create hurdles for us to gain access to the marketplace that remains the most important in the world for us.

**Chair:** That is very helpful. We will explore some of those issues in more detail a little later.

**Andrew Bryce:** UKELA may not be known to all of you. It has 1,400 members, including lawyers, academics, barristers and solicitors. It is a registered charity and non-aligned. Our interest is in producing decent law that works and produces decent environmental outcomes. That is where we are coming from.

In terms of no deal, we remain principally concerned with an effective and orderly roll-over of legislation on whatever may be the exit day stipulated, and then suitable review of that legislation in due course. How that will proceed will depend largely on where we sit then in terms of other trade issues, and the degree to which we want convergence on a whole range of issues. There will be a number of cross-border issues. REACH has already been mentioned, but there will be issues around things like waste movements, for instance.

There will also be some issues around standard setting as we come out of the EU. We will have to have our own systems for standard setting. Many of those would apply across the board, in terms of an exit at some



point. We are looking for orderly roll-over with all the problems that go with that, including a multitude of statutory instruments to be addressed, and a number of policy issues to be considered as part of that process. Broadly that is our position.

**Professor Neal:** I wear a number of hats. As well as sitting in an ivory tower, I am an employment judge in the London Central office of the employment tribunal. For the last 20 years I have been the convenor of the European Association of Labour Court Judges. Somewhat differently from my colleagues, I am at the receiving end of this. The concern is the clarity of that which is left after exit day. We are very much the recipients of some of the fallout of the implementation of whatever the Bill turns out to be.

This area of employment law is no stranger to upheaval. The way in which the Bill has been set up has remarkable parallels to something that happened 40-odd years ago, when the Industrial Relations Act was repealed. If we look at section 1 of the Trade Union and Labour Relations Act, we will recall that that first of all said, in declaratory terms rather like clause 1 of this Bill, "The Act is now repealed". Subsection 2 then reintroduced a large amount of that which had gone before. Subsection 3 then did away with a controversial and much decried judicial institution, the National Industrial Relations Court.

Labour law is not a stranger to this, but of course that was in an entirely domestic context, where a political change of scene was evident. There had been an election fought, essentially, on the basis of the regulation of the labour market. You could even extend the tenuous parallel a little bit further, in that a minority administration under Prime Minister Wilson was struggling to control the troops. Let us put it that way.

In that context, I can speak in terms of the fallout and the way in which, in particular, the employment tribunals will have to deal with the employment consequences of Brexit. Most of those relate to the nature and extent of the material that will be left as a result of this Bill. In a sense, I am at the other end of the process.

- Q112 **Seema Malhotra:** Thank you very much for those opening remarks, which lead into the questions that I wanted to put to you. You have already made some comments in this direction, but I wanted to ask you about the process of converting EU law into UK law, and the approach that the EU (Withdrawal) Bill is taking to do that. It creates the new category of retained EU law. You hinted, to some extent, at concerns in your sectors about what could happen and what might need to be put in place. It sounded to me that there were concerns that cut-and-paste and transposing may leave significant gaps and concerns, and it would not all be technical changes. I was wondering if I might start with you, Andrew, to talk a bit more about the risks with REACH particularly, and then take the input from the other panellists as well.



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**Andrew Bryce:** I defer here to my CIA representative, but we have done some work on REACH. The position there is different from many, in that there is an agency, which is an EU institution, that is in charge of the process. Accordingly, when we leave we will leave that system and no longer be part of that agency. We will not have access to the system.

The position we are in is that we have to make a choice as to how we are going to deal with that in the negotiations. Is there any means of our being an associate member of REACH? EEA members, for instance, have some form of associate membership. If not, then what are we going to do about it? The options are that we have something that is effectively a shadowing of the REACH system, or we put in place our own agency and create a completely different system.

The concerns about that are that we are going to have a UK system and that most of the businesses involved in REACH are international. Therefore, they will then have to comply, potentially, with yet another regime which we are creating ourselves.

Q113 **Seema Malhotra:** Could I ask about that? What kind of timeline do you think is needed? What kind of resources are needed, and do we have those skills and capabilities?

**Andrew Bryce:** I had better defer to Steve Elliot on that, because it is a question of whether the businesses themselves consider that there is adequate talent in the country. My guess is not, because the European Chemicals Agency is a very substantial organisation. Steve might comment on that.

**Steve Elliot:** Would you like me to comment on that and then comment on your broader question?

**Seema Malhotra:** Yes, please.

**Steve Elliot:** I do not know whether it would benefit the Committee just for me to say a word or two about what REACH is. Would that help?

**Seema Malhotra:** Yes, although we have some briefing on that.

**Steve Elliot:** I do not profess to be the expert on REACH, and I have never met one yet. I think it is the single biggest piece of EU environmental legislation in its scope. It is a single market mechanism. It governs the manufacture, the import and the trade of chemicals within the EU. In terms of compliance with business, that really began in 2010. There are three registration periods, leading up to May 2018, where you register with ECHA, the central agency in Finland. That is according to your tonnage band, with the largest tonnage products going first, back in 2010, moving to a smaller tonnage in 2018.

It requires UK manufacturers and importers to register their substances with ECHA in Helsinki. Companies have to generate information on the properties of their substances and demonstrate that they can adequately



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manage any risks related to human health and the environment. Those registrations are then subject to different forms of evaluation by ECHA. REACH is the acronym for registration, evaluation and authorisation of chemicals. There is a sliding scale of attention and compliance. There is a huge regulatory database that supports all of that data. The maxim is "No data, no market".

The final deadline is May 2018, but then there is ongoing work in updating dossiers, responding to the agency on evaluation, addressing developments that are always occurring on substances of very high concern. At CIA, our view is that we remain within or as close to REACH as possible. I will come on to what I mean by that. In saying that, that is us wanting to ensure that our existing compliance efforts to date remain valid. I would be lying if I did not say that some SMEs, and particularly companies who are less exposed to the EU marketplace, would like us to diverge from REACH. The vast majority do not because of that trade data I gave you a little bit earlier. We believe REACH is now setting the global bar in terms of standard, and it is the passport to the global marketplace.

On the provisions, in terms of converting and preserving EU laws into UK laws, where you started, we do not see any specific points on that as affecting the chemical sector. Clause 3 of the Bill provides that the regulations are incorporated into UK law on or after exit date. That includes REACH. It is automatic and we do not have any legal concerns in relation to that. On Clause 2 of the Bill, specifically around preservation and retaining that EU derived domestic legislation in UK law, one of our examples is the industrial emissions directive. That has already been transposed into UK law through the environmental permitting regulations. That is administered by the Environment Agencies of England, Scotland, Northern Ireland and Wales. We do not have any issues there.

Where we might have a related concern is that there is a suggestion that we have different exit dates for different sectors, as the transition progresses. We are still trying to understand what that means, because we are also hearing, both from the Prime Minister's Florence speech and the European Parliament, that if there is a transition then there is no change. What does no change mean in that context? For us, no change would mean being able to continue to behave, respond and comply for however long that transition period is, before we move to a new world and exit.

As Andrew has talked about, there are a number of issues of concern if we move to exit. There is the fact that we have a central agency in Finland. Will we or will we not be recognised in terms of the compliance measures we take? Will we be able to strike an arrangement with the European Union that does not require us to duplicate all of the structures and all of the related cost that that would bring? That would be the worst case for industry. Even if you are able to minimise the cost, the



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administrative burden for both the authorities and industry would be significant. I am going to say a bit more about that.

**Andrew Bryce:** It is worth making a legal point as well. The REACH regulation is an EU regulation. We need to make a decision on all sorts of things in view of the changes that we are going to make to that. It refers to the European agency and it refers to a whole system that may or may not exist on exit day. That decision will have to be taken at the point at which those so-called tinkering amendments are made as part of the roll-over process. It is a decision that needs to be taken well in advance of exit day for those regulations to work appropriately.

**Steve Elliot:** My apologies; you asked me the question about timing and in terms of the transition. I do not mean this to be unhelpful, but I think it is as long as is necessary. We have called for a while for a transition. We are doing some work at the moment with the relevant Government Departments about how long we would require, working back from a no-deal scenario. That involves the Government Department and the potential agency in the UK as well. It is something we are working through now.

**Andrew Bryce:** So 2019, if it was to occur, would provide a serious problem, would it not?

**Steve Elliot:** It would.

**Andrew Bryce:** That is in terms of putting something in place to take the place of the existing EU system and the agency.

Q114 **Seema Malhotra:** I would like to ask this of Professor Neal, and if there is any final comment, Caroline. There has been some confusion as to whether primary legislation, such as the Equality Act and the Consumer Protection Act, fall within the scope of retained EU law. Would your understanding be that they do, and is that significant as a concern?

