

Select Committee on the European Union

Corrected oral evidence Brexit: Deal or No Deal

Tuesday 17 October 2017

4.10 pm

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Members present: Lord Jay of Ewelme (The Chairman); Lord Crisp; Lord Cromwell; Earl of Kinnoull; Lord Liddle; Baroness Neville-Rolfe; Lord Selkirk of Douglas; Baroness Suttie; Lord Teverson; Baroness Verma; Lord Whitty; Baroness Wilcox; Lord Woolmer of Leeds.

Evidence Session No. 2

Heard in Public

Questions 10 - 20

Witnesses

I: Mr Roderick Abbott, Senior Adviser on Trade Policy, ECIPE; Professor Catherine Barnard, Professor of European Union and Employment Law, University of Cambridge; Professor Anand Menon, Professor of European Politics and Foreign Affairs, King's College London.

Examination of witnesses

Mr Roderick Abbott, Professor Catherine Barnard and Professor Anand Menon.

Q10 **The Chairman:** Welcome to you all. Thank you very much for coming and giving evidence to us. The meeting is being televised today, as well as the normal webcast. We are very grateful indeed to you for coming. This is the second evidence session that the Committee has taken in its inquiry into "Brexit: deal or no deal", which is looking at what no deal means and what the transition arrangement would mean. As I said, we are grateful to you.

Would you like to briefly introduce yourselves to us? Then we can get going. We will aim to finish the session around 5.25 pm, if that is all right. I think that meets your concerns and the Committee's, not least because there is a debate on one of the Committee's reports later this afternoon. If things move rather more quickly than you expect and people leave in a hurry it is nothing to do with you; it is because they have to take part in the debate

Roderick Abbott: Going alphabetically, my name is Roderick Abbott. I work as a senior adviser at a trade policy think tank in Brussels. My whole career has been in trade policy. I started in London. I then worked for a long time for the European Commission, doing trade negotiation and trade policy work, mainly in Brussels but also in Geneva. After I retired from the Commission I worked for a while at the WTO. I will obviously talk about economic impact, trade, investment and trade policy.

Professor Catherine Barnard: My name is Catherine Barnard. I am a professor of EU law at the University of Cambridge. I am also a member of UK in a Changing Europe, of which Anand is a director. He can talk about it.

Professor Anand Menon: I am Anand Menon. I am based at Kings College and, as Catherine said, I run a slightly odd think tank called UK in a Changing Europe, which is peopled solely by academics and aims to provide research-based information on Brexit.

Q11 **The Chairman:** Thank you very much. Can I ask you to speak up? The acoustic in the room means things do not always get this end as clearly as they should.

The first question is: what was your response to the Prime Minister's speech in Florence and her subsequent statement to the House of Commons? Do you feel that they provide a sound basis for negotiations between the UK and the EU? Do they provide the basis on which we can make progress in those negotiations?

Roderick Abbott: I have read the speech several times. The question implies that if you are going to make progress, you know where you are going. It also implies that there are stumbling blocks along the way that you need to get past and to make progress. I do not know precisely what the Government's objective is, other than a "deep and special

partnership". I do not know how that will be developed, but from my angle, a free trade area in goods, together with good access to the single market, which will take care of services trade, would be a good objective.

If you then ask, "Was the speech a sound basis for getting there?", I would say that I do not think that is what it was designed for. It was designed to give a slightly different tone to things. The word "conciliatory" has been used a lot. I do not think there are any new proposals or offers specifically, although there are a couple of new ideas that I can talk about if you want.

Professor Catherine Barnard: What struck me very much about the speech was its legal realism. This is not a profound jurisprudential observation, but it has the law. For some time the Government have talked about doing the divorce and the future deal at the same time. Legally, that is not possible, because you can do the future trade deal only once you are a third country. Theresa May recognised that explicitly for the first time. She also recognised that it will take a while to do the trade deal. As importantly, it will probably need ratification by 27 national parliaments and a number of regional parliaments, in countries such as Belgium, that go through that process. All this will take time, which she recognised.

The third thing she recognised explicitly is, as we know, that she thinks there should be a transition period. She calls it "implementation", but again, legally and importantly, she says that she thinks the transition deal can be done under Article 50. The significance of that is that Article 50 requires only qualified majority voting and does not require the ratification of all the national parliaments. Much more legal understanding was explicitly acknowledged in the Florence speech.

Professor Anand Menon: I will say a word about the politics. Given the nature of our politics at the moment, with the lack of a majority and the divisions in the governing party—indeed, of both major parties—over Brexit, we are blessed with, or condemned to, depending on your point of view, government by small steps. There was no point expecting the Prime Minister to come out with a grand declaration of long-term principle, because that is not how she can govern at the moment. She cleared a very low bar, which was to say enough to get negotiations ticking forward on money and to reassure business that she is thinking of a transitional period. I think that is how things will happen: she will deal with the problems immediately ahead of her. She will not start looking to the long-term and what the ultimate relationship will be, because it is impossible to do that.

From a personal perspective, I very much welcomed the amount of time devoted to security and foreign policy. Frankly, I wish she had had that positive tone from the start when she triggered Article 50 in the first place. That was very welcome indeed.

The Chairman: So we had a speech that cleared a low bar, had a good tone, and focused on legal realism and foreign security policy. Is that a

fair summary?

Roderick Abbott: Yes. I think it was largely aspirational rather than trying to set a basis for anything, much like the Lancaster House speech, except that she added quite a lot of detail on things. There were two new things. One, the financial settlement, money has been mentioned already. She did not make an offer or mention any figures, although figures came out in the media afterwards. The other, which has been mentioned, is the transition period. She certainly launched that idea, which had been around for a long time. This Committee talked about transition in its earlier reports. Its context has changed now.

Q12 **Baroness Verma:** Mr Abbott, you mentioned stumbling blocks in your opening remarks. It would be interesting to hear what you think those significant stumbling blocks may be and how an agreement can be reached. Legally, of course, the Prime Minister and all her Cabinet would have known from the legislation that had been agreed by both Houses pre the referendum through all the treaties that were signed up to that there are certain legislative legalities that we cannot put to one side. It would be interesting to hear from you how you feel that those can be overcome.

