House of Commons

# Treasury Committee

## Oral evidence: The UK's economic relationship with the European Union, HC 473

Wednesday 25 October 2017

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Watch the meeting

Members present: Nicky Morgan (Chair); Rushanara Ali; Charlie Elphicke; Stephen Hammond; Stewart Hosie; Mr Alister Jack; Alison McGovern; Catherine McKinnell; Kit Malthouse; John Mann; Wes Streeting.

Questions 1 – 66

### Witnesses

I: Sir Ivan Rogers, former Permanent Representative of the United Kingdom to the EU; Professor Catherine Barnard, Professor of EU Law, University of Cambridge; Professor Sir Alan Dashwood QC, Barrister, Henderson Chambers, and former Director, Legal Service of the Council of the European Union.

# Examination of witnesses

Witnesses: Sir Ivan Rogers, Professor Catherine Barnard and Professor Sir Alan Dashwood QC

Q1 **Chair:** Thank you very much indeed to our panel for being here today. I am going to kick off with some questions. Just for the record, could I ask you very briefly to introduce yourselves.

***Professor Sir Alan Dashwood:*** I am Alan Dashwood. I was Professor of European law at Cambridge. I am currently a member of the Bar.

***Professor Barnard:*** I am Catherine Barnard. I am currently a Professor of European Union law at Cambridge. I am also a member of the "UK in a Changing Europe" programme, which is a non-partisan think-tank.

***Sir Ivan Rogers:*** I am Ivan Rogers. I was the UK's Permanent Representative in Brussels until January this year. Before that I was the UK-EU, G8 and G20 Sherpa.

Q2 **Chair:** Thank you all very much for coming in. You will not be surprised to know we have a long list of questions. We are expecting a Division potentially at about 4 o'clock, so we will take that as it comes. Please do not feel that each of you has to answer every question. If you have something relevant to say to the question, then please feel free to chip in. I would like to start by getting the panel's impressions of progress on the Article 50 negotiations and the prospects for the shared objective of a smooth and orderly exit being achieved. That is of particular interest after some of the comments from EU member states and the EU Commission that we heard at the European Council last week.

***Sir Ivan Rogers:*** I would say right at the outset that it is always very difficult to judge on these things when you are outside of the negotiation. I have been outside the system now for 10 months. I think I have a fairly good idea of what is going on on both sides of the fence, but I would make that caveat straight away. By definition, you really know what is going on when you are immersed in the negotiation.

In terms of where we are, the October European Council very predictably took the decision that sufficient progress had not yet been made to move to the so called phase two of the negotiations. You can see what they have set up for the December European Council, which I always thought was frankly the more important staging post anyway. That will be an important Council. We will be able to judge by then whether we are likely to make a breakthrough and move into phase two and the discussion of the so called framework for the future relationship. December will be a key moment.

What would I expect by December? As I say, it is very difficult to judge from my position. Reading the language in the European Council conclusions and the vibes around the European Council, I would expect the 27 now to be going away and doing what they have said they would do, which is working up where they would come out in response to the Prime Minister's request in her Florence speech for transitional arrangements. In response to that, they are likely to set out how they see a transitional arrangement working and what sort of transitional arrangement would be on offer.

In a sense, that just elaborates and articulates in much greater detail what they have already said, in my view. They said that on 29 April in their guidelines. Paragraph 6 of the guidelines was very clear on the conception that the 27 have of transition. I would expect them to elaborate that in quite a lot more detail, just to outline how a transition would work and how long it would be for. They made it very clear that they would only be up for a time-limited transition. I do not think the two-year perspective that she talked about in Florence is a problem. It is then about what the ambit and the scope of what we are talking about in transition is, and how like the status quo it is in terms of rights and obligations, without, of course, the UK having a voice in the room in either the Council, the Parliament or the Court of Justice.

Beyond that, they are very unlikely to leave it there, for very logical reasons. What you have seen both from the Prime Minister and from the other side of the table is you cannot easily build a bridge to nowhere, so you have to articulate where you are going. I do not know what they will do on that. They have been hoping and waiting for something more concrete from the British side in terms of what kind of destination they have in mind. The Prime Minister has made two personal efforts to articulate that, both at the Lancaster House speech and in the Florence speech.

I can elaborate on this further, if the Committee wishes, as we go through the subsequent questions. Notwithstanding the Prime Minister's language about neither Canada nor Norway but bespoke, unique and specifically British, the other side thinks it is clear from the red lines that she has laid down so far that the maximum the UK could be up for, if I could put it like that, is a free trade agreement. That is a free trade agreement that looks very like the Canada free trade agreement.

Why do I say that? If you read this through European eyes—not just Brussels and Strasbourg eyes but the major capitals—they would say, "You are clearly leaving the single market and you are clearly leaving the customs union". Again, I can explain the reasons why that is clear and unequivocal, but that is uncontroversial in the Cabinet anyway. That has been articulated as Government policy. If that is the case, and you are no longer subject to the jurisdiction of the court, you are no longer making contributions to the budget, and you are no longer respecting the four freedoms—because by definition you wish to curtail the fourth freedom, free movement of people—then if you are a European of the sort that I used to deal with on my circuit, or on the permanent representative circuit, or Sherpa circuit, you say, "That takes Britain substantially further out of the Union's orbit than Switzerland, Norway, or even Turkey, which, after all, has a major customs union."

Therefore, in the world they inhabit, they will say, "That means what you really want, even if you have not expressed it that way, is a DCFTA—a deep and comprehensive free trade area". I think they will say, "We can do you one of those, but that is not a bespoke, unique British-specific deal. It is a DCFTA and we have done several DCFTAs before". They come with certain consequences in terms of market access.

Q3 **Chair:** We are going to unpick a lot of that, including transition and the future economic relationship. Catherine, where we are in the negotiations is obviously of great interest. How do we get from where we are to the likelihood of what has been called a smooth and orderly exit?

***Professor Barnard:*** I would add to what Ivan has just said that, on a positive note, the Prime Minister's speech in Florence suggests a greater legal realism about the way things are proceeding. It is a recognition for the first time very publicly that there are these three phases that were laid out in the guidelines by the European Council at the end of April of this year. As we know, at the moment we are stuck in phase one because sufficient progress has not been made.

What is also striking about Theresa May's observations in Florence was that she recognised that the divorce—the Article 50 deal—is separate from the future trade deal and that they will be done under different legal regimes. The divorce will be under Article 50 and the future trade deal, if it is a DCFTA, under Articles 207 and 218. We can come back to that jargon in a moment. She also does recognise that phase two, which is the transition, which is what the European Council talked about, can be done under Article 50. If that is the case, it is going to have to be short and sharp.

Q4 **Chair:** Alan, do you have anything to add?

***Professor Sir Alan Dashwood:*** Only a little bit, thank you. It may be because I am not as well informed as he is, but I feel a little more optimistic than Ivan sounded about the possibility of meeting some of the objections that are bound to be raised by the EU side to the very ambitious project that the Prime Minister sketched out more, especially in the Florence speech. I suppose the problems are that the access to the internal market for goods and services that the UK would be looking for would be minus the free movement of persons. There are ways in which that could be softened, though it may not be sufficient. It is minus automatic rule-taking, but there are grounds on which one could argue that the case of the UK is different from that of, say, Canada or Norway. There is a real alternative to the Court of Justice in the form of the EFTA Court. We are being encouraged by the President of the EFTA Court to consider that possibility.

Q5 **Chair:** That is very interesting. We will come on to that. As in any negotiation, there is a private set of negotiations and discussions and then there is a public set of negotiations and discussions. We know that the Secretary of State and Michel Barnier come out and do their press conferences at the end of each set of negotiations. Sometimes the phrase "deadlock" has been used, or "more clarity is needed", or "we do not know what the Brits are asking for". Do you believe that the messages that we are hearing publicly are an accurate reflection, or is that a negotiating tactic and actually more progress is being made behind the scenes and relations are better?

***Sir Ivan Rogers:*** It could be either. Quintessentially, that is one of those things where, if you are not heavily involved in the negotiation, it is terribly difficult to judge. There is a lot of name-calling and positioning. This is all predictable. I was one of those predicting it in Select Committee appearances in February. It does not surprise me. The mood had been rather difficult over the summer, and then improved in the fourth round of negotiations and improved post-Florence.

It is correct to say that people appreciated in Florence that, one, there was money on the table, and, two, there was a conception of transition that seemed to chime, at least in some respects—maybe in most respects—with the kind of thing that the 27 thought they had said on 29 April. It is something I am happy to go further on. I am not as convinced as Alan that the reaction on destination is at all in the same place. There is frustration so far that the British side has not been able to articulate something more concrete than, "Neither Norway nor Canada but bespoke".

I understand the bespokery, and we can come back in detail to what that might mean area by area. However, from other capitals often it is read as meaning the Brits would rather like the benefits of three of the freedoms whilst suspending or ending the fourth freedom. The Brits would rather like to have continued, largely unchanged, market access in all the areas that they want, and see no reason why that market access should be diminished.

I am afraid that is not at all mainstream European thinking. People think there is a radical difference between a free trade agreement and single market and customs union membership. The Brits need to understand that there will be a radical difference as a consequence of exiting, in terms of levels of market access in multiple sectors that they care about.