**Professor Neal:** I suspect most of the writing has been done about the Equality Act. There is some very good work from the Fawcett Society. If you look around the blogs, quite a lot of senior silks who represent parties in discrimination cases have opined on that. In answer to the first part of your question, yes, it is significant that primary legislation is in the mix. The difficulties arise at a later stage. There is the question of what adjustments, if any, can be made by reference to the later clauses, and that is where the controversy stands.

The problem is that it is all very well saying, in the accompanying notes or various declarations, that the day after exit day everything will stand the same in the employment law field, including the equality aspect. The words may be the same, but the problem is that is not always how it pans out, as you have heard particularly last week from Sir Stephen Laws. Judge Schiemann was able to indicate the reasons why that might be.



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In this field we have a lot of speculation about what might be done, but very little of what I have read follows directly from the change from before exit day to after exit day. Most of it is an expression of fear about the domestic political will to make changes in the balance of power in the labour market. That is a very important distinction to draw, and one we should be very careful about. Do not feed it back into the Bill draftsmanship aspect; be aware that that is a matter of political will.

When we come to looking at aspects of how adjustments can be made for circumstances that are no longer appropriate, then we can start to see where the technical aspects come in place. Most of those, in our field, come from regulation, so they come from implementing of directives. Much of the primary legislation is older than the initiatives at the community level. The Equality Act, for example, is quite a good mix. Sex, race and disability were well in place long before the 2000 general directive.

There may be some who would say that the freedom domestically to act as Parliament would see fit might not be a bad thing in areas where some confusion reigns. I will give you an example. One of the protected characteristics in the Equality Act is religion and belief. With religion there has not been too much of a problem, although there is controversy. Belief has been a complete disaster, not just for our legislative and interpretative functions but across the whole of Europe. Whenever we have meetings of European judges talking about that, we spend a day wondering what belief might be. I do not think any of us, as judges, believe anything anyway.

**Andrew Bryce:** Chair, may I make a general point?

**Seema Malhotra:** Sorry, I was just going to check if Caroline wanted to come back on any of these points.

**Chair:** Then we are going to need to move on.

**Caroline Normand:** I will defer on the specific legal technicalities to both Stephen Laws and to Professor Neal. From our perspective, as we understand it, the Act in question, the Consumer Protection Act, is indeed part of EU-derived domestic legislation. I see that there are other considerations that come into this as we then consider how that, with other bits of law, then falls within the withdrawal Bill.

Q115 **Stephen Timms:** Can I first of all put a question to Mr Elliot, following up what you were saying earlier? REACH is often characterised as a rather bureaucratic over-regulatory instrument. Where does the balance of your members' interests lie, between staying in and carrying on being part of it, with the burdens involved, and pulling out?

**Steve Elliot:** I would be lying if I said at the outset of REACH, back pre-2010, that we thought this was going to be the best thing since sliced bread. It is enormous in scope. It has been very costly in terms of



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compliance to date. My organisation and others did call for, from our point of view, a more pragmatic and risk-based regime.

So many years on, I find myself now reflecting the majority view from our membership to say that we need to either stay within REACH or as close to REACH as possible, for a number of reasons. One is there is increasing recognition that, the pain notwithstanding for business compliance, REACH is setting the global bar in terms of protection for human health and environment related to chemicals. There are different regimes around the world, many of which are trying to mimic REACH, and a number of which do not. The general direction of travel is towards a REACH-like compliance regime.

That said, I have got member companies, particularly smaller companies because of the cost implications, and companies big and small because their commercial exposure is to somewhere else away from the European Union, who would like us to consider the attractiveness of other regulatory regimes as and when they are important for their products. There is a bit of work we are doing right now to understand better those regimes. There are two points around that. One is, even where we do find those opportunities for potential future diversion, given the 60% export dependence and 75% import dependence opposite the EU27, we could not do that at the risk of losing market access to the European Union.

**Q116 Stephen Timms:** I want to move on to the question of the Charter of Fundamental Rights, which the Bill makes clear is not going to be incorporated into UK law. I want to ask each of you whether that gives rise to any concerns in your areas about a loss of rights for UK citizens.

**Caroline Normand:** Yes, the Charter of Fundamental Rights contains some really important principles for consumers. The particular ones that I would highlight are the right to a high level of human health protection, which is article 35, and a right to a high level of consumer protection. It is important those are enshrined as principles alongside the body of legislation. In some cases these are enshrined in legislation in the UK; in some cases they are not. They are important principles that should stand alongside all manner of pieces of legislation. As I have described, consumers are concerned with financial services, energy and across the economy. They stand as important guiding principles.

If I may give an example, in May last year, the large tobacco companies brought judicial review proceedings challenging the standardised packaging of tobacco products regulations, which are the ones that are blank on the cover of cigarette packets. The High Court dismissed the case in reference to the public health and other rights in the Charter of Fundamental Rights. It is an important piece that stands, supporting consumer rights.

**Q117 Stephen Timms:** So what you are saying is, even if the law is not changed and the text of the UK regulation is not changed, the fact that



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those principles are not there anymore will affect presumably only appeal decisions. Is that right? It is in that domain.

**Caroline Normand:** In this instance this is where the rights were used, but they also stand alongside legislation that does not necessarily directly refer to the consumer and to consumer protection or rights, but impacts on consumers. It holds us to account to ensure that a high standard is complied with.

There is one further principle that is very important, which is the precautionary principle. In some ways the precautionary principle has had a bad rap. It is surprisingly controversial and sometimes is presented as a kind of political anti-technology measure. I have certainly heard it used as such. It is a really important principle precisely for the opposite reason. Without a precautionary principle you can have less focus on understanding what longer-term public health risks might exist, without acknowledging what scientific uncertainty exists, and which might put public health at risk.

Where there is an unquantified but important potential risk, precaution allows you to take that into account. It allows you to stand back and consider what you might want to do in those situations, without charging ahead and carrying on with a course of action which, in the end, is just not safe for human health overall. We have seen how the precautionary principle was not applied in the cases of BSE and asbestos.

**Q118 Stephen Timms:** Can I just press you on that? The precautionary principle is not in the Charter of Fundamental Rights. It is somewhere else, so why are you worried that that will be lost? As you were a moment ago in the other case, are you able to point to any specific examples where you think the existence of the precautionary principle has made a difference?

**Caroline Normand:** The precautionary principle is set out in the EU treaty. The precautionary principle also sits in a few pieces of legislation, and I am not sure whether they are primary or regulations in the UK. It forms part of the SPS agreement in the WTO. It is a well-recognised principle. I will happily provide examples of where it has been used. I can give you examples of where we might regret that it was not applied as it might have been. As I say, asbestos is a classic case that people point to, and BSE is another. There were risks around BSE that were known, but the extent of the risk and the scientific knowledge base around it was not yet complete. The precautionary principle was not applied.

**Q119 Stephen Timms:** If it is in the WTO agreement, does that not mean it will continue to apply in the UK?

**Caroline Normand:** The SPS agreement considers trade aspects and those things that are made under the SPS agreement. The SPS agreement does not cover everything that goes through the WTO. It does not cover all trade agreements. It is a part of the WTO rules. It is



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incomplete and it is for traded goods, as opposed to what we might have in the UK that originates in the UK.

Q120 **Stephen Timms:** Can I ask all the other witnesses whether, between you, there are any other areas where you are concerned that UK citizens might lose rights that they currently enjoy because the Charter of Fundamental Rights is not being incorporated into UK law?

**Andrew Bryce:** UKELA have not done a great deal of work on the charter. There is a provision in the charter that says a high level of environmental protection and the improvement of the quality of the environment must be integrated into policies of the Union and ensured in accordance with the principle of sustainable development. That principle is likely to occur in a lot of our environmental legislation in some form or another.

We have a 25-year environment plan yet to come. I would suggest that a high level of environmental protection probably will be promoted, in view of the assurances to enhance the environment. Sustainable development is already well established within our planning system.

In terms of the other environmental principles, they fall outside the charter. They are another topic. I do not know if you want to go into the principles at the moment. On the precautionary principle, certainly in the environment field, the UK courts have been very reluctant to use the precautionary principle as a central tenet of any decision making. My guess is that, going forward, the basic principles, such as the precautionary principle, are likely to be part of the policy-making framework rather than the direct legislative framework.

**Professor Neal:** There are a lot of provisions in the charter that go to the employment field. However, in the round, I do not lose sleep over seeing the disappearance of the charter. The terminology is that of international human rights law and commitment, and many of the provisions in the charter we must respect through our international obligations in any event. If I take a couple of examples, there is the abolition of forced labour or the prohibition against child labour. These are matters that go to fundamental core conventions at the ILO level. We are obliged to respect those at the level of the United Nations, by our mere membership of the ILO. The principles of equality between men and women do not need the charter to see some progress towards the achievement of that aspiration at least.

A controversial area is title IV, which is headed "Solidarity". The word alone in the title probably indicates something that is not familiar to most United Kingdom practitioners in the labour market. The notion of solidarity goes quite a long way across what we have regarded as free collective bargaining and contractually negotiated obligations between individual workers and their enterprises. There is an obligation to provide workers' rights to information and consultation in the undertakings.