Roderick Abbott: On the stumbling blocks, clearly there are three things that are causing problems and have not yet been solved. One is the financial settlement, which seems to be—from what you can gather, because there is not much transparency in what is going on—a big problem. As I said, no offer was made and no figures were mentioned in Florence. The second is citizens' rights, on which the two sides are talking past each other a little, because the UK plans to deal with this through immigration law, which has a slightly different purpose from what the EU has been doing, which is much more in favour of the citizen. The third, of course, is Northern Ireland, where there is no difference really in what the three sides want to do; they are all agreed that you should not have a physical border in Northern Ireland and that it should be somehow digital or virtual and should preserve the common travel area, the Good Friday Agreement and so on. All three are stumbling blocks if you say what has not yet been agreed. Beyond that is the whole trade relationship, which we have not even started to talk about.

Professor Catherine Barnard: On the stumbling blocks, there is the legal issue of phasing. Three phases are envisaged in the European Council guidelines laid down on 29 April 2017. Phase 1 is the divorce, phase 2 is transition, and phase 3 is the trade deal. Michel Barnier, the Commissioner who is the EU's lead negotiator, has only been empowered to negotiate over phase 1 issues. This is a problem, of course, because particularly when dealing with the Northern Ireland situation, you need to know where your end point is, which is essentially a phase 3 issue, before you can conclude the phase 1 issue. This is where there is a real tension and something of a dialogue of the deaf going on.

Most people, I think, understand the UK's desire to get on to phase 3 in order to be able to work back from what the transition would look like

and thus deal with the divorce issues. However, at the moment, this phasing, which is fairly standard for the EU in trade negotiations, has become a straitjacket for the development and the resolution of some of these issues. Likewise the money: the bill will depend largely not just on past commitments but on future arrangements. Again, this is a major stumbling block.

Baroness Verma: Professor Menon, do you believe that an EU-UK trade deal is therefore likely?

Professor Anand Menon: Both my colleagues have spoken about the Article 50 deal. Let us just assume a world in which that all gets taken care of and we move on to trade. Realistically, we will not move on to trade until about this time next year, because even if we make progress on Article 50 it will take months to sort out transition, because there are a plethora of legal obstacles to having transition. It cannot be agreed very easily, because no one has ever not been a member state but essentially acted like one before.

We start negotiations on a trade deal, and there are several things that can get in the way of that. First, of course, Parliament will have to vote on the package. It is not inconceivable that Parliament votes the package down and stymies the process then. Secondly, it is worth bearing in mind that whatever the debate about sequencing now, when we start negotiating a trade deal post-membership, we will have lost all our leverage. If we think our leverage is the Brexit bill, by the time we are seriously negotiating the trade deal the Article 50 negotiation will have been signed and ratified. So we cannot use the money to negotiate the trade deal because that will be in the past; we will have committed ourselves politically and legally to pay the money, and then we will be negotiating the trade deal.

The first question then is whether the EU has the interest and sees it as a priority to negotiate a trade deal with us, which is possible but not certain. The other stumbling block is that the politics of continental Europe is pretty anti-free trade at the moment. We all know about the problems they are having ratifying trade deals at the moment. Looking at the German debate over TTIP, what causes me concern is that the Germans are as worried about any form of legal enforcement that is not the ECJ as we are about the ECJ. The kind of deal that might sail politically here because it does not involve the ECJ will, I suspect, cause problems in other parliaments across the European Union for the opposite reason: because they are distrustful of alternate mechanisms. Even if we get to negotiating a trade deal, my fear is that the politics of continental Europe will make it very hard to negotiate it and to get it ratified.

The Earl of Kinnoull: In this no-deal section of discussion this afternoon, could you outline the various scenarios you see that would lead to no deal? For me, there are several scenarios. I know quite a few colleagues have questions of detail on those, but perhaps you could just begin by outlining what those scenarios might be.

Professor Anand Menon: Can I just ask a clarificatory question here? When you say no deal, do you mean no deal of any kind or no trade deal?

The Earl of Kinnoull: I think the assumption is no deal of any kind: that we just get to 29 March 2019 and nothing has been signed and nothing agreed. What scenarios do you see which would lead to that outcome?

Roderick Abbott: I am not sure that there are many. At the end of the day, you can only arrive at a failure to reach an agreement if one side or the other, or both sides, have got to the end of the road and nothing is acceptable in one direction or the other. That is putting it very simply.

There is another subset of factors, which is that “no deal” can be used tactically in negotiation, and this may be what the Prime Minister had in mind when she said something quite a long time ago about no deal being better than a bad deal. As a tactical weapon, it probably does not really mean no deal; it means simply that you come back the next week and make another effort. If both sides play that sort of game, you are not in no deal, so that scenario is not really the answer to your question. I am looking at this from the consequences of no deal on trade, but I suppose that if you look at it more widely and think about the security and defence implications and so on, there could be other scenarios that would lead to no agreement. I have not really studied those, because that is not my field.

Professor Catherine Barnard: I think that we can draw here on some of the work that UK in a Changing Europe has done on no deal. We thought about five possible no-deal scenarios. Forgive me, but I will go through them very briefly, because it might help to disaggregate the potential situation so that we can be clear about the terminology.

One is a transitional Brexit, which would be an Article 50 deal—a divorce—and some sort of transitional arrangements, but ultimately nothing beyond the transitional period, so it basically delays the cliff edge. The second is a cliff-edge Brexit, which would be an Article 50 divorce deal and nothing else, which presumably would mean that we would fall back on WTO rules, where they are applicable—my colleague can talk about that.

A third possibility, what we would call chaotic Brexit, is where there is no Article 50 divorce deal and then by definition no transition and no future deal. Then we might talk about a premature Brexit whereby we walk out of negotiations before 29 March 2019 and do not come back. Obviously Mr Abbott would say that there is a good chance that we might come out. The final possibility is a timed-out Brexit: that we keep negotiating up until 29 March 2019 and no deal is reached on Article 50, let alone on the future arrangements.

The Earl of Kinnoull: Just one clarification before we come to Professor Menon. There is, of course, this mechanism which the European Parliament has for voting anything down. Is that a sixth possibility, or is that part of number three or number five?