We can go into whether that is economics or politics, or a matter of law or vengefulness. My reading of what I have ever heard when I was around those tables and subsequently, is people think there is a radical difference between being in a free trading arrangement and a free trade agreement and being inside the single market and customs union. We cannot expect simple continuity, whether it is in energy, telecoms, financial services or multiple other things. The British cannot simply expect the world to carry on broadly as is. They cannot suspend free movement of people because that is no longer applicable to them, live outside the jurisdiction of the Court of Justice, but still have everything that they liked about the levels of market access when they were inside the venture.

***Professor Barnard:*** I would add that the EU is committed to transparency and expressly say that in their European Council guidelines, so that is why we are getting a lot of this. Negotiations, by their very nature, are done better covertly than overtly, and so you have this tension. There is frustration about the fact that there has not been much discussion about what the end point actually is. We understand that, because of course we understand the politics are complicated. One of my colleagues described it as politics by little steps. What you really need is a kangaroo leap to come up with some vision of what the future might look like.

Q6 **Chair:** Based on your experiences of dealing with the Europeans and negotiations, are the negotiations broadly where you would expect them to be at this stage, given the framework set out and the three stages? Ivan, you talked about always thinking December was going to be the most important Council meeting.

***Sir Ivan Rogers:*** I am not surprised that we did not make a breakthrough to sufficient progress in October. I have been saying that to corporates who have been seeking my advice, since before the election and after the election, that I did not think October was going to be the moment of a breakthrough. It was always headed towards December. December will be an important moment to know whether we are genuinely now able to make the leap. I think they will go and draft a set of propositions, both on transition and end state as the 27. They are not going to open that up to the 28th member. They are going to do that amongst themselves.

What I think they will do is say, "We are prepared to plonk something like that on the table." However, that will only be in circumstances where the Prime Minister goes further than the Florence commitment. She will need to not only talk about the two-year transition and the €20 billion or so that looked to be on the table in Florence, but be prepared to make commitments that go beyond that, above all on the reste à liquider, which is the big budgetary problem.

From outside, I cannot possibly judge the politics of that domestically, but there is high expectation in other capitals. They obviously feel that you could jump together, as it were. That is the jargon in Brussels in these kinds of occasions. You have to make moves in parallel and you know that you are making them. They would then reflect her move on money, if there is a move on money, in the European Council conclusions, and simultaneously plonk their own text at 27 on their definition of transition and the end state.

That is why there would not be an agreement in December, candidly. Then the British side is going to have to take away whatever the 27 put on the table, which I suspect will contain some rather difficult, uncomfortable elements on what are we talking about on transition. They will say, "This does not just apply to single market and customs union issues. It applies to common policies: agriculture, the environment, fisheries." It is the whole caboodle. That is what will be in their text.

Q7 **Mr Jack:** Sir Ivan, thank you for coming. Your opening statements were very helpful. In her Florence speech, which you referred to, the Prime Minister said that the UK will honour commitments we have made during the period of our membership. In your view, what is the potential cost of that commitment in financial terms?

***Sir Ivan Rogers:*** That was obviously carefully drafted language. I was not privy to the drafting of it. That has been interpreted in all the subsequent discussions, as far as I have seen, as indicating a preparedness to pay and see them whole, as it were, for the remainder of the multi-annual financial framework. In other words, it is a two-year proposition beyond 29 March 2019. That was the full extent of it.

There was a flurry of press excitement, not just in the UK but elsewhere, that people thought that financial commitments could be read as more expansive than that. You will have seen the coverage in a number of papers. Did that indicate that she was up for a substantially higher sum than €20 billion? We have then heard subsequently, domestically and at the European Council, that that was not the intention.

Where is the other side? From the outside, one does not know. I was always worried, when I was there last autumn, that we were heading towards a sequencing of this process where, without putting a very large number on the table, effectively putting a very large number on the table, that they were then going to set up the Article 50 process exactly as they have done. They would say, "Unless and until you agree the budgetary commitments, we do not move to the next phase." That is one of the reasons why I was urging caution about invoking Article 50 until you knew how it worked, how the sequencing worked and that the sequencing worked for you.

You have heard what Macron has said, which is we are not even half way there. That is the only public statement I have seen from other leaders. To me, that seems to square with everything I hear from other capitals and Brussels, which is the expectation that others have. The RAL, this peculiar phenomenon of the reste à liquider, has been building forever and has now reached €240 billion or so. The UK's share of that bobs around with the exchange rate, but is broadly 12% or 13%.

If you are in their shoes and you are saying "It is not just the ongoing commitments for the transition we want. We want you to honour your share of the past liabilities where there are commitments but they have not been translated into payments", then you are presumably talking about a sum of another €30 billion or so. Beyond that, there is the pensions commitment that you see. Then there are all kinds of questions about contingent liabilities and assets. From outside, you cannot possibly know the detail of the numbers. The expectations seem to be in that ballpark in key capitals.

Q8 **Mr Jack:** Do they take any account of the balance sheet when they are doing these figures? Obviously they look at the profit and loss accounts and say "That is broadly what we think Britain's commitment is." I would ask you two questions. One, does anyone pay attention to the assets that the EU owns around the world which we, as a major contributor, will have some form of ownership in? Secondly, is there anything in law that says, on invoking Article 50, we actually owe them a penny?

***Sir Ivan Rogers:*** On assets, I am sure that will be part of the discussion, and contingent liabilities.

Q9 **Mr Jack:** No one ever talks about it though.

***Sir Ivan Rogers:*** I am sure they are talking about it behind the scenes. I am not privy to what is going on behind the scenes, but I would be amazed if there were not a much more in depth, line by line discussion, as the Prime Minister has called it. The British side, I think in the fourth round of negotiations, in late August, did a fair old dissection of what they thought the other side had asked for in their public four pager. I would be amazed if they were not going through this in great detail and significant depth.

On the legal case on both sides, I am afraid I would slightly resort to what I said back in February, both at the scrutiny committee and the Exiting the European Union Select Committee. There is a legal question, on which I would defer to the lawyers. I can well imagine what the argument is on the other side of the table, and I know what the argument is on the UK side of the table. I might have preferences as to which I would believe. I can see how we would construct our legal case as to why the answer is small, and I can see exactly what the other side will be arguing as to why the answer is large.

I think I said back in February there is a legal question. You need to know the strength of your legal case, area by area, but, candidly, this is a political negotiating question as much as it is anything else. We are never going to reach an agreement about the legal basis. You cannot expect a convergence between the Council's legal service, Commission legal service and TSol on what the right answer is. You could leave this to lawyers between here and eternity, but they are not going to agree. There is going to be a discussion amongst principles in the end, where they start from radically different viewpoints which they can justify legally. Then, sooner or later, a number has to emerge.

As we discussed already, a number does not have to emerge in December or could emerge in December. As far as I can see, the other side is not even asking for it. They are asking for a recognition in principle that we are up for not just ongoing payments to cover transition but for our percentage of the RAL. I can well imagine what the UK argument will be on that. That is difficult territory to go much further in.

Q10 **Mr Jack:** You have said each will have a differing view on the legal position. I get that, but, in broadly percentage terms, how much of it is an exercise in politics, as opposed to an exercise in accounting, when they are looking at the amount that they think Britain should pay?

***Sir Ivan Rogers:*** Once it gets to leader level it is much more a matter of policy. It will matter to leaders for the reasons I think I explained in February. It matters more to Eastern and Southern European leaders than the trade and investment discussion. We may find that distressing or worrying or whatever. That is why the Prime Minister offered to make them whole until the end of the 2020 period. I am sure that has gone down well. She was communicating, "I do not want you to suffer a budgetary crisis as a consequence of UK exit, and therefore to create a budgetary headache for you."

I think I said in February my former Romanian colleague had said to me, "If you depart without paying a penny after March 2019, then the sums of structural funds that we have promised to our citizens in downtown Timișoara, instead of being 100 become 88, and I have got a huge headache, or my Prime Minister or President have got a huge headache in their Parliament." The Prime Minister has shrewdly taken that off the table and said, "I am not reopening this seven-year multiannual financial framework, and I will see you right and see you whole. The UK will make its contributions until the end of 2020."

Others will be, I am sure, grateful for that, but they will then say, "Hang on, there is a whole wodge of other liabilities which are legal commitments. You entered into those legal commitments knowingly. You were at the table when they were made. They have not yet translated into payments and you are up for your percentage of those." That is about 12% to 13%. I can well imagine the UK will say, "No, there is an annual budget process. We do not accept that commitments that have been racing way ahead of payments for a very long period necessarily translate into those payments. In any case, after we have left this organisation why should we be in the business of helping you meet the gap between commitments and payments?"

It is much more politics than law when it comes to leader level, because in the end the leaders will have to decide "Has sufficient progress been made?" What does sufficient progress mean?

Q11 **Mr Jack:** I would like to move on to an area that I have a particular interest in. In Dumfries and Galloway, which I represent, there is the port of Cairnryan, which is a major link to Northern Ireland. The Foreign Minister, Simon Coveney, has said that Northern Ireland should have special status. There is concern with regard to ending up with a hard border, if you like. That could easily be at Cairnryan, for obvious reasons. That is not a good thing for the Good Friday Agreement at all, and not a good thing for the Northern Irish. I would like your views on how we continue to have a long and very open border with southern Ireland in a DCFTA.