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That is going to be an area where I think we will see some interesting consequences, depending on what comes out at the end of the day in the adjustment arrangements for the residual EU derived rights. There are structures, for example, European works councils, which are no longer necessarily going to form part of the arrangements that we have in the United Kingdom. They never sat comfortably in our system. It is a tribute to the draftsman that we have managed to get it into our legislation in a form that is vaguely workable.

A consequence of that is individual rights for representatives of workers who sit in various bodies that are not our notion of collective bargaining therefore would not fall within the general, let us call it, United Kingdom derived tradition. This is to be found in the Trade Union and Labour Relations (Consolidation) Act, which is the primary collective legislation in this field. We have quite a lot of technical fallout issues there.

The really controversial one is the right of collective bargaining and action—article 28 of the charter. We are obliged to respect this from another perspective, this time the European Convention on Human Rights. This is the provision that judges are obliged to have regard to under the Human Rights Act. The right of collective bargaining is assured in article 11 of that convention. However, the European Court of Human Rights has not gone as far as to say that the right of collective action is encapsulated under article 11 of the European convention. So it is controversial as to whether the two are in symmetry and therefore whether one loses or merely is equally denied an apparent right.

**Q121 Joanna Cherry:** We are talking about the fact that the Bill will say that the Charter of Fundamental Rights is not part of domestic law on or after exit date. I am correct, am I not, in saying that clause 5(5) says that the general principles will be retained in domestic law? However, crucially, Schedule 1, part 3 says there will be no right of action in domestic law based on the general principles, and no court or tribunal or other public authority may, on or after exit day, disapply or quash any enactment or other rule of law, or quash any conduct, or otherwise decide that it is unlawful because it is incompatible with the general principles of EU law. The lawyers on the panel will confirm that, although the general principles are retained, there will be no right of action on the basis of them, so they will be somewhat toothless. That is correct, is it not?

**Professor Neal:** If I may, I would not go as far to say toothless. I would say somewhat weak. The principles remaining then ask you whether they can be applied to areas that have no consequences upon them as a result of this Bill becoming law. What I am suggesting is that there are other sources that give rise to obligations on the part of the United Kingdom.

**Q122 Joanna Cherry:** But a British citizen will have no right of action and no remedy if he or she feels that the general principles of EU law have been breached in relation to their rights after exit day. That is correct, is it not?



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**Professor Neal:** That is normally the case across all these types of rights. I would understand that to be the case, yes.

Q123 **Joanna Cherry:** At the moment, a British citizen does have that right.

**Professor Neal:** In very limited circumstances. The right of individual action, for example, for rights under the European Social Charter of 1961—

Q124 **Joanna Cherry:** We had a Supreme Court case last summer when a gentleman enforced his pension rights. That was a ground-breaking case, the case of Walker, which has been discussed on the Floor of the House. A gay man was able to get pension rights in relation to his husband as a result of the general principles of EU law. Our Supreme Court imposed that. That right will not exist after exit day. That is correct, is it not?

**Professor Neal:** That appears to be the received wisdom, yes.

**Chair:** That is a helpful point of clarification.

Q125 **Craig Mackinlay:** This is aimed at Professor Neal and Mr Bryce. First, we are very lucky to have your wisdom and experience with us today. Looking back at taking out the Charter of Fundamental Rights, we still have the European convention, and you have highlighted some differences and similarities. When the EU failed to get its constitution in place because of various national referendums, someone of my persuasion would say they saw a lot of those constitutional issues coming through the back door of the Treaty of Lisbon through the charter.

We and Poland had opt-outs. What was the value of those opt-outs, or were they actually fairly meaningless? We were told at the time that this would have no more value than, I think, *The Beano*. Or was it really a grab by the institutions to try to give ECJ power into what we would consider to be more political and behavioural issues, which were already broadly being done by the European convention? We had rights before we joined the EU. We are signed up to the ILO and UN as well. Does it actually mean anything at all to withdraw from this thing? I thought, because we were told at the time, that it had very little effect anyway when it was implemented alongside the Treaty of Lisbon.

**Professor Neal:** There are a number of strands. Let me try to address one or two of those. First of all, withdrawing from the convention is a declaration of intent. This is the terminology that continental colleagues are used to dealing with. This is the language of the French revolution and its aftermath and the sort of declarations we see in constitutions. We do not have that tradition. One of the problems of dealing with EU-derived rights through the currency of our membership has been that a lot of terminology used in directives is rather vague. I will not say woolly; that would be unfair. It is not intended to be that way.

To those who are used to going to the dictionary and asking, "What do these words, put together, mean in the normal sense?" and then trying to



derive an appreciation of the scope of a granted right or the limitation of that, that is a rather difficult way of going. The so-called teleological way, trying to work out what the declarer or the draftsman intended to do, has become part of the terminology in my ivory tower. It is easier done there as a discussion than put into practice in the courtroom. The problem in the courtroom is that we still have our principles of interpretation.

When the charter was declared in its first incarnation in 2000, it probably was right to say that there was little other than the declarations themselves. When it was reiterated in 2007 with the same terminology, just capital letters for the rubrics, it was then set up to be part of the *acquis*. That is why, as you rightly say, the Treaty of Lisbon was so important. That did bring about a change. Our understanding of the extent of what I will call the opt-out, as you have, that the Polish Government and our Government—

Q126 **Craig Mackinlay:** They were protocols, were they not?

**Professor Neal:** That is right. The impact of that was probably dramatically overblown, because it was thought that by saying there was no extension of powers or competencies that meant there was no extension of rights. That does not follow from the wording. There have been impacts, and there have been impacts that which I think will remain with us.

The European Court of Human Rights in Strasbourg draws its principles from a number of sources: classically its own treaties, that convention and the European Social Charter. It normally goes directly to ILO treaties, so the UN level. Increasingly in recent decisions they go to the wording of the charter in the European Union context. There are a couple of these decisions in this country, the *Boots* case in particular. I am not saying it is a source as such, but it clearly inspires some of the rationale that leads to conclusions at that level.

We will still be required to have regard to the jurisprudence of the European Court of Human Rights, so we cannot ignore that. You are right in suggesting that there was a time at its inception when the charter probably did not mean a lot, other than the declarations and a sense of good faith. It has become more than that, but it is a highly disputed question as to whether it gives rise to concrete rights of the kind, for example, that an individual could go and say, "I want my right enforced on this". You have to use other things, but this buttresses that claim.

Q127 **Craig Mackinlay:** You have explained very well the complication you have as a judge to interpret what these things are trying to say. If we remove ourselves from this, have we not got a sufficient body of case law, general international interpretation and Britain's history, to say that we are still rather well protected without it? It is a leading question, I know.



**Professor Neal:** There are a number of individual rights, things like unfair dismissal, for example, which the community has never had competence over. In fact, I was the UK expert member on a committee that sat in 1990 that the Commission set up trying to establish a directive on protection for workers at the point of the initiative of the employer. That never came to anything. It was intended, under what then were unanimity competencies, to act in the social field. The Commission has never tried to resurrect that. It was a non-starter in any event.

It probably did not need to be a non-starter, because we, like almost everybody else in the world—and I include countries like the People's Republic of China—respect a framework and principles set out in an ILO recommendation. It is not even in a convention. That is where the basic ideas come from that an employer has to have some reason that can be shown, it has to be an objective reason, and the procedure has to be undertaken in an appropriate way.

Q128 **Mr Rees-Mogg:** I wanted to come back to the issue of the law that will be coming into UK law on the day of departure when everything comes in. We had evidence at the session before last that that might leave ossified EU law in the UK system with no very clear route to change it. I wonder, Professor Neal, if I could start with you and then work along the panel. How do you think that would best be solved, to provide both the certainty and clarity that it is clear that you, the panel, want, but also to ensure flexibility within our legislative system? How can it be solved so that we do not find that in 30 years' time we have got EU law as of 2019, while EU law has changed very dramatically, and indeed what we have got is not necessarily meeting the requirements of 30 years' time?

**Professor Neal:** I would make the point that sometimes it may be the case that the direction of travel of EU law is in common with the direction of travel of labour law, for example, at a wider range in terms of global standards. The United Kingdom will be part of and participant in that direction of travel. We have to be careful that some things are in that way anyway. Just to take an example, how do you regulate Uber drivers, a case that has just been heard on appeal, and the new forms of employment in the gig economy? That is the sort of thing that Matthew Taylor has been looking at. That is one point.

The ossification point goes to two dimensions. One is the instruments, so directives, regulations and treaty provisions, which the EU shares among its member states. There we have a problem if changes are made to an instrument that we have retained on exit day. There is clearly a need to reassess one's approach to particular cases that arise within that context. Should we recognise that particular regional direction of travel and how do we give effect to that, if at all? The answer has to be that it remains a matter for political decision-making. At the end of the day, it will be you who decide whether we ought to be taking this up. It may be a matter of personal data, different forms of employment or an area of abuse like



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modern slavery or something of that sort. That is one sort of ossification. That is the instrumental one.