Professor Catherine Barnard: We could add in all sorts of permutations, but as you and the Chairman rightly said, the Government have committed to the UK Parliament having a vote on the deal. Under Article 50, the European Parliament has to have a vote. For that reason, there is talk that negotiations have to finish sometime in September or October 2018 to give enough time for the European Parliament to debate and for the UK Parliament to have its say.

On the point about the UK Parliament having its say, there is a lot of talk about the UK Parliament trying to block the deal. The trouble is that that is at the domestic level. Article 50 would still determine what is going on. Article 50 says that unless the two-year period is extended, which requires the unanimous agreement of the 27, the treaties will cease to apply on 29 March 2019. So even if the UK Parliament tries to block any deal and vote against it, the clock will still tick down. Then, assuming there is political will, we will have to ask the EU whether it is prepared to extend that two-year period, but it would have to agree that by unanimity.

Roderick Abbott: I would assume that the no deal question is really about no deal in the Article 50 negotiation. If you are going to extend this to ratification by any Parliament, you are getting into a much wider area that is very complicated. I thought that the question applied to no deal at the end of the negotiation phase.

The Earl of Kinnoull: I think the European Parliament vote must be part of the question, even if the Belgian regional parliament was not, because it is structurally part of Article 50 in itself.

Professor Anand Menon: Yes, the regional parliaments do not get a say on Article 50. It is simply the European Parliament that does. I preface my remarks by saying that there are lots of examples in the history of political outcomes that none of the participants wanted. That is perfectly possible.

I shall pick up on two things that Catherine said that are worth stressing, the first of which is that a transitional deal does not prevent a cliff edge; it delays it. You prevent a cliff edge only if you have a deal after the transitional deal that prevents a cliff edge. Simply having a transitional deal does not solve the problem; it simply delays the moment of choice.

The second thing that Catherine mentioned was the parliamentary vote, I assume around this time next year. Michel Barnier has suggested that the negotiations have to finish in October next year. The crucial issue there is what the default condition is if the deal is rejected. As Catherine said, if Parliament simply rejects the deal and says to the Prime Minister, whoever that may be, if the vote is lost, "Go and renegotiate another deal", there will be no time to negotiate a whole new deal without securing the agreement of the 27 to extend Article 50, which is far from a foregone conclusion. If the default is that we remain, that is a whole different ball game, but Parliament's power when it comes to this final vote will depend on what precisely the choice is.

On the technical issues that my colleagues have talked about—Northern Ireland, money and citizens—there are all sorts of ways in which we could end up failing to find a solution. For me, the role of the ECJ in relation to citizens means that no obvious compromise is possible. One thing we should bear in mind is that the significance and priority accorded to Brexit in other capitals around Europe is declining. This is an imperfect measure, but it is staggering how many agendas of academic conferences do not have a Brexit panel, which is interesting in and of itself. If you have a conference on challenges to the European Union and Brexit is not there, that tells you something about the way people are thinking. It might just be that our partners are not willing to extend the process and keep going because they want to turn their minds to something else.

The Chairman: Professor Barnard, of the various scenarios that you outlined, are there one or two that you think are more likely than the others, given that real life sometimes intervenes?

Professor Catherine Barnard: Yes, absolutely. I think there will be an Article 50 deal of some sort. The EU is ultimately good at deal-making. It might be the 11th hour and there will be a lot of bumps in the road. Realistically, there will be transitional arrangements of some sort too, because we have such a vast number of things to do in the next 18 months. There is not the capacity to come up with a full new immigration policy or a full new customs policy, to hire and train customs officers and to get the technology in place. If you think about this across all sectors—agriculture, fisheries and so forth—these are huge policy areas that require a lot of thought and capacity. We are trying to do it all at the same time.

I think there will of necessity be a transitional period. At a minimum, I think there will be an Article 50 deal of some sort, not least because it is in the EU's interest to get some sort of deal on Article 50, otherwise there will be a big hole in the budget. Ultimately there will be an Article 50 deal and transition. I also think that there will ultimately be some sort of future deal, but that may take much longer. That then raises further questions about how long we can extend transition for.

Roderick Abbott: I fully agree. I thought we would come to this when we talk about transition, but it is pretty clear to me that both sides want to avoid a cliff edge. Both have important trade and investment interests at stake. If it turns out, as seems likely, that you cannot make a deal, certainly not a trade deal, by March 2019, I would have thought that a transition is a certainty. I am not supporting people who say that the EU would not go for something like that with the UK, whatever they might think generally about free trade.

Lord Teverson: Professor Barnard mentioned the 11th hour. When is the 11th hour for Article 50? As we all know, if we do not get to the end of this process, a lot of the economy could shift. We also think of the EU stopping the clock and doing a deal at the end of the day. There seems to be a psychology out there in certain parts that you could do all that in the negotiation but without thinking about the legal basis there has to be for

all this. I am trying to get to the idea of whether there is any flexibility. As you said, on midnight on 29 March, that is it. Is there room for those usual national-type negotiations here, or are we completely driven by legal process?

Professor Catherine Barnard: The law certainly frames all the negotiations at the moment, but we also know that politics will eventually kick in. Of course, the law is on the EU's side at the moment and the EU is sticking to the rules of the game as laid down by Article 50, such as we know them, and Article 218, which is the other process that is being applied.

As for when the 11th hour is, the legal answer would be 28 March 2019, but in practical terms and for legal certainty banks and airlines say it will be spring 2018, because they need a year, particularly for airlines planning schedules and so forth, to have some certainty. Of course early spring is not a hard deadline, and the EU is good at working up to a hard deadline, but the December European Council might well give some movement on transition, which will give the certainty that banks, airlines and so forth would like.

Lord Teverson: But is that not a transitional deal at the 11th hour? I think Lord Woolmer will follow that up later on. That makes the Article 50 11th hour earlier than that, does it not?

Professor Catherine Barnard: Absolutely, unless you do an Article 50—

Roderick Abbott: Unless you extend it.

Professor Catherine Barnard: Yes, or you do an Article 50 and a transition more or less wrapped up together, because the legal basis for the two is going to be the same. Your point about stopping the clock raises the sensitive question of whether Article 50 is revocable. Do you want me to talk about that now or later?