***Sir Ivan Rogers:*** It is extremely difficult, in all honesty, because we are leaving the customs union. Let us be clear: we are leaving the customs union because we want an autonomous sovereign trade policy. You want an autonomous sovereign trade policy because you intend to have a different trade policy. If you have a different trade policy, you are going to apply different tariff rates to various goods. You are also open to applying different standards, for example veterinary standards and phytosanitary standards.

Say, for example, we did a UK-US free trade agreement. The Government is pushing that hard and wants that agreement. Like everybody else, I read the *FT* the other day on that. From my rather lengthy experience of dealing with the Americans on free trade agreements, I can tell you they will not do a free trade agreement with the British or anybody else without a major agricultural component in it. Congress cares more about agriculture and agricultural market access than any other issue. You may think that is very sad, but it is true.

They will then make a set of demands in that free trade negotiation that will entail not necessarily a weakening of standards, but a divergence of standards from European standards, as their price in that deal. One, they will want market access for various of their key agricultural products, which they think they cannot get in the European Union at the moment, and they are right. They think the EU blocks out various of their agricultural products. The EU thinks the US blocks out various of theirs. The moment that happens, then the hard border becomes a big issue for the EU27.

Q12 **Mr Jack:** The EU has not got a trade agreement with America, so that is highly unlikely.

***Sir Ivan Rogers:*** As soon as you have a divergence of British trade policy from EU trade policy, you immediately create the case of why the EU27 will have a problem at the Irish border. They will have a problem at the Irish border, because otherwise it will be a massive route of circumvention of goods that have come in through the UK, go through the Irish border and get into the EU27 by that route. We cannot just dismiss that as a theoretical problem. It is not a theoretical problem.

**Mr Jack:** Do you see anything physical infrastructure being necessary on the Irish border? I know I have used my time.

Q13 **Chair:** I wanted to ask whether any of our lawyers have any comments on the whole EU border. Sir Ivan, do you have anything on the physical infrastructure briefly before we move on?

***Sir Ivan Rogers:*** Everything I have heard from Irish sources indicates they do not think a technical solution, avoiding physical infrastructure but having a virtual, invisible hard border, is an answer. Some of this has been lengthily expressed by both Leo Varadkar and Simon Coveney. They keep on saying so, very openly and determinedly, around all 26 other capitals. They are saying, "This is not a solution and we are not accepting that as a solution."

They read the British document, when it came out in August, as indicating that the British thought there was a technological fix to this problem, and that went down pretty badly, in my estimation. The mood has improved somewhat between London and Dublin since, but Dublin felt the British were trying to find technological wheezes for something which was not susceptible to a technological solution. That was my estimation.

Q14 **Chair:** Before I bring Charlie in, I do not know if either Catherine or Alan have anything in particular to say on this Irish border issue from a particular legal perspective or the Good Friday Agreement.

***Professor Sir Alan Dashwood:*** It is a very difficult issue. It is different from some of the other issues on the table in the sense that both sides are agreed on what the outcome ought to be. That is preserving the Belfast Agreement and the travel area, and avoiding physical infrastructure on the border. All the argument is about the way of getting there.

At first sight, it looks as if there are only two possible solutions. One this conversation has already excluded, which is for the UK to have an arrangement that is tantamount to remaining in the single market and the customs union. That would be an easy solution. The other one is technological, and the Irish authorities are far from convinced that it is going to be possible. Otherwise it could only be achieved, I suppose, by some kind of complex network of international agreements. That would take a long time to set up.

Q15 **Charlie Elphicke:** First of all, forgive me: I am going to discuss more negotiation and negotiation tactics, so inevitably I will be addressing my questions to Sir Ivan. You have over two decades of experience at the top of euroland and at the top of No. 10. Can I first ask you briefly about the initial negotiation that David Cameron had when he was Prime Minister? He asked for a loaf of bread and they gave him one slice. Did you say to the interlocutors at that time, "You ought to give more than this, because otherwise there is a risk that the British people are going to vote to leave the European Union"?

***Sir Ivan Rogers:*** He asked for the stuff that he put in his manifesto for April 2015. That was his and the party's choice. No civil servant was involved in the construction of that manifesto, as you know. Our job as civil servants, which we served up on the morning of 8 May 2015, as I recall, was to say, "These are the commitments you have made in the manifesto. This is how we would translate those into demands at the European level." That is what we did in the letter to Donald Tusk, which, as I recall, went on 10 November 2015. It took six months of tortuous internal negotiation to get there, but if you look at the Cameron-Tusk letter of 10 November 2015, I would argue that it was entirely in line with the manifesto commitments that were made.

I can go into inordinate detail on the conduct and the course of that negotiation. We spent most of our time in that negotiation on two issues. One was the relationship between the eurozone and the broader European Union, because that was a particular Cameron and Osbourne preoccupation, and, I think rightly, if we had stayed in the European Union what the relations were. That was particularly in the area where there was growing tension between the financial stability driven concerns of the eurozone, at 19, and the financial services and markets driven concern of the 28, with London as easily the biggest financial market.

My proposition to you would be that the Cameron intended destination was a multi-tier Europe, but with Britain very much in a different tier of its own. His biggest preoccupation about it structurally was "Are our interests going to get systematically overridden and subordinated by the interests of the eurozone?"

The famous Section A of the document was the most difficult to negotiate. It took us the most time and I would say got about 0.001% of the political attention in the referendum campaign, for reasons I totally understand. Then there is the complex question of free movement of people and what he asked for on that, and the provisions he asked for on the benefits side. Going for a benefits provision, a four-year capacity to stop people claiming benefits until they had logged four years in the country, stemmed, I think, from an Open Europe proposition in October or November 2014.

He had obvious both legal and political difficulties. We laboured long and hard to try to negotiate that. Again, I was not the arbiter, nor should I be the arbiter. Politicians have to be the arbiter of "Is that the right ask?" We thought about lots of other things, including emergency brakes, numbers provisions and whatever, but in the end, in the manifesto in April 2015, he came down to that being the proposition. We got quite a lot on that. You do not need me to tell you it evidently did not sell to the British public, so we are where we are.

This negotiation does not have very much in common with that negotiation. That was a negotiation that was designed to say to the British public—

Q16 **Charlie Elphicke:** Let me just move on to this negotiation. Moving on to this negotiation, you said to the Brexit Committee last February that we should not contemplate a sequenced approach, and yet that is where we seem to be. How would you break out of that?

***Sir Ivan Rogers:*** There is no point in my being wise after the event, tempting though it is. I did say last autumn I would not agree unequivocally to invoke Article 50 unless you know how Article 50 is going to work. The moment you invoke Article 50 the 27 dictate the rules of the game. They will set up the rules of the game in the way that most suits them. This was heavily opposed by various people in London at the time for, again, reasons I am not naïve about.

My advice as a European negotiator was that that was a moment of key leverage. If you wanted to avoid being screwed in the negotiations in terms of the sequencing, if I can put it brutally, you had to negotiate with the key European leaders and the key people at the top of the institutions. You had to say, "I will invoke Article 50, but only under circumstances where I know exactly how it is going to operate. It has got to operate like this, otherwise this is not going to work for me."

That is not what we did. That is a matter of history. We are where we are. They have set up the sequencing exactly as you would predict that they would set up the sequencing, because if you were in their shoes that is exactly what you would do. You would think, "Let us maximise the pressure on the British side to move on money and squeeze as hard as possible, because the debate they really want to have is about the future partnership. The more pressing that gets to them, and the more pressing it gets to their private sector to talk about transition, the more likely they are to be more generous with their money." Anybody could have told you that is exactly what the 27 would do.

Q17 **Charlie Elphicke:** Would you say the key thing we have now got to guard against is the risk of a blank cheque and agreeing to accept any terms?

***Sir Ivan Rogers:*** You are starting to get into the no deal issue.

Q18 **Charlie Elphicke:** No, I am just saying there are some who say, "We have to do a deal and we should be prepared to pay whatever and accept any terms that the European Union ask of us." Would you say that is something we should strongly resist as a country?

***Sir Ivan Rogers:*** In any negotiation, where I start out is what is the counterfactual. In any negotiation where the counterfactual is the status quo, obviously you not only threaten to walk out but sometimes would walk out. Why would you not? If the status quo is better than the world that you are being offered, you walk out. The status quo is not on offer here. The counterfactual if there is no deal is not the world we currently inhabit. It is a world without a deal.

I know we had this discussion quite a bit last autumn. You have to know exactly what no deal might consist of, and is that a tolerable world to inhabit if you want to make a threat, either to walk out or say, "This is intolerable. I am not prepared to put up with this." Obviously any Prime Minister has to say no deal is better than a bad deal, but in order to know whether no deal is tolerable you have to go through sector by sector, area by area, what no deal could mean. You have to know in detail what are the implications of no deal in aviation, financial services, energy, data protection and every other area, and work through what the consequences would be.