The real problem is the interpretation of ossification. That does not take place, because we have a pretty well-trying approach to both statutory interpretation and the approach to the intention of the legislature with that which we deal. The point about employment tribunals, in common with most lower judicial instances, is that we are creatures of statute. Therefore we have no competence to go outside the matters or on the terms with which we are required to act.

In the employment field, the employment tribunal has been a bit of a dustbin. Everything that has come in from Europe has been dumped on the employment tribunals, whether it is whistleblowing or all sorts of things. Many of these can be said to be attached to the world of work, but then pretty much anything can. We have had all sorts of problems, first of all in working out what the rights are and how they should be recognised and given effect to, if appropriate, and, more importantly, in how the heck we enforce the things. The enforcement procedures are not always very consistent.

It is actually a point where, in reference to the last question, you can see a significant difference between the treaty provision on effective remedies and the declaration in the charter. Article 19 of the TEU requires effective remedies for rights arising under European Union law. Article 47 of the charter uses the language of human rights. It is the sort of declaratory position that we would find in article 6 of the European Convention on Human Rights. There are different ways of doing that, but I do not have too much discomfort about the interpretation, provided we know what the playing field on which we are working is.

That is asking for the impossible, because in an ideal world you would like to have the reverse of what happened when we joined. When we joined, in the old days, you had libraries. You may remember them. They had books in them. They do not come up on tablets. You would wander up and down the aisles in some institute, and you would see this body of, in those days, EEC law, which we were then to give effect to. The reverse is clearly not possible. You heard your witnesses last week. The task is just out of our hands, even if technically it might be absolutely clear what the position is. That is not even a foregone conclusion.

**Q129 Mr Rees-Mogg:** In your view, the ossification is not going to be a problem, on the condition that retained EU law is not some magical form of law that is difficult to change, if it becomes a normal part of UK law. If Parliament then does its job and the judges do their interpretation then it is actually not an ossification risk.

**Professor Neal:** That is right. It is open to the normal democratic process. Parliament will take proposals and decide whether they are appropriate to put into place. If they do, then we will do as we are instructed in the statute that we receive.



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Q130 **Mr Rees-Mogg:** There is some issue as to what the status of retained EU law is, but that will be determined by the courts in due course.

**Andrew Bryce:** We are told that retained EU law is a new category, but the nature of that category is not clear at the moment.

Q131 **Mr Rees-Mogg:** It is clearly not a constitutional statute.

**Andrew Bryce:** No.

Q132 **Mr Rees-Mogg:** But it is somewhere in between that and ordinary law.

**Andrew Bryce:** Yes. This throws up a whole series of issues. I will try to be as short as possible. We did a quick review. UKELA published a report about Henry VIII clauses, how they would operate and the extent of the operation, because there was a lot of airplay about them. Looking at the environmental field, we came up with a pretty small number of bits of primary legislation where amendment was necessary. There was a bigger category where changes were advisable, and this would apply to SIs as well. Those are in the areas where you are referring to a directive or a piece of EU legislation.

We have a choice. We either re-enact now before exit day, or we roll over with all those cross-references, then we have the job of reviewing what we have. To put it in a proper category of neater legislation, you would want to re-enact the provisions of those directives within a body of law. We can decide thereafter how we wish to amend it. It may be one and the same process, but it is a big operation to do that, particularly if you are talking about primary legislation. That is one issue.

The other issue is that in the course of changing the SIs you will have to make a number of policy decisions. We will probably come on to those in a minute. In terms of ossification going forward, certainly in the environmental field we will be rolling over for certainty and then reviewing the legislation, but it will take a long time to look at all those directives. The problem we have is that those directives will change very rapidly. There will be constant changes in those directives. Within a few months of roll-over there will be changes. We will have to have either a mechanism for incorporating those changes, or go through a whole parliamentary process to incorporate or not incorporate. We have a choice, but the legislation we have done by reference will be out of date pretty rapidly. We then have to make a choice as to whether we wish to adopt the changes.

Q133 **Mr Rees-Mogg:** Can I move on to my next question? Ms Normand and Mr Elliot, this is very much directed at the two of you. The great opportunity post-March 2019 is that we get rid of oppressive laws that are damaging to this country. Ms Normand, what law would you get rid of to help British consumers?

**Caroline Normand:** I am partly going to answer the previous question, but I will also develop it, if I may. From my perspective looking at this,



the idea of ossification, from a non-legal perspective, does not make sense to us. Where we start from is to look at whether there is consumer harm or detriment. We see what is going on in the economy. Life always changes. As we move forward and obviously from the way in which digital markets develop, we are always going to be pressing to make sure that the law of the land is up to date and meets the needs of consumers.

We will also be opportunistic. There are issues that we see across the piece, often small issues, in pieces of legislation. From a consumer perspective, we can see ways of making improvements in them. I can give you some brief examples. MiFID II, the financial regulation from the EU, requires all manner of transparency of information for consumers, which, through all of our testing and everything that we have learned, actually do nothing at all in terms of transparency for consumers. APR is a particular figure in that instance. There are issues that we cannot touch; VAT on energy is something that is set at 5% by the EU. Across the piece there are many small pieces of legislation where, with a free hand, we could see ways in which we could help make the situation and the rules better for consumers.

The other thing I would say is that we absolutely need to take the opportunity, as we go forward, not only to move legislation into the UK and maintain the status quo that you were talking about, making sure that the gaps are filled, but actually do a better job. If we look at consumer confidence in energy producers, it is at 32% in September 2017. In mobile operators it is at 38%. You can see that the situation for consumers is not all that they wish it to be, and that is partly because of how the operators operate and partly because of the regulatory framework. We will be looking very closely to see what else there may be in the legislative underpinnings that we can look at to see how we can improve the lot for consumers. There are many opportunities that we need to dig into and find to improve the lot for consumers. I am not going to put my finger on the magic piece of legislation.

**Q134 Mr Rees-Mogg:** You have given me one. You have given me 5% VAT on energy bills, which I think is very important. It becomes a very interesting opportunity for a consumer group to start campaigning for what ought to be changed or got rid of to benefit consumers, to make their position better and more favourable and take some of the burdens off them. Mr Elliot, you admitted that the chemicals industry lobbied very hard against REACH. It did not want it at all and, now it has got it, it thinks it is absolutely lovely, possibly because it is a protectionist measure, but what regulation would you like to get rid of?

**Steve Elliot:** At the risk of disappointing you, I am not going to specify one piece of regulation, but I would like to highlight the fact that the chemical industry is highly regulated and that is absolutely right. We have to give confidence to the people who work on the plants, the local communities and, increasingly given the debate we are having here, customers of our products as well. That needs stressing.



Again, as part of the earlier discussion, it is more around implementation and enforcement. We have had a bit of discussion around the precautionary principle. As Caroline referenced, our issue would be more about the misuse of the precautionary principle than the precautionary principle itself. I already see, even before exit, a diluting of UK officials' ability to influence ongoing European dossier development. That is disappointing for our industry, because I happen to believe that our officials and our regulators at the European level are very much focused on risk-based, pragmatic, practical outcomes, and I do not necessarily see that among many of the 27. That is a concern going ahead, in terms of who might take the place of the UK.

It also links to how closely we can stay within or mirror REACH, in this case, because there are lots of supporting structures that will have an influence on how we are able to produce and market our chemicals. I would like us, somehow or other, as a UK authority, to stay close to that influencing role, even if that might not mean having a vote as well. That is a key thing for us about implementation and enforcement.

**Mr Rees-Mogg:** I was hoping you were going to say Roundup, but you have not gone to that.

**Chair:** There are a couple of very quick questions on the points we have just been discussing, but we need to have as much brevity as possible if we are going to get through all the ground. Jeremy Lefroy, you indicated you had a quick question.

Q135 **Jeremy Lefroy:** Thank you, Chair. What I would like to understand is, if you are a manufacturer or provider of services, and you are selling to the European Union, there are two different things you have to take into account. The first is whether you are going to meet the specific requirements of that market. Secondly, are there any environmental—and I just the word in terms of the context rather than the environment—considerations that are taken into account, in terms of gaining access to that market? Are you aware in your industry, specifically the chemicals industry, if you have manufacturers that have almost two different production lines, one for the EU and one for everybody else? Or is everything done in accordance with REACH and the EU and, therefore, whatever you offer to the United States, Australia or Japan is offered in accordance with EU standards? What I am trying to get it is, in the end, if we want to sell to the EU, we basically have to manufacture everything to EU standards, even if those standards are perhaps worse, better or different than elsewhere.