The Chairman: We concluded some time ago that it was.

Professor Catherine Barnard: Marvellous. Of course the Government do not take that view. In the Miller case, both sides said that Article 50 was irrevocable. But assuming that you are right and the Government are wrong, the very difficult question about revocability is still whether it is a unilateral decision. Can we decide to revoke the notification or do we also need to have the EU saying, "Yes, we welcome you back with open arms"? The answer is that it is not clear. You can run arguments both ways, but the reality is that only the Court of Justice has the jurisdiction to say that, which raises further issues in turn, of course.

Roderick Abbott: If you withdraw your letter, which might be what would happen, that presumes that it is unilateral, although it might be challenged if the other side did not like it.

Lord Woolmer of Leeds: Building on the idea of building blocks, first, could I just get some clarity about words? The City and financial services

people are certainly saying that they want some certainty on the question of transitional arrangements, and they want that by the end of March next year at the latest. So there is that, which is not about the deal but about them saying that they want something that makes that certain. In a moment, I would like you to tell me what could be said by the end of March that could give certainty to companies and businesses that are saying that if they do not have that, they will relocate.

Secondly, beyond that, there is the question of actually agreeing that some kind of trade and other deal will be done and that a transitional period will be given to negotiating the details of that deal. As I understand the word "transitional", it is not really about transitioning to something but moving from now to what the trade and other agreements will be.

Finally, there would be a third phase, an implementation phase, in which we would both have to have time to implement that. Am I right that there are these different building blocks over time? How do you see the timing? Critically, at the moment, what could be agreed and would be binding between the EU and the UK by March next year that would lead consequentially to a transitional deal?

Professor Anand Menon: My short answer to the certainty point is that nothing can be said in March next year that will provide certainty. If you want to be cynical about it, you might say that countries such as the Netherlands, France or Germany might want to provoke a certain amount of uncertainty, because the best of all worlds for them would be the relocation of City firms and the signing of an Article 50 deal. We might call that them having their cake and eating it in the sense that they benefit economically from our loss of business while at the same time getting the Article 50 deal that secures budgetary payments. I think it will be very hard. I am sure the Government will try to sound certain about this, but ultimately this is a political process, and you cannot be certain until everyone has voted, which I would imagine will be at some point in spring 2019.

Roderick Abbott: I would give the same answer: that there is no way you can be certain as early as March next year. You may have started to talk about a transition period by then, but I do not think you will have had any agreement about it, and it may turn out to be a difficult thing to agree on. I do not think that anything can be certain by March next year. I am sorry for the people who want that.

Q13 **Baroness Suttie:** You have all touched a little on Northern Ireland already, but what do you think the implications for Northern Ireland will be of no deal?

Roderick Abbott: I am optimistic that you could manage somehow—somehow—to have a kind of virtual border between Ireland and Northern Ireland with the sort of technology that is being developed to track trade. A lot of what crosses the border there is actually shopping rather than trade, so that could be done. The real problem would be how you control

migration within the flows of people. If you do not have a physical border and are doing it all through technology, you have a big gap in the EU's external border, which it will not be happy about; you know how many problems it has had with migration over the last couple of years. I am optimistic that they can do something, but I do not know yet how it will be done.

Professor Anand Menon: I am less reassured by technology than I think Roderick is, partly because I am not sure how this overcomes the problem of smuggling and people who are trying to tiptoe past the rules to smuggle things into or out of the European Union. If we look back to when the countries of central and eastern Europe joined the European Union, there was a very heated discussion at one point between the Poles and the European Union about the border with Ukraine, because that was a very soft border. Western Ukraine did pretty well out of that. Its levels of economic development were pretty close to eastern Poland at that time, because commerce came and went, and the Poles were making the point that it would have a damaging impact on Ukraine if the border was made into a hard border, to which the response was, essentially, "Tough. This is an EU external border. It will be hard".

I have no doubt that if this were left to the UK and Irish Governments we might fudge this in some way, shape or form to make the border as invisible as possible. I suspect there are people in Brussels who will say, "Look, this is the external frontier of the European Union. It needs to be visible and it needs to work". That is partly for the reasons that Roderick says about people but partly, too, because of the dangers of smuggling, particularly if we go on to sign our own trade deals that impose lower tariffs. There was a big row 10 years ago about Chinese bras, when Britain opposed high tariffs. Let us just say that down the line we sign a trade agreement with China that involves lower tariffs on bras. There will be nothing to stop them shipping them into Italy and selling them cheaply there. That will not work.

Professor Catherine Barnard: Anand might be talking about bras, but I would like to talk about phytosanitary inspections. The reality is that the more divergent the regulation between north and south, particularly if we have our own free trade deals whereby goods come in from other countries that do not comply with EU standards, the greater the necessity for controls. They might not be physically at the border, but much greater levels of control and inspection will be required, which requires quite a lot of vets. An issue here at the moment, which a colleague of mine has been bending my ear about, is that we are currently chronically short of vets with this particular expertise. A lot of vets who do that sort of work and do controls in abattoirs and so forth are EU nationals.

Q14 **Baroness Neville-Rolfe:** There are lots of uncertainties and there is a real need to get the negotiations on to a more constructive basis, because I think there can be a win-win, despite what has been said. John Longworth from Leave Means Leave gave evidence to us last week, and he said that it was vital for the Government to start realising the benefits

of Brexit to the UK economy. Do you agree that there are potential benefits? What are they, and is it possible to quantify them? Obviously you need to think about both the short term, when there will be more costs, and the longer term.

Roderick Abbott: My answer would be that everything depends on what assumptions you make. If you make the bold assumption that you are going to have continuing free trade—free trade in goods and good access for services so that our exports are not damaged—obviously there will be Brexit benefits in that sense, because you have a good deal. But that is a pretty bold assumption as things are. Beyond that, if you do not make that assumption, I can see no really clear benefits, unless of course you go into areas such as, “We will be in charge of our border, we will be in charge of our trade sovereignty, and we will be independent”—benefits of that kind. But I am always thinking about the economics and the trade and investment.