What would that mean for the UK economy and society if in the end, on 30 March 2019, we jump into the void? It would be a void, because there is a WTO world for some of it, but there is not a WTO world for a lot of it, for pharmaceuticals, chemicals, aviation or large chunks of financial services. In those areas in particular, you have to work through what is the worst that could happen. We leave on date certain, we have no deal, there is no law at all applicable in this space, we become a third country, in the awful jargon of Brussels. A third country has its own joys. We have no more rights than Venezuela or Yemen in the EU market. We have no more rights of access, because we have got no preferential agreement and we have got no legal agreement. What does that look like?

If I can go on a bit, my problem with some of the no deal arguments at the moment—

Q19 **Charlie Elphicke:** In connection with that, you have also said previously that we have real negotiating weight and real leverage. Can you say what that leverage is and how we could deploy it to get a deal, as well as what a no deal would look like?

***Sir Ivan Rogers:*** Yes, sure. To complete my point on no deal, I have looked at all the no deal literature at the moment. I have extensively gone through every argument in favour of no deal that I have been able to examine. Everybody talking about no deal does not mean no deal. They mean when we get to the wire there would be a succession of mini deals that we would be able to negotiate, and that the other side would be willing to negotiate. They would assure us of very significant continuity in all the areas that we would be most concerned about, ranging, as I say, from electricity interconnectors, to financial services, to data protection, to whatever.

The proposition that you really get from the people advocating no deal is not no deal. No deal does not mean no deal, if I can coin a phrase. No deal equals no deal. I have not seen anybody actually advocate no deal, because they know that jumping into a legal void without any legal provisions in any of these areas is potentially very damaging.

This is where the British press coverage, if I can be blunt, is rather misleading on no deal. People are writing endlessly, and rightly, about which bits of Kent—you are a Kent constituency MP—you would have to concrete over, what the lorry parks would look like and how you would manage customs arrangements in the absence of a deal. That is fine. What is the other side of the channel going to do? There are not enough border inspection posts on the other side of the channel to deal with British goods and meat exports or food exports.

What is going to happen? In the absence of a deal, have the French, Belgians or Dutch any incentive to sort that problem, or do they have an incentive to keep us stewing? In the area of data protection, do they have an incentive ultimately to cobble together some agreement at the last minute in order to keep data flows, or do they have an incentive to maximise the flow of UK business that has to shift to the continent? That is what I mean. I am very pro having a contingency plan, but the contingency plan has to be really brutally road tested against the reality of what the other side of the channel would do in circumstances of a breakdown in the talks.

**Charlie Elphicke:** And leverage?

Q20 **Chair:** Do you want to do that very briefly, because I want to move on and hear from Catherine and Alan as well about the no deal. Catherine and John are going to ask some questions. Sir Ivan, have you got anything very briefly on the leverage?

***Sir Ivan Rogers:*** We have covered money. Money, and therefore preparedness to make significant contributions, is leverage for obvious reasons, because it matters enormously to the other people at the table. The financial sector is leverage as well. There are areas where access to our capital markets, deep liquid capital markets, is a big problem for the European banking sector, and the European economy and European corporates more broadly. There are various areas where, again, the system has to go through area by area and think "How do you exercise that leverage?" It will be highly problematic for the other side. It is not just problematic for our side of the table if there is no deal.

Q21 **Chair:** Catherine and Alan, from your experience have you got anything particular you want to add about this no deal scenario, the walking away?

***Professor Barnard:*** The trouble about the language of no deal is it is so evasive. People mean different things. It could be no deal, which means no future trade deal but we do a divorce deal and possibly some transition. It could be that we do no divorce deal at all, and that we might call pretty much the chaotic Brexit, which is what Ivan has just been talking about. It may be that we walk out before 29 March 2019 because things are looking so ghastly. Then the clock will tick down, and so we basically fall back into the chaotic Brexit scenario, with perhaps a bit of time to be planning for that. You have got to be quite careful about the language that is being used.

As far as what it looks like, there is a reasonable chance that we will get some sort of Article 50 divorce deal, because that is in both sides' interests. Transition is also in both sides' interests, to the extent that the money will keep flowing and it does not leave them with a big hole in their budget. However, transition is no panacea, because if there is no deal at the end of the transition period then the reality is it is just extending the cliff edge. You are walking the plank and the plank is just a bit longer, but there is still a pretty steep drop at the end.

Then that raises questions about what transition might look like. Is it going to be a cut and paste—

Q22 **Chair:** Let us come back to that in a moment. We are going to come back. There are some questions on transition. Alan, is there anything in particular you wanted to say on this no deal language?

***Professor Sir Alan Dashwood:*** I have just a very small footnote. We have been talking about the macro aspects of failure to reach an agreement. There would also be terrible legal uncertainty regarding, for example, the status of EU citizens in this country and of UK citizens in all 27 of the other member states. There would be uncertainty about the status of businesses that already benefit from passporting. There might be a legal argument to be made that they have established rights, vested rights, which cannot simply be extinguished. There would be enormous uncertainty.

One could reduce this by what Ivan referred to as a series of minor agreements dealing with very specific issues, but it is quite difficult to envisage how this could come about in a situation where there has been a breakdown of the negotiations.

***Professor Barnard:*** This is where the EU (Withdrawal) Bill becomes extremely important, because it is also there as a safety net to freeze the legal positions. At least in respect of EU nationals who are here already, the position under the EEA regs 2016 will be preserved. That does provide some sort of safety net.

The trouble is a lot of EU rules are dependent on reciprocity. Thinking about the EHIC card, the European Health Insurance Card, how would that work in practice? We could honour that for Poles who are here, but we cannot get the Poles to honour that for British nationals who are there. Paradoxically, we would reimburse some money to the Polish government, but the Polish government will not reimburse the money to us. A lot of the rights that are dependent on reciprocity cannot be replicated through the withdrawal bill.

Q23 **John Mann:** So paradoxically, Professor Barnard, the more Parliament addresses those issues successfully in amending the Bill, the easier a no deal would be.

***Professor Barnard:*** Yes and no. It would provide some legal certainty. For example, think about recognition of judgments. For lawyers, the fact is that commercial courts are incredibly important for the City of London legal practice and legal services. There is a huge amount of international litigation conducted in London. At the moment, the fact is that once they have got a judgment in London it will be recognised across the EU.

It is all very well for us to say, "We will recognise the judgment of a German court", which we can do through the withdrawal bill, but, frankly, the number of German judgments that have an impact on us are tiny. What we are dependent upon is our judgment being recognised in the

German courts. Because we leave without a deal, the German courts will not be under any obligation to carry on recognising our judgments. There are clever legal arguments you can run, but the reality is it is deep uncertainty. Why take the risk of litigating in London in 2018, early 2019, when you have no idea whether your judgment for a large sum of money will be recognised and enforced elsewhere?

Q24 **John Mann:** This is my second question. Sir Alan, you might be well placed. Which group of lawyers are going to make the most money in a no deal? Which category of lawyers would make the most money in a no deal scenario?

***Professor Barnard:*** Not the academic ones.

***Professor Sir Alan Dashwood:*** Not me. I suppose corporate lawyers and commercial lawyers who are setting up the kind of deals that could have resulted in the litigation that Catherine referred to. They will have to think about how to structure those transactions and which law they should apply and so on. Undoubtedly there will be a lot of work for lawyers, but it is work I should certainly rather do without.

Q25 **John Mann:** Is there a possibility of there being any corporate redress claims in a no deal scenario?

***Professor Sir Alan Dashwood:*** Do you mean against the UK Government?

Q26 **John Mann:** Yes, or against the EU, but against the UK Government as an illustration.

***Professor Sir Alan Dashwood:*** I think not, but that is a very guarded answer.

Q27 **Chair:** Do you want to have a think about that? You are very welcome to write to the Committee afterwards if something further occurs.

***Professor Sir Alan Dashwood:*** I will. Thank you.

Q28 **John Mann:** Sir Ivan, how prepared is Ireland for living in a no deal scenario?

***Sir Ivan Rogers:*** It is impossible to judge from outside. It is a huge issue for Ireland, not just the border issue. It is an enormous macroeconomic threat to Ireland. 80% of their goods are exported either to the UK or through the UK. All the issues that we are talking about in terms of friction free trade to the degree that you can have that if you are outside the customs union, all arise for the Irish as well. It is a major macroeconomic issue for the Irish. For them, this is an existential crisis.

Q29 **John Mann:** In your judgment, in terms of Irish leverage, is that a danger to the process? The UK Government could be overly optimistic that the Irish will use internal leverage because of the potential catastrophe that could impact on them. Or is it in fact significant leverage, in that the Irish will have to use their position as one of the 27 to try to stave off a no deal?

***Sir Ivan Rogers:*** The Irish have already used their leverage very effectively in the first phase of the negotiations and got their key issue into the top three issues. That shows you, one, they are putting enormous diplomatic effort into doing so. Two, they are getting considerable solidarity from the other 26 capitals because of the impact that everyone can see coming on the Irish economy. Of all the economies most affected by the Brexit issue, other than the British, undoubtedly Ireland is easily top of the list, and everybody knows that.

Understandably, at the moment they have focused all their efforts on the other 26 capitals to get people to understand both the peace issues but also the macroeconomic issues facing Ireland, because of their dependence on the UK export market and the throughput through the UK.

Q30 **John Mann:** You have all very clearly outlined the no deal concept does not exist. What would happen if the European Parliament vetoed the deal? What are the legal ramifications of that?