**Steve Elliot:** Our members would not have the luxury or the wish to be operating to differing manufacturing regimes that might respond to differing environmental standards around the world. One, it is very inefficient practically and, two, it is wrong. The emphasis and the ability for divergence—and I say that in a positive sense of the opportunity rather than trying to chase the lowest environmental standard around the world—is around this implementation and enforcement role. No, I cannot



think of a single member company or business that would seek to operate two manufacturing lines.

Q136 **Jeremy Lefroy:** In effect, you will be manufacturing to European standards whatever, whether we are in or out, or to better than European standards. Those will be the choices that we are, by default, capable of exporting to the rest of the world.

**Steve Elliot:** I said a bit earlier in the discussion around REACH that REACH is setting the global bar and our businesses have to abide by that.

**Chair:** That is very clear and very helpful.

Q137 **Wera Hobhouse:** First of all, I have to declare an interest because our family business is dealing with exactly these things. It is treating industrial textiles chemically in order to go into the motor and aerospace industries, so we are dealing with REACH all the time. I know that issue very well. For example, our business could not cope with having two production lines. Of course, chemicals also come from different origins of countries and you mix them together. It is for the protection of our workforce that we actually have to comply with REACH. You have been talking about, or we have been asking about, the timeline to set up a parallel or separate regulatory system to REACH. You have not really answered that. How quickly could we put anything in place that would actually satisfy anybody who we were dealing with in the world that it is to the standards or similar standards of REACH?

**Steve Elliot:** We said a bit earlier that March 2019 is an insufficient timeline for us. We have been very clear as an industry, since the middle of this year, about the need for a transition period. I cannot see a transition period of less than two years enabling us to do what might be necessary, but what might be necessary is still not clear. God forbid we have to end up duplicating every existing structure that we currently respond to in Europe, at one end of the spectrum, back to something that moves closer to potential mutual recognition and a better understanding. That requires the 27 to co-operate with wherever we end up, so I would say two years is a minimum.

Q138 **Stephen Kinnock:** I wanted to focus on the institutional framework and particularly functions that are currently carried out by either the European Commission or EU agencies, in terms of enforcement, compliance, accountability, monitoring and measuring compliance with legislation, enforcement of legal requirements, reviewing and reporting on compliance, setting standards or targets, co-ordinating action, and publicising information—an array of functions that are currently carried out at EU level for many of these cross-European regulations. Can you give an assessment of where you think the UK's capability is, in an institutional sense, to absorb those functions and implement them, either from 29 March 2019 or, indeed, by the end of the mooted transition phase in the spring of 2021? It is to all of the panel really.



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**Andrew Bryce:** UKELA has produced a report on these issues. You have cast it quite widely. I would say, for instance on standard setting, we are working on a report to be published in the next two or three weeks dealing with the issue of standard setting outside the EU and how we will organise that, having regard to our existing very sophisticated standard-setting systems within the EU framework.

In terms of enforcement of environmental law going forward, we have expressed a view that in terms the existing arrangements for the Commission to exercise a regulatory role, as they do through infraction proceedings, a lot of informal mediation-type processes and a citizen complaints system, we are suggesting, will leave a gap when we leave the EU. We are suggesting that judicial review, which is put forward as the answer by the Government currently, is not the answer for a whole series of reasons that I am more than happy to go into. Cost, ability and accessibility are some of the factors involved in the fact that judicial review is not a regulatory tool; it is something to deal with shortcomings that occur in the system.

We have suggested that, going forward, there is a good argument for having a body in the UK that has some oversight of Government and public body conduct, in terms of carrying out its obligations as they exist in legislation. We are up for discussion on that body. There are a number of models around the world that we think are worthy of consideration. The Environment Agency and other agencies in the UK are involved in direct enforcement of permitting and the legislative regime against operators. We are talking about something that has oversight of what Government and other public bodies do or do not do in future, which is currently an oversight held by the Commission. I will not say any more; if you want any more detail, I am more than happy to provide it at some point.

**Professor Neal:** Let me mention one area that you can put under the umbrella of employment law. That is health and safety. There is an agency in Bilbao that deals with a range of issues. This area is one where the British experience, the Health and Safety Commission and Executive, has very much been at the forefront of setting where the bar stands, in terms of compliance, even though the advent of a regime at the European Union level, through a directive in 1989, completely changed the way in which that is done. It went from a checklist system to a risk assessment system. We are actually pushing out and advising on those sorts of capabilities. We do a lot of training through some of the Government agencies or publicly funded agencies. The same thing goes, for example, in the dispute-resolution area, where Acas carries out a lot of training overseas, including in some unusual places. I mention China again.

In that context, we have a large amount of capacity and experience, and it is an experience that does not come just from having words on a sheet of paper that is called an Act of Parliament or a law, and seeing whether



that comes to fruition or not. It is all about looking at the nuances of the particular sector, looking at the capacities of the parties and reinforcing those. It is part and parcel of a capacity-building exercise, as much as anything else. I think we are well equipped in some areas for that; health and safety is one shining example. Whatever is said about the budgets there, they do a heck of a lot with those budgets.

**Steve Elliot:** Just picking up on Professor Neal's point, we have been talking about REACH today, and the enforcing arm for REACH in the UK is the Health and Safety Executive. I would echo what Professor Neal has said in terms certainly of the technical professional capability of the executive. The challenge is the size of the task, the timing and the related resource.

If you look at clause 7 on the corrected efficiencies, it is very helpful. It recognises the practical concern that, when EU law is converted into UK law, there will be provisions that no longer work when we leave the EU and that need to be corrected to continue. There are many aspects of chemicals regulation that depend on the involvement of EU institutions. With REACH, it is ECHA in Finland. With the biocidal products directive, it is the Commission, and then they all have supporting structures and committees that look at socioeconomic analysis, and there is the Committee for Risk Assessment. The big question there is if the onus will be on the Health and Safety Executive to look at carrying out all of the current ECHA or Commission functions.

There is some drafting in the delegated powers memorandum that is very helpful, because it explicitly references the chemicals sector in one of the examples, but the detail is limited, maybe inevitably at this stage. Wherever the word "agency" is mentioned, as in Finland, it is substituted by "executive". Wherever the phrase "member state" is referenced, it is substituted by "Secretary of State". Clearly that language needs to get tighter and more meaningful, and we would just encourage that those amendments are not watered down.

There is an example that says member states will currently have helpdesks related to REACH. The language in the clause talks about "must" or "may", which raises a question or two about how committed we are there. There is certainly some tightening for the language, as pleased as we are with the explicit recognition.

I have to say that I think HSE has been, to date, a good enforcer of REACH, but a lot of that enforcement is also triggered by the European body. The powers and the duties will inevitably be broader than they hold currently.

**Q139 Stephen Kinnock:** Could you paint a picture for us in terms of the so-called governance gap? At the point at which we leave the European Union in March 2019, it is absolutely clear from what you said, there will be a significant gap in terms of the institutional capability that we need to build in the UK to take on these enforcement functions and



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the current arrangements. Is it your view that law can be transposed as a paper-based exercise, but it is not actually worth the paper it is written on until such time as you have institutions in place that can enforce, monitor and regulate?

**Steve Elliot:** That plays to the plea for a transition period that enables us to have those structures as best in place as possible, because I cannot see that eventuality by March 2019.

**Andrew Bryce:** There are more issues. For instance, the reporting process to the Commission under many directives, environmental and others, will fall away. UKELA's view on that is to suggest that reporting provisions should be standardised, to an extent, but that that reporting should then be to Parliament.

**Caroline Normand:** If I may, there are a number of institutions I already mentioned that are absolutely critical to consumers across the piece. If you just take food standards, the European Food Safety Authority and the role that they have in understanding the science behind food and new foods, the risk assessments that they make, the standards that they set, the early warning systems that they have in place for when food is found on the market that does not meet those standards and some of EFSA enforcement all need to be replicated in order to have a sound and solid food safety regime in the UK.

That is one of the instances where we actually have a mirror institution that is on the case. I will not say they are ahead of the game, but they are hopefully on a track to getting there. It is one thing to have the institution ready with plans. It is another to actually create the scientific community, the committees and the culture as well, and then link that back in internationally, so there is a huge job. It is mirrored in medicines and it is mirrored across the piece.

The piece that I would particularly like to pick up on is the enforcement regime. The consumer enforcement regime in the UK, whether for trading scams, for product safety or for food safety, is all carried out by Trading Standards. Quite apart from the EU exit that system is falling apart. Since 2009, there has been a 56% reduction in Trading Standards officers, who are the feet on the ground who go and check that things are happening as they should. Already we are finding in product safety that we have recent incidents of faulty products, which include fires and deaths linked to faulty kitchen appliances. The product safety regime is not keeping people safe and, quite apart from EU exit, we at Which? are calling for fundamental reform of that regime, because it simply is not working. If you look at the food enforcement regime, much of the responsibility for enforcing food law falls to local authorities and through our research we are seeing a huge variation in the way food enforcement is carried out and, therefore, different levels of consumer protection of food. We know that is already a problem.