Professor Anand Menon: Yes, there could be benefits. One of the problems with the current situation is the spectacular lack of clarity about what government policy will be post Brexit. Some people are saying, for example, “As soon as we leave the European Union we can get rid of all tariffs on food imports”. That might mean that some kinds of food would be cheaper. We might well negotiate good trade deals with other partners. The crucial question is whether we can do enough of those to make up for the loss of trade with the European Union if we leave the single market and the customs union.

Some of our colleagues at the LSE have done some number crunching on this. Their forecast is that leaving the single market and the customs union would, over a 10-year period, cut our trade with the European Union by about 40%, which might amount roughly—this is a forecast—to about 3% of GDP year on year. The estimate of what a trade deal with the United States would mean that removed every single tariff is in the order of 4% of GDP.

Part of this depends on whether you believe, as I do, that geography is a crucial determinant of trade. There are some who say that the world is changing and geography no longer matters as much as it used to. I have yet to see evidence of that myself.

Q15 **Lord Cromwell:** It will not be news to you that it is widely debated that if we start doing global trade deals, the whole question of standards comes in to what we have to negotiate. If we say that our standards are fixed, we have no negotiating position with countries that may have other standards. We will be pulling away from European common standards into a whole new world. Is that factored into those benefit calculations?

Professor Anand Menon: I am not sure, but one of the profound ironies is that all the Chinese economy has done in several sectors is adopt EU standards. We might be pulling away from the European Union to sign deals with the Chinese only to find ourselves effectively reimposing those EU standards on ourselves, because in areas such as car emissions the

Chinese have found it far easier to say, "Okay, we'll take those standards and have them here".

The other thing worth saying is that a lot of the impacts of Brexit above and beyond tariffs will be the distortions due to the time that customs checks and the like will take at borders. That will have a disruptive effect on supply chains. With the best will in the world, I do not see us co-producing cars with New Zealand with complex, just-in-time supply chains, because in that sense at least distance is a real barrier. We have to wait and see what the deal is to see what the impact on both sorts of supply chain will be.

Baroness Neville-Rolfe: Would you expect to see more domestic production in all scenarios?

Professor Anand Menon: Possibly, but the flipside is that we would expect to see less foreign direct investment by foreign manufacturers.

The Chairman: I think we should move on.

Q16 **Lord Crisp:** Are the Government doing enough to prepare for the possibility of no deal?

Roderick Abbott: I do not know what the Government are doing. The question has now been raised and people are getting worried about it. I have read the customs Bill, which talks, apparently, about a contingency scenario. I am not sure that I have found in the Bill what that is, other than the fact that they intend to introduce a power to legislate so that you can introduce a customs tariff in the UK and the VAT and excise regimes that go with it, so that on the day after you have left you do not otherwise lose all your revenue. You have to do that in any event, so that is not really a contingency scenario; it is just what you have to prepare as you would normally do to be ready for exiting the EU. Clearly, the Government should be prepared for any outcome. The problem at the moment is that we have no idea what the outcome will be. It is pretty hard to take more specific action to prepare.

Lord Crisp: Are there other views?

Professor Catherine Barnard: The Government are in a difficult position over preparing for no deal, because there are significant cost implications that might ultimately be wasted costs. These are huge costs. If you are buying up whole tracks of land around Dover, these are things not to be sniffed at. While it strengthens our hand at one level in the negotiations to say that we are prepared to walk away, on the other hand we are keen to have a deal. In the light of the evidence, the economic consequences would be pretty serious. That is not to deny that there might be political benefits in sovereignty and so forth, but the economic consequences will be serious. I can see why the Government's hands are somewhat tied, particularly at a time when we are still dealing with the consequences of the financial crash. We do not want to be seen to be wasting this money.

Lord Crisp: Professor Menon, could you enlarge a bit on what you think the consequences of no deal at all would be? We have heard some very disastrous statements on that.

Professor Anand Menon: Of necessity, we have to be slightly speculative here, because on the specific sectors, such as what happens to airlines, we will not know until the day. There are lawyers who say that any legal expert worth his or her salt will say to the airline they work for, "Do not fly, because we are just not sure what the legal situation is here". Catherine might want to talk more about this, but obviously it will have a massively disruptive impact on trade initially because it will affect everything from the need to have checks at customs—not just on our side of the border, because the French are not doing enough to be prepare their ports either; if they are not doing that it impedes trade the same way—to the question of which country's legal system you will litigate contracts under. That is currently taken care of under EU law but becomes absolutely unclear. You get a tremendous amount of uncertainty over the whole body of cross-border trade.

On top of that—I will leave it to my colleagues to talk about the law and economics in more detail—the political implications of no deal will also be significant, because they would have a massively negative impact on our relationship with our European partners. The fear there, of course, is that that spreads over to everything—it cannot be contained in a box called the EU—including NATO and other forms of bilateral co-operation, because it is fair to assume that the mood politically would be ugly. Governments on all sides will engage in a blame game.

Roderick Abbott: Let me say something about trade. It is very simple: if there is no deal, you will crash out and be over the cliff edge unless something else is put in place. Then you will face tariffs and non-tariff barriers, particularly for goods' rules of origin. You will face being shut out of the single market unless you can find other ways in through equivalence, mutual recognition or something of that kind.

When you come to the sectoral aspect of it, the crucial question is whether there are separate deals that are already open to non-EU countries, in which case you may be able to make side deals that could survive, even if you have a no deal overall, because they are self-standing. I do not know the answer, but that is what you would look at.

Professor Catherine Barnard: On the legal side, the European Union (Withdrawal) Bill is by definition planning for that scenario, because, as you know, it is incorporating the whole corpus of EU law into domestic law. So there is contingency planning from that point of view. The problem is that some of these regulations, such as Brussels I and the Rome regulations, are based on principles of reciprocity: that we recognise their judgments and they recognise ours. We can say that we recognise German judgments, but in the scheme of things that is minor, because it is far more important for the City of London that Germany recognises our judgments. There are many more of those in international trade than there are German judgments. We, of course, cannot mandate

the Germans to recognise our judgments. Then it becomes a question of where the balance of interests lies. The balance of interests is that there should be a deal to work out how we carry on in some kind of relationship with the EU over access and recognition of these things.