***Sir Ivan Rogers:*** Could I just come back on your first question? I do not think no deal does not exist. I think it is so dire to contemplate that people, as soon as they talk about no deal, say, "But in practice there would be lots of mini deals." I am questioning just how valid a proposition that is, and how viable it is. Maybe I could give you a couple of examples. People get very bogged down in this and think "It is so dire it obviously would not happen, and something would happen." I do not want to be unfair to no dealer rhetoric, but people always come back to say, "Obviously they would not allow that to happen, because they would be damaging themselves either more than us or as much as us."

It is important to come back to the legal reality, because the European Union is a complex legal construct. We are leaving a legal construct. We would be leaving without an agreement and jumping into a legal void. Then you are reliant on the other 27's contingency plan and what they put in their contingency plan.

If we go back to the famous aviation example, what actually happens? I have been working on this and multiple of other examples in case the Committee is interested. With no agreement in place, our air carriers lose the right to operate EU-UK air services. Any flights between the EU and the UK would cease to operate. UK air carriers that had been operating within the single market pre-Brexit would lose their EU air traffic rights. To keep operating flights within the EU and continue to qualify as EU air carriers, which is the precondition to operate intra-EU air services, those companies would need to relocate their principal place of business into the EU27, i.e. where they oversee those air services' conduct, maintenance and repairs and maintain their principal financial functions.

This is not theoretical. Air companies were coming and talking to me about that in 2015, 2016. Immediately after the referendum CEOs were coming to talk to me. The UK would fall out of 50 aviation agreements between EU and third countries, including the EU-US Open Skies Agreement, under which UK-US air traffic currently accounts for about 40% of the EU-US air traffic. We need to negotiate new bilateral agreements with third countries in replacement.

Then you say, "Can you not revive the old bilateral air service agreements with the individual member states? Would that not provide a solution?" I defer to my legal colleagues, but my advice is I do not think so, because those are outdated, restrictive and unfit for purpose. Where the EU has exercised competence, which it has in this case, it seems to me very improbable that individual member states would step back.

Q31 **John Mann:** I am trying to get to the question of defining how a no deal might come about. Let me ask the question again. What are the legal ramifications of the European Parliament voting down the deal, whatever deal, presuming there is a deal, or the legal ramifications of the UK Parliament voting down a deal, if there is a deal? What are the legal ramifications of those two, in other words a no deal because either the European Parliament or the UK Parliament has voted down a deal, if there is one on offer?

***Professor Barnard:*** The simple answer is that the clock keeps ticking. The clock keeps ticking down, and it is for that reason that there is talk that the negotiations have got to finish somewhere in the region of September 2018 to give six months for the European Parliament to have a vote. This is where, on the remain side, the talk about voting down a no deal does not make that much sense. In reality, even if they were to vote down a no deal—although voting on a negative is quite problematic—the clock will keep ticking down.

Likewise, the European Parliament, whose role has been grossly underestimated in all of the discussions, has got to vote in favour of the Article 50 deal. It will also have to vote in respect of any future deal, but in respect of the Article 50 deal if the European Parliament says no there is no contingency plan. The only contingency plan that is factored in to Article 50 is that the Article 50 period can be extended, but that requires unanimous agreement of the 27.

Q32 **Catherine McKinnell:** It is an interesting scenario, in terms of no deal and the timeframes for it to be approved, both by this Parliament and the European Parliament. What are the scenarios that would see the European Parliament voting against a deal? What leverage is there? What factors would they consider?

***Sir Ivan Rogers:*** One, I agree with what Catherine said, which is never underestimate the role of the European Parliament. Perennially, over the last decade or two, I fear that we have. We underestimate their institutional weight and importance. Equally, I would not overestimate their weight and importance. They will exercise leverage all through the negotiation. Bear in mind that for most countries their key European parliamentarians have much better and more systematic access to their leaders. They influence the position those leaders and their delegations take much more effectively probably than happens in the UK. There is much more of a symbiotic relationship between key European Parliamentarians and national delegations. They will be influencing the process as they go along.

I am less worried at the end, because it is pretty binary. They either vote for or they vote against. It really is a nuclear option to vote against something that all the leaders have been able to agree. Personally, I do not think the European Parliament would do that. They could exercise considerable weight and leverage during the negotiation in quite problematic ways for the UK, but at the end, if leaders have agreed at 27 and they have got a package agreed with the UK, it really is a dynamite option for the European Parliament, even towards the end of its term. Bear in mind, it is a febrile time. We are heading towards European elections. People will be manoeuvring and posturing a great deal before the European elections and there is always a danger that somebody might do something lunatic, but actually, at that point, their leverage is probably less at the end of the negotiation than during the negotiation where they can do a great deal during the negotiation not just to make it more difficult but to assert their issues and preoccupations into the negotiation.

Q33 **Catherine McKinnell:** In reality, there is no no-deal scenario because there will be a deal on the table. It may be a no-deal in the view of the British Parliament but it could be a deal in the view of the European Parliament that they would vote on. It would not necessarily be agreed but it would presumably be a deal on the table.

***Sir Ivan Rogers:*** There does not have to be a deal on the table.

Q34 **Catherine McKinnell:** When we arrive at the date that the process says we need to arrive at in March 2019, or an earlier date which the European Parliament requires, there will have to be something on the table to either agree or disagree. There cannot be no deal. No-deal does not really exist.

***Sir Ivan Rogers:*** The two scenarios under which no-deal does exist—and, as I say, as an official you then certainly have to take very seriously that no-deal might mean no-deal—are the following. One, we get to December, say, and the other side say, "We are prepared to offer a transitional arrangement which heads towards a deep and comprehensive free trade agreement but only if you sign on the dotted line and demonstrate now, Prime Minister, that you are up for paying the RAL." She says, "Cannot, will not. This is far too much money; I am not prepared to do it". At that point, if there is a breakdown at the December Council or at an emergency January or February Council, both sides will be thinking, "Is this the end of the negotiations and do we have to go somewhere else?" The other side is already thinking about contingency planning at 27. I am sure our side is thinking about contingency planning at one. The point I am trying to make is that there are contingencies which we think we cannot plan for in the UK without knowing what the other side will plan for on their side.

The other scenario is you trundle along through 2018 and it looks a bit like lots of 2017, namely that not a lot happens. We march through every European Council and a little bit of progress is made but not enough, and you start to get close to the edge because, as Catherine says, you probably need at least four or five months at the end of the process for the European Parliament to ratify, and they will be demanding that and they will be demanding time to look at it, and it looks like we are getting nowhere. At that point, you could flip into a less conflictual no-deal. A no-deal that is either a walkout or a breakdown in December or in February or in March is unlikely to be anything other than bloody with a difficult breakdown of trust. Then, as I say, the 27 start marching through aviation and chemicals and pharmaceuticals and food and phytosanitary and financial sector and data protections and every other issue and they will start thinking, "Okay, in extremis, what does the world look like if we have no legal order with the British and how tolerable or intolerable is that?" This is not a discussion that they will be conducting consensually with London; they will be saying, "We will have our own contingency plan at 27 and we will make our own plans for emergency legislation that we might or might not be prepared to introduce at 27".

The UK will be doing its own exercises in that. If it is really conflictual and bad, trust levels will be very low and there will be a huge amount of name-calling across the Channel. There will be a big fistfight and the UK will be saying, "We will make our own contingency plans at one". My point is that there is then not a guarantee that the two sides come together in some affable moment at the end of 2018 and say, "You know what? The world might end if we do not do a deal which is not really a no-deal". It might be so bloody by then that both sides are looking to knock chunks out of each other and to start a trade war.

**Chair:** I am conscious of time and potential votes and all the rest of it. Alison has one very short question and then we will move on to transition and Stephen.

Q35 **Alison McGovern:** Yes, I have a very brief question to tie up what you said about Ireland earlier. The consequences for Ireland have been underestimated. In your view, the potential consequences of not just no deal but a bad Brexit deal for Ireland are much worse than the 2008 financial crisis, are they not?

***Sir Ivan Rogers:*** That I cannot judge. It was pretty brutal for the Irish in 2008, as you know. They have recovered amazingly since but it was a pretty horrendous experience with a rise in unemployment from very low digits to 14% in very rapid time. Who knows? It is pretty dramatic. I have not looked at the latest Irish Government or private sector modelling of it but a no deal or a very bad deal solution for the Irish is a major problem for the Irish economy—there is no question about that—because they are hugely dependent, as I say, not just on trade flows to us but trade flows through us. Any friction added to trade at the Channel ports is an enormous problem for Ireland as well.

Q36 **Stephen Hammond:** Good afternoon and thank you for coming this afternoon. Just before we get into the murky areas about diplomacy and other things, perhaps I could ask the lawyers this, just for the Committee's record. The legal status of transition is merely that it is a treaty signed as an extension to Article 50. What legal obstacles do you see, in purely legal terms, to completing a deal by 31 March 2019?

***Professor Sir Alan Dashwood:*** Do you mean a deal that would consist of a withdrawal agreement plus a transition?

**Stephen Hammond:** I just want to be absolutely clear on the legal facts first of all.

***Professor Sir Alan Dashwood:*** I do not think that Article 50 represents any impediment to a transitional deal. There would be different ways of organising it. The simplest, but it might not be seen as politically feasible, would be to delay the entry into force of the withdrawal agreement. I do not think there would be any legal objection to that. It would simply mean that, although all the terms of withdrawal would have been agreed, the UK would effectively continue to be a member state of the Union for a further year or two years—whatever the period was—because it would only be then that the withdrawal agreement takes effect.