If you add to that what will fall on the shoulders of consumer enforcement agencies post-EU exit, there are questions around how we will duplicate the kind of early-warning RAPEX systems. There is a whole piece. As we have trade from new trading partners, we are going to have to do more in the world of tracing products through. TRACES, as I think it is called, enables port health authorities to exchange information about consignments that are arriving. There is more that Trading Standards are going to have to do in that space. The weight is going to come and the system is currently not fit for purpose. There is a huge piece that we are particularly concerned about in this whole space that is consumer enforcement to make sure that the whole is fit for purpose.

Q140 **Mr Djanogly:** If I could just go back to Mr Bryce's initial remarks on enforcement, I do not think you were quite clear. Are you suggesting that we should replicate existing EU processes? I think you mentioned infringement procedures, for instance. Is that what you were saying?

**Andrew Bryce:** I think we could do better. There is going to be a gap in oversight of what the Government and other public bodies do. In a sense, there will not be a citizens' complaints procedure to complain that Government are not doing something they should be doing. There is not going to be an infringement process to make Governments comply with laws that they have entered into. What we are putting forward is the fact that there will be a gap. There is obviously then discussion about whether the gap needs to be filled. We look around the world and there are a number of models whereby there are bodies that undertake that function. They are effectively a monitor for what the Government are doing and whether they are doing what they should do.

The same applies to other public bodies. For instance, in New Zealand they have an environment commission that has that function. It is not too dissimilar from our Committee on Climate Change, in the sense that it is taking on a monitoring role and reporting to Parliament. Taking it to the next stage, we would look to there being some legal basis within that system. It may be a reference to a tribunal for disputes. There is a lot to be done in terms of working up the idea, but we are looking at some sort of commission that would be carefully modelled to carry out that supervisory role and be responsible to Parliament.

Q141 **Mr Djanogly:** I really wanted to clarify that you are looking at the gap, rather than at replicating exactly what is there at the moment. I think you have made that point.

**Andrew Bryce:** No, we are looking at the gap. We would not put in a new enforcer.

Q142 **Mr Djanogly:** The following question I would put to Caroline Normand. Given the overall scenario that you very kindly gave to us in quite explicit terms, it seems to me that it is a bit much for putting on the face of the Bill. What you are talking about is much more than the Bill remit. It is a whole review of consumer law. Is that right?



**Caroline Normand:** The withdrawal Bill and the approach of the withdrawal Bill seems a sensible one, subject to some comments that I am sure I will come to later, which is a device for working out how to reduce the number of gaps in our rules by bringing anything into UK law and then seeing what we will do with it.

Q143 **Mr Djanogly:** Is there anything you want to see in this Bill? Let me turn the question round.

**Caroline Normand:** I am going to continue what I am saying. That is exactly what this Bill should do, particularly as it is framed. This is not a Bill that is designed to change bits of legislation, to make policy and to sort policy out, as it is currently framed. As it is currently framed, we would want to see this do what its job is and make sure that we cover the technical niceties that we need to in order to reduce the number of gaps. That said, there are then gaps that will need to be dealt with and dealt with quickly.

Q144 **Mr Djanogly:** Going to the specifics, the delegated power in the Bill for correcting deficiencies is generally accepted to be drawn quite widely. My colleague, Mr Rees-Mogg, was speaking about the potential opportunities that could come out of the use of delegated legislation for making our regulations better. Looking at it from the other point of view, do you think that this clause is drawn too widely? Can you give examples? I think we had some in terms of the environment but, for instance with workers' rights, corrections or changes could be made by the use of clause 7. Do you think there should be more restrictions on this power, for example to exclude certain rights and protections?

**Professor Neal:** In principle, I do not think it is too widely drafted. I can see the argument and you have to put it all in the pot in case something needs adjustment, for the sorts of reasons spelled out in subsection (2). The problem of course comes to a matter of trust. It would not be for me to comment about the level of trust between parliamentarians or between opposing parties within Parliament. From the writing that you see and the comments made in relation to employment rights, there is clearly a fear that this could somehow be used as a shield behind which you could undertake clear policy shifts, of the kind that we had with the Industrial Relations Act when it was repealed.

I do not read it that way. I place faith—and I think Sir Stephen Laws did the same—on the words “arising from the withdrawal” in clause 1. There is a limitation to this. We have to see that nexus for the justification to exercise the power. Now, that is fine to say that, as a matter of principle or observation on the words. The question is how that goes into practice, and you start to get fuzzy edges.

Let us take the most benign view. There is clearly a problem if it is anticipated that one could improve or correct something that everybody regards as being necessary and desirable. The difficulty is that we may



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all agree with that today, on this particular issue but, tomorrow, when it is something that we do not share unanimity about the desirability and acceptability of, we are not going to take the same view. We are in that sort of ballpark, first of all. How you deal with that by statutory draftsmanship I really cannot say. You heard Sir Stephen saying that he was not prepared to embark on on-the-hoof suggestions about how one could address that. I have to say I have thought about it since watching him give his evidence, and I have not come up with any thoughts on it at all, other than what we have here. I can see why it is drafted broadly and I can see that there is a need for some sort of scrutiny. Let us put it there.

One suggestion recently put forward, and yesterday's *Evening Standard* had a version of the argument, is that at least when it comes to primary legislation, changes should only be put in place by a similar level of power, as opposed to the delegated regulatory powers. That is a matter for parliamentary procedure, as much as anything else, but again it goes to this question of trust. The difficulty is that we do have situations, and there are lots of them in the employment area, where the issue is things not having any practical application or not being appropriate. The terminology is always difficult and we have heard the discussion in other evidence around that.

If we are talking about those sorts of things, you can come up with quite a lot of examples. For example, as I mentioned before, the absence of European works councils goes to the whole area of representative channels and what is often called employee voice, in relation to their enterprises and those who make managerial decisions in them. Now, we have provisions in various areas of European Union law dealing with the rights of workers to have some sort of response opportunity to proposals being made by their employer. We have various provisions involving an obligation on employers to disclose information in advance of making certain managerial decisions. Some of those are in primary statute. For example, collective dismissals and transfers of undertakings you will find in the Employment Rights Act. Others, for example in relation to European works councils, you will find in regulations. The amended regulation started life in 1999. We have to have a wide ambit, I can see that. The question is how you ensure the appropriate scrutiny to avoid "abuse", and that abuse can only follow from an absence of trust and a betrayal of that trust, on the part of those who you will doubtless have a wish to influence over the coming weeks.

The problem then is what happens with a technical attempt to make a change that is subject to challenge. Does one anticipate a day when somebody arrives at the employment tribunal in central London and says, "Actually, my defence as an employer in this case is that the Minister had no real power to do this, so please do not hear it"? I have no power at my level of the judiciary to do anything whatsoever about that, other than stay it or at least to offer an opinion. It is unlikely that, outside judicial review, that would have much traction. On the other hand, I



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would have certain provisions in front of me about which, as Konrad Schiemann explained, I have to make a decision and give an outcome on the issues of the case.

There is a real problem there, but I do not offer an answer—I am sorry about that. I do not lose sleep over the breadth of this. I do not have problems about the historical precedence, nor do I have a fear that the trust level for the legislature is so low that we cannot find some way of dealing with this. It may be that assurance or comfort can be given by making certain sorts of adjustments under what are currently clause 7 provisions be done at a particular level, for example through primary legislation, but of course we have the parliamentary timetable, which is absolutely chock-a-block. It is not going to get any easier if we have those sorts of procedural aspects, albeit they go to vires, but they are procedural essentially and reflect this problem about trust. I am afraid I cannot comment on that.

**Andrew Bryce:** I pretty much go along with the view that the wording in clause 7 is very much restricted to “arising from the withdrawal”. If anything goes much outside that, there will be challenges. I do not think there is any question about that. In terms of the Henry VIII powers, as I mentioned earlier, we have done the mapping exercise for the environment and it is a relatively quick process. Good faith would be maintained if that could be done across a number of other principal sectors to show that the degree of change under those powers is relatively small.

The devil is in the detail, without doubt, and the scrutiny that will be given within the timetable, as the professor says. We have an indication from the Secretary of State that, in the environmental field, there are 850 legislative provisions that will give rise to 160 statutory instruments. That is all going to be over a pretty short timetable. My main concern is scrutiny.

The main thing also to bear in mind is that what may be described as technical or tinkering changes will often involve quite significant policy decisions. I take as an example references to the Commission, for instance, which then may be substituted for references to the Secretary of State. The words “power grab” perhaps are unfair, but it would be a policy decision being taken in terms of that amendment, so we have to be very careful that we do not see this as mere tinkering.