Professor Anand Menon: May I add one more point very quickly? When it comes to people, EU citizens here and British citizens in the European Union will be in a legal limbo, because the rights they will have will be rights of EU citizens. Presumably in a no-deal situation alternative arrangements might not yet have been made. Everyone might say, "Okay, let's just turn a blind eye to this and not implement", but there will be that profound uncertainty for about 4 million people, because their rights will not be at all clear.

The Chairman: Thank you. I think we should move on to talk in a little more detail about transitional arrangements.

Q17 **Lord Cromwell:** You have all underlined the need for time, which is no surprise, of course, because a ticking clock is a key part of any negotiation discussion. In order to move us on, can I take it as a given that you all see the need for a transitional arrangement, or is anybody going to tell me that we do not need one?

Roderick Abbott: No, I think it is inevitable.

Lord Cromwell: Fine. You mentioned, Mr Abbott, that it is in the equal interests of both parties to the negotiation to get this arrangement in place. But is it in both parties' interests equally, or is it again part of the negotiation that can be played as it is more in the UK's interest than Europe's interest to get it done within the time?

Roderick Abbott: I think the second question is slightly different from the first. If you are talking transition, I said that it is inevitable, because I do not believe that you will get a deal by March 2019, certainly not the trade deal. Therefore you will need to do something to bridge however long it might be until you have completed that negotiation. People might disagree with that and say, "Well, we can do it", and then you get what seems to be the Government's position, which is that you need a transition period in order to implement a deal that you have done. That is not the position that I would take, because I do not believe that you will get that deal done in time.

Frankly, if you go to the EU and say that you want a transition to give more time for implementing, I think that is a different kind of offer from saying, "We need more time to finish the deal", because I think, because I am in Brussels, that the EU is just as keen to have a deal and to have a partnership. It may not be the same partnership, but it is just as keen to have one and some form of continuity, subject to rules. It is also just as keen as the UK to avoid this cliff edge. Its trade into the UK is actually bigger than our trade that way, of course, but proportionately it is far worse for us because it is 45% of our trade, plus whatever the services side is. I do not think there is a real dichotomy of interest here. Both

sides will probably feel that they have to have a transition. The question, of course, is under what conditions and under what terms.

Lord Cromwell: Thank you. That leads very neatly on to my next question, unless anybody wanted to come in. If we peel back the lid a little on the transition agreement, will we have one or, rather to Lord Woolmer's point, some that are sorted out sooner and others later? Will there be a series of transition agreements or one all-embracing one?

Roderick Abbott: I would say one, because you either extend Article 50 or you do not.

Professor Catherine Barnard: I think that is probably the case. I will just say something about whether there is even the power to have a transition under Article 50. You will recall that it is advantageous to do it under Article 50 because it requires qualified majority voting and not the full bells and whistles that come with going for the full trade deal. However, Article 50, of course, says nothing about transition. It says that there will be negotiations on the divorce with a view to a future trade deal, so it does feel as though some bridge may be needed.

Article 49, which is about accession, also says nothing about transition, but it is customary to have transition arrangements. So it seems likely that if you can have transition on entry, you should be able to have it on exit. It was quite striking that Theresa May referred in her Florence speech to the fact that transition can be done under Article 50. But there is a potential problem. She refers, very carefully, to a time-limited transition of about two years. But the question is what happens if we are not done in two years, and what happens if there needs to be some sort of rolling transition.

I recognise that the politics of this is complicated, and here I speak as a lawyer, but if we had many years of transition in some areas that you might be talking about, can that still be done under Article 50, or does it look much closer to a future trade deal, which actually needs to be done under the different legal regimes of Articles 217 and 218? That becomes quite difficult, which is why Theresa May was very careful to say that we should go for a time-limited transition. But if it is not done in that time, that creates a problem.

There is a further problem: will the transition be more or less a cut and paste of what we have at the moment? If so, it is slightly odd, because transition for exiting would suggest a reduction in the content of the agreement rather than a continuation of what we have at the moment. That is why some people argue, despite all the political problems that would accompany this, that it would be better to lobby for a continuation of membership; in other words, to go for the extension of the two-year period, because legally that would be much more secure. Because it is an extension of the period expressly envisaged by Article 50, legally it is more certain, but I accept that politically it is probably unacceptable.

Lord Teverson: I come back to that question, because the problem is

that if we are no longer a member of the EU, it is not just about an agreement with the EU; there are a number of third countries involved. There is a whole shedload of international free trade agreements from which we benefit, and I cannot see that you will get those 40 countries, as well as sovereign states, agreeing a transitional agreement. So we are still stuck with a customs barrier between us, are we not, because we are not part of all those third-party agreements, let alone tariff-rate quotas? The WTO is already disputing the ability to divide the EU-UK proportions, and that would be true in other areas as well, so it cannot be done, can it?

Roderick Abbott: This depends on the wording of the transition. If you are extending Article 50, and it is indeed virtually extending membership, I do not think that the impact on the third-country deals would be so important. In any case, the third countries probably want to go on as they are, free-trading with the UK as well as with the rest. So I do not think that is a major thing, but the political problem of extending membership is absolutely crucial.

Professor Anand Menon: Catherine and I have had a long-standing row about whether politics trumps law or vice versa, which we take up whenever we are on a panel together. The legal problems of transition are abundantly clear, and you are absolutely right that one of those problems is that the third-party agreements are signed between member states and the third party. If we cease to be a member state, no one is quite sure what our position is there, but the assumption is that we will not still be party to those agreements. But politically it is very hard to see, in the current climate, any extension of Article 50 being possible for this Government. It makes all the sense in the world legally, but not politically. I find it very hard to imagine circumstances, with the current Parliament in place, in which this could happen.

Q18 **Baroness Wilcox:** This will be a shorter question than originally thought, because you have gone well into it. Catherine, what issues are there, if not Article 50? I have left out the first part of the question because you have all worked very hard at that. The question would have been, "Does Article 50 provide a legal base for the EU?" You have already answered that.

The Chairman: If you could also say something about the legal basis from the UK's point of view, that would be helpful.