The second possibility would be for the withdrawal agreement itself to provide that part of the existing treaties should continue to apply to the UK. Article 50 itself says that the treaties cease to apply when the withdrawal agreement enters into force or, failing that, two years after the initial notice. I do not interpret failing that as meaning "in any event" and I would interpret the reference to the treaties ceasing to apply as a reference to the treaties as such ceasing to apply, which would not exclude part of the treaties being given continuing effect under the withdrawal agreement.

The third possibility would be a slightly modified form of that where the relevant provisions of the treaties, particularly the Treaty on the Functioning of the European Union, were written into the section of the withdrawal agreement relating to the transition.

All this can be done on the basis of Article 50 by way of the withdrawal agreement. I can see no legal impediment to this.

***Professor Barnard:*** I would add a third possibility that I suspect is the least politically palatable, which is to ask for an extension of the two year period, which could be done by unanimity. Politically, that is very difficult because of course it means that by 29 March we cannot say that we have left.

There are some people who say that Article 50 does not provide an adequate legal basis for the transition. I do not agree with that, and I think Sir Alan was saying that he does not agree with that either. Even though Article 50 makes no reference to transition, Article 49 on accession makes no reference to transition and yet it is standard practice to have transitional arrangements there. If you have transition for a soft entry, surely you can have transition for a soft exit. The difficult question is how long transition might be.

Q37 **Stephen Hammond:** I might come on to that in a moment, if I may. Thank you for that. That is legally very clear. It is important to have that basics down.

Sir Ivan, in evidence you gave in February this year, you had said that the free trade ratification process was likely to take until the early mid 2020s. Has anything changed in the last eight months to change your view on that?

***Sir Ivan Rogers:*** No, in short.

**Chair:** We like short answers

Q38 **Stephen Hammond:** That is helpful. Therefore, broadly speaking, I take it from all of the panel that no one thinks it likely that negotiations on an UK / EU trade deal will be completed by March 2019.

***Sir Ivan Rogers:*** I stand by every word of what I said, and I used to say it when I was in Government, and it also what I hear in every capital now and from Brussels and Strasbourg now. What we are talking about going into the new year are not trade talks; they are talks about the future partnership and the framework for that future partnership, and that is what is specified in Article 50. Those are not trade talks. I can understand why the press keeps on talking about them as trade talks. Obviously they get into the whole structure, ambit and scope of the future relationship, which goes to trade, but the trade talks will only begin after we have left the European Union.

**Stephen Hammond:** Your view is that partnership talks could be completed but trade talks will not be.

***Sir Ivan Rogers:*** Yes, and then you will ask me the impossible question of what on earth a framework is and how deep a framework can go.

**Stephen Hammond:** I was not but you can answer that anyway.

***Sir Ivan Rogers:*** I would hope from the UK side, and I hope from both sides, that people will want to go as deep as possible as fast as possible on the framework so that the framework is not a nothing five-page document in November 2018 but has some substance in it. Say I am correct in my prediction of what happens in December, which is that the other side says, “We are prepared to do a transition deal, and this is what the transition looks like as far as we are concerned. We think that you want, from reading your remarks, a deep and comprehensive free trade area, in our jargon, and that makes you look much more like Canada than like Norway or like anything else". That will immediately raise the question in British minds of, putting it brutally, "Are these people offering us a deal where there is much more in it for them with goods than there is in it for us on services, financial services, professional services, et cetera?" The answer is probably "yes". Look at CETA. The jargon in Brussels is "Canada or Canada-dry" while the jargon in London is "Canada-plus-plus-plus."

If you talk to people that I know well in Brussels and other capitals about Canada-plus-plus-plus, they regard this as a British fantasy land and they say, "That is not on offer". As soon as you get into that discussion of the framework, there will be an argument about how ambitious a trade deal you are intending to strike. You are straight into that argument next year.

Q39 **Stephen Hammond:** It leads us to some very interesting questions about the very nature and length of transition. Although we may or may not have struck the partnership deal by March 2019, we will not have struck the trade deal and, if the trade deal is a substance, then a transition phase triggered only once we have completed the deal itself leads to some very interesting possible connotations; either we will not have a deal and therefore we will not strike a transition period or we do not have a deal and the transition period will only start when we strike that deal. That could be anywhere between 2019 and mid2020, as you have just suggested, depending on the language you are using.

***Sir Ivan Rogers:*** My point about trade deals—and I did say it in February—is that they are inordinately complex legal, lengthy documents. They often run to thousands of pages. There is no way that an EU / UK trade deal as comprehensive as the one we want to strike will be done in under a couple of thousand pages. Those couple of thousand pages will not be legally baked and done by October 2018. As I say, legally, they are under a different article of the Treaty and different negotiations.

Q40 **Stephen Hammond:** More importantly, the transition period of two years does not seem feasible to achieve any of that either. I am being told by the Chair that I am allowed one last question, so it is this: would it not be more sensible for us to contemplate a staggered, multi-layered, sector by sector approach to transition so that we have a period where we can continue negotiations during a transition period so that people do not have to leap from point A to B and then to C but A to C straight away? If that transition period takes, as the Prime Minister said, slightly longer than two years, we should not be afraid of that, should we?

***Sir Ivan Rogers:*** You cannot know how long a free trade deal discussion will last until you get into it. I have lived through a number of them, including the Canadian one, which we all thought was relatively straightforward, which we kicked off in about 2009, and it still is not in force; and they are one of the more simple partners. You cannot know until you get there. There are things that are simpler with us than with Canada simply because we have been in the organisation. There are things that are more difficult because we are a diverging partner rather than a converging partner. All trade deals in history are struck between people that are trying to get closer together. This is the first trade deal in history struck between partners who are trying to get further apart. There are some things that are simpler because they know us better and we have been part of their organisation and, by definition, there is a huge degree of regulatory convergence and they know our regulation but we are obviously going to diverge to some extent, and the question that is politically live, including in this House, will be how far we diverge.

If you are them, that is quite a worrying trade deal to strike because you are striking a trade deal with a partner who is deliberately taking themselves further out of your regulatory orbit. You can imagine the kinds of things that the other side will be putting on the table as part of the negotiating, and I can imagine some of the political reactions to the things they will put on table.

It takes years; I have always made that clear. I do not say this in order to be gloomy; I just say it as a pretty experienced person who has been around lots of trade negotiations. These things take an enormous amount of time and they take an enormous amount of legal prose. It can be done and there is appetite to do it on both sides but we will have a row straight away in 2018 on the scope and ambit of a free trade agreement. Even if the other side comes forward constructively and says, "This looks like a Canada type deal to us", the reaction from London will be to say, "A Canada type deal to us is grossly inadequate and we need something far more comprehensive and deeper", and then you are straight into the argument in 2018.

***Professor Barnard:*** Could I just add, in answer to the question, that the EU has made it clear that they will not do a sector-by-sector approach?

***Sir Ivan Rogers:*** No, they will not. I should have said that. They will not do a sector by sector approach. That is very clear.

Q41 **Stewart Hosie:** Professor Barnard, the Government have stated that the UK will leave the EU at the end of March 2019. The Treaties will cease to apply. The European Communities Act will be repealed. However, they have said, for an interim period—perhaps two years—it wants people and business, effectively, not to notice any practical difference. Notwithstanding the answer you and Professor Dashwood gave about possible transitional arrangements, are these two objectives even compatible?

***Professor Barnard:*** You are right. We are now in really quite difficult terrain legally and structurally. At the moment, to put it simply, the European Communities Act acts as a conduit pipe that gives effect to the whole corpus of EU law into domestic law and, if there are lacunae—if there are gaps—between what the EU requires and what we have done, then individuals can rely on the direct effect of those provisions; "direct effect" means the legal enforceability of those provisions and they trump any conflicting provision in national law.

Q42 **Stewart Hosie:** That is helpful, and I will come to the direct effect issue in just a moment. If I can just carry on with this for the time being. What do you see as the key legal difficulties associated with preserving the existing commercial relationship with the EU outside the Treaty framework? How would you envisage such an arrangement even working particularly if the UK persists with its determination to end free movement, one of the key powers of all of the Treaties?

***Professor Barnard:*** The withdrawal Bill will at least provide legal certainty for the individuals who are already here except those who are exercising their right to free movement because that will be dealt with, presumably, under the immigration Bill. We have already had an indication from the UK Government about those who are already here; if they have been here for five years, they can apply for settled status and so forth. It will not be a cut and paste of what they have at the moment, particularly if they have third country national family members, so the family reunification rules are problematic.

There is a question, which goes to the heart of why it is still proving very difficult to conclude an agreement even on Article 50 withdrawal, which is that, at the moment, if EU law give me greater rights I rely on those EU rights and if the British courts are not enforcing those rights in the way that I think is correct, I can go off to the European Court of Justice. In fact, the numbers of cases which go the European Court of Justice from the UK are very small indeed—much smaller than France or Germany—and so those on the Leave side says that that shows that the British courts do a good job. However, where the problem comes is that, if there is a change of government, change of position and change of Prime Minster post Brexit and the agreement which has been entered into for those who are already here is altered in some way, the question is then: what can the Polish national who has been here for a number of years do about it? Of course they can go to the British courts and enforce it but the British courts have to uphold the latest version of British law, which may have repealed our obligations that we have entered into.