Q145 **Peter Grant:** Good morning, everyone. Jonathan’s question has actually led nicely into my first one, which is looking at these very extensive delegated powers that Ministers will have if the Bill goes through. In relation to employment rights, which the Prime Minister promised at the Conservative party conference she did not intend to change, or in relation to the Charter of Fundamental Rights, which the Government White Paper has promised us it is not the Government’s intention to weaken, is it reasonable to say that we are moving from a position where all of these



rights and protections are guaranteed to the full force of the law to a position where they are effectively guaranteed by the full force of a promise from a politician, who may or may not still be in office at the time those promises are due to be delivered? Is that a reasonable non-lawyer's summary of where we are going?

**Professor Neal:** The declarations as to what is intended suggest no change, as you indicate. One has to take those at face value, at the moment. As I say, a lot of the blogs and the comments in this area of employment are more about fears as to a policy change that will be implemented in the domestic situation, in any event. It is something that we have had before the EU and we will have after it.

There are some quite significant problems however, when it comes to areas where we regard the UK implementation provisions as gold-plating. We have some interesting examples. I take the transfer of undertakings provisions as an example. We consciously went well beyond what was required by the revised directive, ostensibly on the advice of the better regulation committee. We had all sorts of litigation arguing about whether enterprises, in their particular transfer circumstance, were under the umbrella of the regulations or not. The view was taken to regard all of these transactions as within the umbrella, and then we could argue about real things. That was done but now, of course, once you move away from that, time goes on and memories dim, you get a different argument. You say, "This is gold-plating. There is far too much of this", but you do not ask what the business case might be for that.

This question of what is appropriate and what is possibly substantially redundant, or whatever the terminology may be at which part of the clause you are looking, is not as clear-cut as it may seem. There may be very good reasons why matters are in need of being retained where they are, notwithstanding the change that comes after exit day. That is an area that we do not have any opportunity at all, within the context of drafting this Bill, to address, but it is something that has to be made up.

The other point I would make in passing is that, although it is right that there are generally held views that many of the areas are over-regulated—and I take the expression there in different ways—sometimes one has to recognise that business is pretty adaptable and that practices within major institutions, large enterprises and even down to the level of SMEs have come to terms with the requirements. Actually, the hit in terms of changing the business model may be just as big from going back to an idealised notion of what is a more likely regulated situation. It is not a clear-cut argument, one way or the other. I am not advocating for either, but I think we need to take that on board.

Q146 **Peter Grant:** Could I take it a bit further and look particularly at the environmental and public health protection regimes that apply in each of the devolved nations? The Scottish Government, in exercising their devolved competences, have taken a number of policy decisions that begin to diverge quite significantly from the position adopted by the UK



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Government. That is what devolution is for; it is to allow the different parts of the UK to take different decisions. The Scottish Government's national planning policy now has a very firm presumption against planning applications for new power stations in Scotland. They have recently extended a temporary moratorium on fracking applications, which they now intend to be permanent.

I hear what is being said about good faith, trust and so on. If the withdrawal Bill goes through unamended, what is there in law to prevent a Minister of the Crown from deciding it is appropriate to overturn decisions such as those that have been taken by the Scottish Government? As I say, I hear what is being said that they probably would not and they said they would not. At the moment, they cannot do it because the devolution settlement gives that power to the Scottish Government. What is there in law, after that Bill becomes law, that would prevent a Minister of the UK Government from overturning decisions such as those that have been taken by one of the devolved Administrations? Is there anything in law that would prevent them from doing that?

**Andrew Bryce:** That is a good question and I am not sure I have the answer. The devolution settlement would prevail. This process does not remove the devolution settlements. What it does is to produce a situation where a lot of legislation, and some of the EU legislation is UK-based and is to be rolled over and retained. Going forward, I would not feel qualified to give a view as to whether or not the powers extend to reversing decisions made within the devolved Administrations, but I would be surprised if that were the case. There is a bigger discussion about the incoming legislation and then its repatriation, but I am not a constitutional law expert, nor would I profess to be.

Q147 **Peter Grant:** If the Scotland Act as recently amended got in the way of a Minister doing that, does the withdrawal Bill not give the Minister the power to amend any Act, including the Scotland Act and the Wales Act—any Act of Parliament at all? Although at the moment there may be an Act of Parliament that says, "This is devolved to Scotland", the Ministers would also have the power to amend or, if necessary, repeal those Acts of Parliament if they got in the way of a decision they decided to take. Can I ask the question another way? Are any of you able to give me a clear legal obstacle to a Minister acting in the way that I have outlined?

**Professor Neal:** There are two separate things, if I may say so. That last point I am with you on, because any attempt to make that change would be subject to scrutiny within the parliamentary system. You started off, if I understood you correctly, with the proposition that it might be possible to interfere with the decision made, for example by the Scottish authorities, in relation to, let us say, planning a power station, where private rights then get engaged. I think that is a much more contentious area. I share the view and would be surprised if there was anything that could be said to give rise to that opportunity, but I am not



convinced as to what the route to getting to that conclusion is. It is a matter of surmise, at the moment.

- Q148 **Peter Grant:** Very briefly, if I may, Chair, could I come back to the discussion we had earlier about the Charter of Fundamental Rights? The Government's position is that we do not really need to have that specific provision, because taking it out of UK domestic law is not going to damage anyone's existing rights. Could I turn it around the other way and ask you, if Parliament was minded to amend the Bill so that the Charter of Fundamental Rights was retained within UK domestic legislation, who might feel that their interests had been damaged by that? Is there any group, individual sector or society whose interests would stand to be damaged or weakened by agreeing to leave the Charter of Fundamental Rights?

**Professor Neal:** If you made the provision in the charter relating to collective action a matter of justiciable right in the United Kingdom, you would have pretty much the uniformity of employers up in arms about it. At the moment, the received wisdom is that there is no positive right to strike in this country. There are immunities for those who undertake industrial action in certain circumstances, provided that they comply with a number of procedural requirements—ballots, notification and all the rest. Even at the level, as I indicated earlier, of the European Court of Human Rights in cases praying in aid Article 11, which is the freedom of association matter, it has not gone that far. You might have a fairly large group up in arms there, if that were to be seen as being a justiciable right. I have to say that, in the declaratory terms in the charter, I would have difficulty seeing it as being a justiciable right without more, so you would need a certain amount of padding to go with it. I do not actually see the danger as so stark, but you can pretty quickly develop that scenario.

- Q149 **Sammy Wilson:** So far in the discussion regarding compliance, regulations, etc, we have concentrated on the costs and time of setting up the replacement organisations, etc. There is quite a degree of criticism about EU regulation from industry and various bodies. For example, Mr Elliot, you have explained that you see benefits in the REACH arrangements at present. The EEF has been critical. The European representatives of chemical industry have talked about it being a monster that is devouring the ability for innovation, forcing firms that are not even trading in the EU to comply with standards and test materials that have already been tested. Consumer organisations have also criticised the regulatory regime and the overreach of European regulation, for example in frustrating government policy on prices for alcohol, etc.

In the setting up of new compliance regimes here in the United Kingdom, upon leaving the EU, can each of the panel explain to us what potential for improvements in the systems of enforcement and compliance you see from your own area of expertise. What kinds of improvements would you like to see when we come to a point when we set up our own compliance



regimes?

**Andrew Bryce:** I have already mentioned that our proposal is about filling the commissioning gap. In terms of overall compliance, there continues to be a resource issue for the Environment Agency and other agencies in the UK. If we are talking about deregulation, I do not see an enormous scream for deregulation in the environmental field. If you take the waste industry, for instance, they feel that they have reached a degree of stability in the statutory regime. There are one or two things they would like to be a little bit more certain about, such as the circular economy, which looks like being on the cusp of our leaving. As to whether or not we will be applying it, they are rather keen to know about that, and there is some other tinkering.

In terms of the enforcement approach generally, I genuinely believe it is a question of boots on the ground and good resourcing of the agencies that we have at the moment. I would not see the new body I propose as a mega-cost or over-regulation. The Committee on Climate Change costs about £3.5 million or something of that sort. The New Zealand model that we were talking about is quite a bit less than that, so we could develop a pretty good framework within that area ourselves. As I say, within the environmental sphere, we do not see enormous howls for massive changes in the way that regulation takes place.

**Steve Elliot:** Thank you, Mr Wilson. I talked a bit earlier about how we are where we are with the REACH regime. If we were starting with a completely fresh sheet of paper, would we design it in the way that it has turned out? No. The cost implications of REACH, typically, are that an average registration cost for a company putting a substance through REACH—and these are official numbers—is about €70,000. You might not be surprised that, when I talk to member companies, they say that is a significant underestimate of the cost. There is also the opportunity cost in terms of them being able to innovate and research, because of the diversion of money.

In 2016, there was an estimate that, in the worst case, if we were to re-register everything because of exiting from the European Union and the need to do that, that cost would be about £350 million. The UK happens to be the second-highest registrant in terms of countries around Europe, so that is a huge sunk cost and potential cost. We do not want to do that again.