Professor Catherine Barnard: In respect of the EU, the alternative legal basis could be Article 207 or Article 217. Article 207 was the legal basis, for example, for the EU-Canada free trade agreement. Article 217 is the legal basis for the EU-Ukraine association agreement, and it tends to be more for deeper arrangements. The deeper and more complex the arrangement, the more likely it is that there will be unanimous voting in Council, and it may even become a mixed agreement. That raises all sorts of issues, because it means that you are back into the territory of having national and regional parliaments ratifying. That is why it was so

striking that Theresa May cited Article 50 for transition: to avoid some of that complexity.

The Chairman: That is rather from the EU's position. What about from the UK's position?

Professor Catherine Barnard: There is quite an important legal point that if the transition is under Article 50, it can be done under the European Union (Withdrawal) Bill, and there are clauses in that Bill—I think it is Clause 9; I will check—that seem to give scope for the Government to do a transition even under the existing Bill.

Q19 **Lord Whitty:** Could you give us a bit more of a view as to what this transitional arrangement looks like? You have told us fairly clearly that you regard it as a transitional arrangement in the sense that there will still be things to be sorted out, but this is almost directly contrary to what Mr Davis told us the last time he was before this Committee, which was that it was simply an implementation phase to phase in what you had already agreed. Let us take your version of it. Institutionally, would it, or could it, involve time-limited continued membership of the customs union, or could it involve an EEA-type continuing period of time-limited membership of the single market? Whatever the answer to that part of it is, what kind of arrangements would operate between the EU and the UK in that interim period, given that we have ruled out an ECJ role? Would there need to be a joint decision-making arbitration process?

Roderick Abbott: I will give you the answer that comes from the other end, which is: what are you likely to be offered? We are in a position where the UK is the demandeur—although I have said that I think both sides would be willing to go this way—asking for a transition for whatever reasons. What is likely to be offered is, I think, based on past experience, an extension of Article 50 under the same conditions as you have now. Legally speaking, that means continued membership. The one thing you might be able to get is that kind of a deal in a pragmatic way rather than a legal way. Lawyers will tell me that that is very bad, and I am sure it is, and actually the EU is a very legal construct, so it may not be willing to offer that, but it is the only way out that I could see from extending Article 50 under the same conditions as you have now.

Lord Whitty: I am sure that Professor Menon would say that politics could trump it this end as well. If we do not leave the European Union in March 2019, there are politics arising here.

Roderick Abbott: You might refuse, of course.

Professor Anand Menon: Politics is a constraint here and law is a constraint there, and how you find the space between the two is the big issue, is it not?

Professor Catherine Barnard: I would just add that the EU has made it a precondition for any transition that the existing regulatory, supervisory and judicial regime applies; in other words, the ECJ. I think there are some signs that the Prime Minister has conceded that for the transition,

but of course that is for a limited two-year period. The question then is: what will happen to the supervisory mechanism? This is an area of quite significant complexity.

I think everyone agrees that there needs to be some sort of enforcement mechanism, particularly for the future trade deal. There are various options on the table. One possibility would be a more political mechanism—some sort of joint committee. Another would be to use the investor-state dispute mechanism, which is very unpopular; as we have already heard, it is unpopular in countries such as Germany. Another possibility would be docking to the EFTA Court, which has not been ruled out yet and is something that the EFTA Court itself would be keen to see. But the Court of Justice will have the final say on any future trade deal, and it can be challenged, as indeed CETA is currently being challenged and as the Singapore agreement was challenged.

The Court of Justice is very jealous of its own prerogatives. Indeed, when it was asked to look at the proposed EEA court—the court that was going to rule on the European Economic Area agreement—it kicked it out and said that the idea of borrowing some members from the ECJ and some members from the EEA states was not good enough, because the Court of Justice members would have a conflict of interest. So even with a future trade deal under Articles 207 or 217, the Court of Justice will be in a position to have a final say on its compatibility with EU law. There is no guarantee that it will not strike it down further down the line. So there are many bumps in the road, which is why transition becomes so important. Then the question is: how long will the transition last?

Lord Liddle: I did not quite follow what you said about an extension of Article 50. I cannot see the European Union wanting us to stay technically members of the EU beyond June 2019 at the latest, because that is when the new Parliament takes office, the new Commission has to be elected and chosen, and all of that. Therefore, surely the EU is going to say that the transition excludes membership, or are you saying that you think that might be illegal?

Roderick Abbott: No, I am not saying that it might be illegal. I am saying simply that if you ask for a transition under Article 50—like Catherine, I notice that the Prime Minister mentioned this in her Florence speech—you then ask the member states through the Council, “Are you all unanimously in favour of extending this for another two years?”, or whatever period, and I do not think they would say no. There is community of interest in avoiding a cliff edge—again, always on the economic front. You mentioned Commission terms and Parliament terms. That is very relevant politically, but if the question was simply, “We have to have more time, because nothing has yet been finished, and are you all agreed that we should have another two years?”, I think they would be willing to do that and that somehow the political thing would be fudged, because that is often the way.

Professor Anand Menon: The discussion arose from the fact that we were talking about the legal hurdles required to have a transition when

you are not a member state. That is how the conversation arose in the first place.

Lord Liddle: Yes.

Professor Anand Menon: But you are absolutely right that the political hurdles when it comes to extending membership, both here and on the EU side, because of those elections, are significant.

The Earl of Kinnoull: I am very interested in something that Professor Menon said a moment ago. You were describing how the EU was constrained by legal issues and we were constrained by political things, and I was thinking back to the Cameron renegotiation when he was able to come back and hold up a bit of paper and say, "This is legally enforceable", and it was essentially an agreement over dinner among the European Council. Do you feel—you might want to write to us about this afterwards—that that method of getting round the legal issues within Europe might be open at the end of the Brexit process?

Professor Anand Menon: I can feel Catherine's eyes boring into me. I have always felt that it is very hard for the legal system of the European Union to overturn a unanimous decision of the European Council. That said, part of the Cameron deal was dependent on something that would later be enshrined in treaty change, which always struck me as somewhat ephemeral, because I do not see the European Union having treaty change in the near future, because someone will veto it and people need referendums. I do not think it will fly for a trade negotiation of the kind that the Prime Minister is talking about. I think it will be the full ratification mechanism involving the 38 various parliaments around Europe. There is a tried and tested EU procedure for doing this and there is no quick political fudge. This deal will have to be ratified in the normal way, including by the member states.