Then we fall back onto the question—this is what the EU is pressing for—which is that the withdrawal agreement, particularly what has been concluded about citizens' rights, has some sort of quasi-direct effect in the UK. The EU is saying that, furthermore, EU citizens already here should continue to have access to the Court of Justice, which could be for decades because the EU is saying that is even for those who are born here. That could be for decades of time. The UK is saying that that is not acceptable but that is where the tension lies, and the question is whether we can look to an alternative route. Is this where the EFTA Court might fit in as some sort of compromise solution?

Q43 **Stewart Hosie:** As an aside, thinking about an EFTA type of arrangement, on the DCFTA, as a bespoke arrangement, I wonder how that stands with the Prime Minister's assertion that she does not want the UK to have a deal that looks like anyone else. She does not want the same kind of deal anyone else has. Do you think that was just a bit of political flourish or a bit of a rhetorical flourish before they had really thought through what the consequences of that meant?

***Sir Ivan Rogers:*** I do not think it is particularly possible for me to answer. There is a danger that this argument gets theological on both sides. I would be an optimist in this area that, if we ever got down to discussing the trade deal, we would find that it was different from anybody else's trade deal and deeper and more thorough and more through going but that, nevertheless, in the theology of the other side, fitted into a category that they already have.

Some of this stuff is a bit overdone. What they mean is, "If you do not want supranational jurisdiction and you want national control of borders and you are not prepared to make a budgetary contribution, you want one of these". One of these is a DCFTA, and we know how to do one of those. It is not an association agreement; it is a DCFTA. I know how these people think and that is how they think. We think, "That is insulting to us and we are far bigger and bolder than Canada and we are not 3,000 miles away and we have a much deeper relationship and a much deeper textural relationship and we are easily your biggest capital market and an enormously important partner, and it is insulting in some way to be viewed as a sort of super Canada".

In the end, once you get into the trade discussion, as I say, it will get very feisty and very difficult on some of these areas where they will say, "Well, you are not prepared to accord people free movement. You say that you have accepted the indivisibility of the four freedoms but, in reality, you want to get the full benefit of three of those freedoms without the fourth". That is their pitch. We will say, "No, we just think a combination of common sense and economic self interest on both sides of the Channel means: why would you deliberately suppress existing trade and investment flows in circumstances where it is to the benefit of both sides?" The two sides are talking past each other, candidly.

Once you get into the trade discussion, they will start talking past you and there will be a huge number of fights on individual issues and they will get very, very difficult, which is one of the reasons why it takes so much time. You will then discover, of course, that the intensity of your relations is far greater than that which Canada has with the EU and, in practice, it will not look exactly like a Canada deal. My worry is that everybody gets obsessed with bespoke and unique versus cookie-cutter and never gets down to the discussion of the substance.

Q44 **Stewart Hosie:** I myself am more concerned that anyone would not do the deal because they were insulted to be described as a super Canada.

I just have a final question to Professor Barnard, back to the direct effect issue. With the repeal of the European Communities Act, the principles of direct effect and of primacy of EU law in the UK legal systems will end. Do you think this could be a problem for the EU in agreeing a status quo transition of one form or another?

***Professor Barnard:*** Yes.

**Stewart Hosie:** Can you expand a little on that?

***Professor Barnard:*** The EU has made it clear that, if we want transition, we have to be subject to the full regulatory, supervisory and judicial mechanisms. It also seems to me very likely that they will insist, although Theresa May did not go this far in the Florence speech, that we carry on accepting all of the EU rules that are adopted between 29 March 2019 and 2021.

If it is basically that we are EU members but with a lower pass-mark, the fact is that they will still require us to give effect to doctrines of direct effect and supremacy. That then raises interesting legal issues about how we deliver that because, if we do not go down the route that Alan has described and we use the European withdrawal Bill and we repeal the European Communities Act, there is a question about how we disinter the turning off of direct effect and supremacy. That is quite a lot of negatives but we will have turned off direct effect and supremacy by repealing the European Communities Act and then we will have to turn them back on in some way.

**Stewart Hosie:** I know exactly what you mean. I am going to hand back to the Chair. While that is a very interesting problem in legal terms, I suspect it is a far more political problem for those who want to sell the idea of a clean Brexit.

**Chair:** Thank you very much indeed.

Q45 **Rushanara Ali:** I am just going to ask a few supplementary questions to the earlier remarks. Sir Ivan, you mentioned your concerns about triggering Article 50 and the fact that the bargaining positions were not clear before Article 50 was triggered. Do you think it was irresponsible of the Prime Minister, therefore, to trigger it?

***Sir Ivan Rogers:*** That is not a question I can really answer. As I say, my preoccupation with triggering Article 50 was that we obviously needed to know what we wanted at the point that we triggered it and it was extremely difficult to get there. This is an asymmetrical process designed for the benefit of the incumbents, as it were, and the people staying rather than the people exiting. Article 50 was produced in a rush in the European Convention process early in the century. Nobody, including the author, who was one of my predecessors, really expected it ever to be used. I suspect that it was therefore drafted by a combination of diplomats and lawyers but I do not think an enormous amount of thought had been given to how it would work.

The reality, of course, is that the 27 are in charge of the Article 50 process and we are now on the receiving end of that. My advice, simply, in advance of triggering, was that, the moment you have triggered, you have lost control of the process because they are the people who will write the guidelines. They then produce the guidelines in detail, including on transition, on 29 April. It is their guidelines and they therefore dictate the game and dictate the pace of the game and dictate what the game is about. Once you have therefore moved into an Article 50 process, you have very little leverage to say, "Hang on a bit, I do not really want the process to work like that; I want the process to work like this". That was my preoccupation. That is water under the bridge. We are where we are now.

Q46 **Rushanara Ali:** Just moving on from that then, you mentioned leverage and the financial sector providing some leverage and it being in our mutual interest to come up with an agreement. The Governor of the Bank of England correctly pointed out, when I asked him about this point about leverage, that, in reality, using leverage can be hugely disruptive particularly when it comes to the financial sector and the insurance sector. What does it actually mean to have leverage and which part of the leverage that we have is credible in the negotiation and what is not, in your view? Are we actually talking about mutually assured financial destruction if we get into the language of leverage?

***Sir Ivan Rogers:*** You can exert leverage without using the language of leverage, if I can put it like that. What is our proposition going to be once we get into a free trade discussion or a discussion of the framework next year? Say they put a Canada type proposition on the table and say, "That is the kind of thing you want and you do understand, Britain, do you not, that, under a free trade agreement, you are going to get very markedly less market access in multiple different sectors than you did when you were in the single market and the customs union but that is your choice? You have taken many fewer obligations. That is fine by us, much as we regret it, but the consequence is the following on market access". We are bound to go back saying, "But your proposition for a Canada-type agreement is biased in favour of goods and manufacturing, which is where you have a huge surplus with us, but we have a very huge surplus with you on financial services and legal services and other services, and we do not want an asymmetrical deal that is biased to you". You are into that straight away.

The creative way of addressing that, where I think the Government ought to go—when they go there, I do not know—is to try to articulate why it is very much in the EU 27's interests not simply to suck more and more business in key chunks of the City or financial services out of London in order to disperse those into the European Union. There are loads of arguments that differ from CCPs to asset management to investment banking and we cannot go into all of that in depth. However, what is our core proposition? "It is not overall, in your wider economic interests in sustaining the future of the Eurozone, to see that business sucked progressively and then dispersed across the European Union. It will have a fragmentation and dispersion effect which will not work for you and which will raise the cost of capital for your companies and so forth".

Therefore, the constructive way of exercising leverage is surely to make the argument that, "It is not in your interests to see a radical diminution in what London does for the corporate economy of Europe and, furthermore, that quite a lot of business would not migrate to European capitals but would migrate to New York or to Dubai or to the Far East and therefore would not stay in the European time zone". Is this a hard sell? Yes. You will have received more eloquent answers from the Governor and from others. It is a very hard sell.

The other thing I would say, which is very difficult in these negotiations and which I experienced in the Cameron re-negotiations, is that the people that you are up against in the room, by definition, are permanent representatives and Sherpas as the people around Prime Ministers. With all respect to them, and I have worked with them for many years and they are very good and very smart people, they are not very immersed in the financial sector and they are not very close either to the European Central Bank or their own central bank. They are all very well briefed people but they are not people who live in that universe and are thinking in those terms. Leaders' offices and the people who are doing this negotiation can sometimes think in quite mercantilist terms of, "What is in it for us?" and "What business can we suck out of London?" and "Where is our competitive advantage here"?

Somehow, you have to raise the tone of this debate. That is why the trust thing is so important. You have to raise the tone and tenor of it and say, "20 years hence, where do we want to be, all of us, post-Brexit? You want us as close partners on the security side, on the financial sector side and on multiple other things where we will have very close alignment of interests in the world because we will remain amongst our closest partners and friends. We want that with you". However, to do that requires an economic and trade deal which goes very substantially deeper than the one that they might be offering us. That is the sort of elegant way to try to exert leverage.