On the question of what we might do better, both in terms of implementation and enforcement, there are a couple of specific examples on REACH. We have fought a relatively isolated battle to try to enable a regime that is less rigorous around what are called strictly controlled conditions. Our argument is that the way in which we produce certain substances gives every reassurance about employee safety and health. That argument was not won at a broader European level, and I still hold to the fact that the arguments we were putting forward were robust and sound. Looking ahead, does that give us the opportunity—and I stress



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without endangering employee health and safety—to diverge a little in the future and minimise cost? It potentially does.

In the area of the industrial emissions directive, this is one of those clause 2 elements. It is EU-derived domestic legislation that has already been transposed into UK law in the environmental permitting regulations. As we work the latest level of negotiation on this, still within the European Union, there is a significant danger, I believe, that we will end up with standards that go above and beyond what is required, because those standards tend to reflect where some other European countries' chemical industries are in the state of their capital equipment.

Maybe we could have invested more in the past, but the fact is our particular kit is at a certain level. Germany's kit is at a more advanced level, and there is a danger that the negotiations are influenced and the delivery in the UK is driven by German standards that are out of kilter with current UK capability. That is not to say we want to drive standards down; that is just a reflection of where we are. There is an opportunity, working with our environmental regulator in particular, just to better reflect where our current standards are.

**Caroline Normand:** If I may on consumer law, and I will cover competition law for now, much of that legislation came from the UK. We were very influential in how consumer law has developed in the EU and, likewise, the competition regime. In effect, we have taken quite a lot of that into the EU and brought it back through the Consumer Rights Act, the Enterprise Act and other things. What we have is a body of law. In terms of how it works, we would say it is pretty sound. I am not going to go into the wide range of other areas in which consumers are interested.

Coming back to the enforcement points that I was making earlier, there are big opportunities to improve the compliance regime and improve the enforcement regime. As I said, it is pretty much strained to breaking point. There are many ways that we could bring enforcers together. There is digital enablement that just does not happen, which would allow people to talk to one another, smarter risk assessment and pinpointing, all of which could be looked at. In the same kind of ways that perhaps DIT is looking at as they set up some of their new regimes, we should be looking at making long-standing but strained regimes work better.

Q150 **Sammy Wilson:** There are areas where Government policy—for example with food labelling, where the Government try to get companies to show how much sugar is in their products—is frustrated by what is called EU overreach. Firms often appeal to the labelling standards within the EU and indicate that, on that basis, they do not need to provide that information. Do you not accept that there is room for improvement in the compliance regime?

**Caroline Normand:** Absolutely. As I mentioned in a previous response, there are instances across EU legislation we are looking at. Indeed, food labelling is an example I had alongside VAT and some other issues that



appear within bits of legislation. Absolutely there are elements across the piece where, from a consumer perspective, we go, "Yes, that is something we could improve".

**Q151 Sammy Wilson:** A number of you have mentioned the cost of setting up new regulatory bodies. Steve, for example, mentioned re-registering at £350 million. Is that cost not over-exaggerated, insofar as we do not always need to set up a brand-new body? For example, the Health and Safety Executive could do some of the chemical stuff. Many firms do not sell to the EU. If they were not required to register new products that they produce or even some of the products that they are producing at present, they would not have to re-register, so the net figure could perhaps be quite low.

Are there not significant savings, especially for small and medium firms, where a lot of innovation comes from anyway, in not being subject to the EU regulatory body, so they can get on with innovating products and not having that kind of €70,000 registration for a new product, which very often stifles innovation? If we are going to have a dynamic economy and drive a lot of small and medium-sized enterprises, is there not an opportunity, in a new regulatory regime, to say to firms, "If you are not exporting to Europe, you do not have to go through this costly registering exercise, because those standards might not be required for the countries in which you decide to sell your goods"?

**Steve Elliot:** I understand that. You sounded exactly like some of our SMEs when you spoke there. For us, it is a balancing act. I cannot think of a member country that is not export-dependent. That is the first thing. The extent to which the domestic marketplace is everything is very limited for us. Having said that, 60% of chemical exports go to Europe and 75% of our chemical imports and building blocks and finished products come from Europe. That is a huge percentage of our interest, but we are looking around the world to try to think about exactly what you have just said. What are the markets that matter most for us? If I look at the markets that have tended to respond to the requirements of REACH, they are China, Korea, Turkey, Russia and Taiwan.

The markets that are, at the current time, more risk-based rather than hazard-based would be the US, Brazil, Canada to an extent and Japan to an extent. They are significant marketplaces. It is just finding the right tipping point or balance between ensuring we get market access to Europe while, further down the line, looking at the opportunities within those regimes for something that responds more favourably to the sorts of companies you have talked about.

**Q152 Sammy Wilson:** I have one last question. When it comes to setting up these bodies, the Bill allows them to be set up by secondary and tertiary legislation that will have the power to charge fees, etc. There has been a lot of criticism about just how accountable the regulatory bodies are and just how much influence there can be when they introduce inappropriate changes. What provisions would you like to see in the Bill to ensure that



any regulatory bodies set up in the UK are subject to stricter accountability than some of the regulatory bodies that you have had to work with in the EU?

**Steve Elliot:** We and our members would say that the experience we have with our existing UK regulatory bodies is, by and large, a good one in comparison to the stories they hear of what their sister sites hear on the continent, in working with the continental European regulatory bodies. That manifests itself when we come to collective decision making in the area of chemicals. I have said earlier that we feel like we have almost become the lone voice of pragmatism and risk-based decision making on one or two important dossiers. We would always want more reassurance but, actually, the culture and the way in which decisions are taken in the UK, and the influence the UK has, we support, by and large. Our issues are going to be more around whether there is enough resource to support the technical competence that there already is.

**Chair:** Thank you very much. Can I just say that you have given us two examples? There was the new environmental body you referred to, Mr Bryce, and, Mr Elliot, your assessment was of the cost of re-establishing a REACH-type system and registering. If you have any further information on those two, the Committee would be interested in headcount as well as cost. I would say to the rest of you, if there are any other bits of work that you are doing to say, "We might need this", if you could submit that in further written evidence or a note to the Committee, it would be extremely helpful. A final question comes from Richard Graham.

Q153 **Richard Graham:** Caroline Normand, this is really a question for you. In March this year, Which? expressed concern about consumer rights and those that are not related to the acquis but to other pieces of legislation, including air passenger rights. Can you give us an example of what the concern is on air passenger rights, how it could be lost, what you would do to prevent that and whether in fact there are any opportunities perhaps on air passenger rights actually being strengthened outside an EU-determined environment?

**Caroline Normand:** This is one of the instances I was describing at the beginning, where you may bring rules into the UK through the withdrawal Bill, but the fundamental underlying agreement that sustains those rules has not been fixed, if you like. There are a number of issues with air passenger rights and I am not going to go into all of them.

**Richard Graham:** I was only asking about air passenger rights, because the Chairman is keen to move on.

**Caroline Normand:** Indeed. There are compensation rights for consumers. We will bring the relevant regulation into UK legislation, and that will mean that UK passengers leaving a UK airport destined for the EU or the rest of the world will indeed be able to get compensation for their flights. The way in which the regime works—and I will be happy to submit more information about it because it is a complex regime—means



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that at the moment we are left hanging, not knowing whether rights for UK passengers departing from EU airports to elsewhere in the world, say you have a connecting flight, will be enshrined, so, in other words, whether you can get compensation. There are complex issues within these questions of rights.

**Q154 Richard Graham:** What is the way to prevent that uncertainty, in your view?

**Caroline Normand:** There are rights that relate to open skies arrangements, which are international rules, and there are rights that relate to how open skies works with the EU. In order to get this piece sorted out, we need to work out how to make an arrangement and do a deal with our EU counterparts that fills the gap. There are different ways you can do that; you can do that nationally or you can attempt to do it through businesses.

**Q155 Richard Graham:** You can do it through IATA presumably.

**Caroline Normand:** No, you cannot do it through IATA, I think. Potentially you can, but again we can submit more information about it. It is a complicated piece of interlinked international agreements that partly involve the EU and partly involve other international agreements.

**Richard Graham:** Can I recommend, Chairman, that we invite Caroline Normand to submit a little bit more information about this?

**Chair:** Yes, with the greatest of pleasure.

**Q156 Richard Graham:** In my experience as a former airline manager, many of these things are not really done through legislation. I have to say I would be interested to know what specifically you think might be the gap in UK legislation, as we withdraw from the EU, but copying over EU laws and directives. I would be interested to know what the gap is and perhaps whether there is not an opportunity for the UK, if it wanted to, to strengthen their passenger rights. I would be interested if she could submit written evidence on both those points.

**Caroline Normand:** I would be very happy to do that.

**Chair:** You would be happy to do that. That is wonderful. Time is up. Can I thank, on behalf of the Committee, all of our witnesses for your answers today, which have been very helpful to our inquiry?