Professor Catherine Barnard: The David Cameron deal was certainly a temporary triumph of politics over law. I would not like to concede anything more than that. But it was, of course, an international agreement under international law, essentially a post-dated cheque that there would be treaty amendments. Also, crucially, the issues that people were passionate about, such as migration, the fourth basket, required legislative change such as a change to the social security regulation about the exportability of child benefit and amendments to Regulation 492/2011 on the question of limiting in-work benefits. When David Cameron went out to talk about this, and certainly when we were trying to explain the deal at town hall events, people would say, "Can you guarantee that those regulations would be changed accordingly?" We could not guarantee that, because of course the changes had to go through the standard legislative process, which involves the European Parliament, which could have blocked it at any stage. It was a clever move in a very short timescale, because obviously he needed a deal quickly, as this was February and the referendum was in June, but it did kick the legal problems down the road. Now, of course, the deal is dead, because we voted to leave.

The Chairman: I think we should move on. I suspect the arguments over the primacy of law and politics will continue after we have had this session.

Q20 **Lord Selkirk of Douglas:** I would like to ask three associated questions concerning the necessary components of a transition arrangement. First, do you expect the United Kingdom to continue to pay into the EU budget during the whole transition period, and how would the contributions be calculated to make certain that they represented value for money for the United Kingdom? Secondly, how would the status and the rights of the United Kingdom with regard to the EU change during the transition period? Thirdly—this is a question that you have answered in large measure already—would the United Kingdom be able to negotiate trade agreements with third countries during transition? Would they be able to do this to any extent? It appears that the position is not very clear on that issue.

Roderick Abbott: I will give you three quick answers to your questions. First, if, as I have been suggesting, you get a transition on the same terms as you have now, whether that is legal or pragmatic, you will not be able to negotiate trade agreements with third countries during that transition. That is my answer to that. For the rest, if transition is on the same terms as you have now, the UK would pay into the budget according to the same key as now, because you would be in a status quo situation. The status and the rights of the UK, again, would not be affected if you have a status quo type of agreement in which you continue to operate under the same terms as you have been. That means obligations as well as benefits.

Professor Catherine Barnard: I would say that it depends on how the transition is done. If transition is done so that we leave on 29 March 2019 and are no longer formally a member state, the rules that say that you cannot negotiate a trade deal no longer apply, unless the EU puts a clause in to say that we cannot do that. In reality, it will take a while to negotiate those trade deals, and, of course, our partners might not be that willing to rush into negotiating a trade deal with us until they know the outcome of future trade deal negotiations.

If, on the other hand, we extended the Article 50 period and so stayed as members of the European Union, legally we could not negotiate future trade deals. Then again, this is where politics kicks in. The politics might say, "Well, who is going to bring enforcement proceedings to stop us?" We will not be able to conclude a trade deal while still a member, but it is hard to envisage somebody trying to stop us from at least having talks. So it does depend on how the transition is delivered: whether it is delivered through an agreement as part of the withdrawal agreement under Article 50 or whether it is done as an extension of our membership, with Article 50 being used to extend our ongoing membership.

On the question of whether the UK's status will change, of course that depends on whether we are still in or whether we are out, but it is likely

that we will not participate in Council meetings and decision-making about the future arrangements.

Professor Anand Menon: I agree absolutely with Catherine on the trade agreements and whether people would be willing to negotiate with us if they did not know our final status, because it would make no sense.

On the question of us paying money in, yes, we will pay money in. How would it be calculated? Here it will be a question of the politics, because it seems to me that one way in which the Prime Minister can get out of her current fix about the Brexit bill is simply to negotiate a deal where we pay a little more than perhaps we otherwise ought to for a transition, and dress it up in that way: that we are paying for continued access rather than paying a leaving bill.

It strikes me that the political presentation of the Brexit bill will be absolutely crucial to the saleability of the deal to her Back-Benchers. Is it possible to frame an effective transition without knowing the future? This refers back to Lord Woolmer's earlier question about the distinction between transition and implementation, which I do not think we answered at the time. Absolutely it is, because transition essentially means negotiation. I see transition as a period in which we will be negotiating the deep and comprehensive trade agreement. I am sceptical as to whether we will have time in that period to do implementation as well, so towards the end of transition we will have the debate that we are having now, yet again, about whether we need extra time in order to implement what we are now in the process of negotiating.

Lord Whitty: Just to clarify the position about third parties. If the transition agreement meant that we had left the European Union, but part of the agreement was that we were still members of the customs union for a limited period, again we could conduct negotiations but would not be able to conclude agreements with third parties. Is that right, legally and probably politically as well?

Professor Anand Menon: If that were the case, the Government would have to negotiate the ability to talk or at least to negotiate an understanding that we would not be taken to court for talking.

Lord Cromwell: If the objective was to reach a fully functioning post-Brexit world, and if law was subject to politics—an uncomfortable scenario, I realise—how long should this transition and implementation period last in order to achieve that overriding objective?

Professor Anand Menon: It depends how ambitious the trade deal that we want is. If the Government remain committed to our being outside the single market and outside the customs union, the question remains how closely you want to approximate those sorts of arrangements once you are out. We do not know yet, but the more closely we want to approximate, the longer it will take both to negotiate and to implement. That is my fudge of an answer.

Lord Cromwell: That was a fudge, yes.

Roderick Abbott: I could not possibly tell you how long. We have the PM saying that it will be for about two years. That may not be enough. That is also a fudge.

Professor Catherine Barnard: I think it will take five to 10 years, that order of magnitude. But, of course, the politics may say that this is just impossible, that we have to stop sooner and that people just have to get themselves organised to get out before that.

Professor Anand Menon: It is worth saying that the European Parliament has already said in its negotiating guidelines that it wants a transitional phase limited in time, to three years if I remember rightly.

The Chairman: Thank you very much indeed. We are extremely grateful to all three of you. We have covered a huge amount of ground. It has not, at least to me, made our inquiry look any simpler than when we started, but we are very grateful to you.