**Chair:** Are you going to move on to the ECJ questions?

Q47 **Rushanara Ali:** Yes, I will. I just have one more final point on this. In the light of what all three of you said about the challenge between a transition deal and a no deal, in reality, in Parliament or the European Parliament, we are caught between a rock and a hard place when it comes to a vote, which is a poor deal, a raw deal or no deal. Neither of those scenarios are ones that are actually particularly palatable when we are having to make that choice because of the consequences you have talked about. Is the only ultimate, realistic, sensible option the transition option and should that be the third option as opposed to these binary choices that have dictated this whole debate?

***Professor Sir Alan Dashwood:*** It is a very interesting question. The choice may not be entirely binary because it would be a risk of course. If a deal had been negotiated and there was a text—there has to be a text before it can go to the European Parliament—and it is voted down either in this House or by the European Parliament, that could be a scenario in which the heads of state and government were willing to consider an extension of the negotiated time limit because it would alter the political situation. However, of course, it would be a risk.

Q48 **Rushanara Ali:** Thank you. I know that you have touched on some of the points on the ECJ already but the Prime Minister stated that, on leaving the EU, we would leave the jurisdiction of the ECJ. Then the language softened in September around what would happen during the transition period. What do you think should be the role of the ECJ in the interim period?

***Professor Sir Alan Dashwood:*** In the interim period?

**Rushanara Ali:** Yes.

***Professor Barnard:*** I would start by saying that it may be the fate of being a professor of EU law that you have to defend the ECJ from time to time because it is always painted as a red line, and I understand that. However, it is actually worth bearing in mind that the Court of Justice has done good things for the United Kingdom. It has responded to challenges about trying to move clearing out of the UK to be done in the Eurozone and the Court has said "no" to that. It has also been a staunch defender of the single market, which is of course something that we wanted in the past.

It is important to show a degree of balance towards the ECJ. The fact is that the EU has been clear and, as we have heard, the boot is very firmly on the EU's foot. However, I also recognise that the Court of Justice is a red line for the UK and so we need to think about alternative arrangements, particularly in respect of the future trade deal. We have to be very careful here because, in respect of any future trade deal, we can come up with all sorts of imaginative scenarios about perhaps having some joint court that has representatives of the EU and of the UK but that is what they originally proposed for the European Economic Area Court, and the Court of Justice struck that down in 1991 because it said that, actually, the European Court of Justice judges sitting on that proposed court would be conflicted.

We therefore have to be careful because the Court of Justice is very jealous of its own prerogatives. Any alternative scenario, therefore, becomes quite difficult, which is why the EFTA Court is attractive because the ECJ has recognised the EFTA Court. That is why quite a lot of attention is being focused on the EFTA Court. As far as the EFTA Court is concerned, they work in English. They, of course, follow the decisions of the Court of Justice but they often deal with issues that the Court of Justice has not had to consider. Furthermore, the advantage from the

UK'S point of view is that there is no direct effect as such and there is also no mandatory obligation to refer cases so there is much greater flexibility with the EFTA system than there is with the ECJ.

**Chair:** Thank you. I will stick on the EU law theme but I will bring in Catherine.

Q49 **Catherine McKinnell:** One of the issues that is not clear is whether the UK would be required to adopt law coming out of the EU during any transitional period. However, the Prime Minister, in response to a question, suggested that there would not be an issue anyway mainly because the process takes so long that it will not be a problem. I just wondered what your views and thoughts were on that.

***Professor Sir Alan Dashwood:*** The legislative process in the EU is quite slow. If we are talking about measures that have not even been proposed at the date of withdrawal, then they are unlikely to enter into force before the end of the transition period, particularly if they are directives because they will have an implementation period added on to them.

***Sir Ivan Rogers:*** I agree. It seems to me quite good timing as well because it is a fallow period towards the end of the Commission and the beginning of the new one. Therefore, if you look at the legislative cycle in European terms, it is sort of peeking around now and it will dwindle in 2019 and it will not rev up again very rapidly under the new Commission because it takes time for the new Commission to get its feet under the table and start producing the legislative sausage machine. It is probably good timing but I would be amazed if they did not say in print in December in their transition document that we will be subject to any new legislation despite not necessarily having been in the room, either in the Council or in the Parliament, to agree it. That is the status that we would be in over a transitional period. We will be respecting the rights and obligations of membership but we will have no voice.

***Professor Sir Alan Dashwood:*** I agree with that.

Q50 **Catherine McKinnell:** Another issue, which comes from some comments that you have made, Sir Ivan, to a previous Committee hearing is that of how influential Britain's interests are in terms of European lawmaking at the moment anyway. If laws come in during the current period that we would be subject to, how influential have we been in that process in any event?

***Sir Ivan Rogers:*** I am definitely not the right person to ask on that.

**Chair:** Do not feel that you have to answer it.

***Sir Ivan Rogers:*** You will have to direct the question to my successor. Inevitably, the day after the referendum, life felt different straight away for me and all of my UKREP team. It is straightforward for others. They think, "You are on the way out and we do not have to take notice of your interests because you will not be there when this legislation applies. By definition, you are no longer as big a player in the room and as influential in the room because people are thinking that you will not be around when this is in force so why should we pay attention to you in the way that we did before?"

**Catherine McKinnell:** In reality, however, we may be.

***Sir Ivan Rogers:*** That is true. It is undoubtedly more difficult for UKREP people and for Whitehall people generally in working groups at the moment to espouse positions and push them as hard or as effectively as they used to. Inevitably, talking to some of my colleagues, on all those issues where they would look to the Brits to lead, which was on lots of issues, and for us to lead the caucus on likeminded member states on multiple issues, we are effectively no longer there for that, and you are seeing some very interesting things happening around the circuit at 27 as people start to think, "In a world without the British, who convenes the pro-competition and pro-trade liberalisation issues?" Those things are already evolving a different dynamic because they need to get used to the idea that we will not be there. That is not immediately the day after the referendum.

Q51 **Catherine McKinnell:** In terms of the transition period—presumably we will have one or one will be required—what will the position be there?

***Sir Ivan Rogers:*** We will not be in any room. We will not be in the Council or the Parliament but we will be subject to all laws passed without us being in the room.

***Professor Barnard:*** We might have some very soft influence with UKREP people using their contacts. This is a Norwegian experience. The Norwegian colleagues tell me that they spend an awful lot of time wining and dining. This is not just to sample the gourmet delights of Brussels but to try to get some very soft influence. However, of course, they are not there at the table.

***Sir Ivan Rogers:*** The job for my successor will become totally different and is no doubt already becoming totally different. I was already talking to Norwegians and Swiss and Americans and Japanese and others and working out, for a post-Brexit world, how UKREP will function and how we will deploy ourselves to maximise British influence in Brussels since we will be a third country state.

***Professor Sir Alan Dashwood:*** Can I say a word?

**Catherine McKinnell:** Please, yes.

***Professor Sir Alan Dashwood:*** it is important not to exaggerate or to overestimate this problem. As the Prime Minister recalled in her Florence speech, we are already subject to the same rules as the EU so we start, once we become a third country, in a completely different position from any other that has tried to negotiate a trade arrangement. That would equally apply to the transition period. There may be some legislation that comes in after the exit date but before the end of the transition, but I do not think that there will be very much of that. The other rules will be ones to which we are subject already.

Q52 **Kit Malthouse:** I wanted to ask the professors a little about third country agreements but, before that, Sir Ivan, you said earlier that the WTO has no arrangements for pharmaceuticals. That is not actually correct, is it?

***Sir Ivan Rogers:*** I have a whole plethora of examples in regard to the WTO.

Q53 **Kit Malthouse:** You said pharmaceuticals, which do form part of tariff schedules. In fact, there is a WTO pharmaceutical agreement that offers a zeroforzero tariff agreement between the major pharmaceutical suppliers and consumers, which we could be signatories to and which the EU is a signatory to. Is that not correct?

***Sir Ivan Rogers:*** Yes, but it does not get you very far. This is the point about financial services.

Q54 **Kit Malthouse:** When you said that there were no WTO arrangements for pharmaceuticals, that was not correct, was it?

***Sir Ivan Rogers:*** Let me complete what I want to say because there is a proposition around at the moment, which I think is wholly misleading, that the WTO effectively acts as a sort of featherbed across multiple sectors or across all sectors and in some ways allows you to enforce your rights. For example, Iain Duncan Smith said on the radio the other morning that, if the EU did not do a basic aviation deal with the UK on exit—this was part of my no-deal point—that the WTO would "go ballistic", as he put it, and haul in the EU to account. First, it does not cover aviation and, second, the WTO does not exist to go ballistic. It is not an intercontinental EU.

Q55 **Kit Malthouse:** I understand that but, on the specifics of pharmaceuticals—I am the chair of the Life Sciences All-Party Group—it is not correct to say that the WTO does not have arrangements for pharmaceuticals.

***Sir Ivan Rogers:*** No, but they do not enable Britain to do anything comparable to what it does now. A UK company seeking to continue selling pharma products in the EU that, pre-Brexit, had been authorised either by a member state or by the European Medicines Agency would need to set up an entity, as you know, in the EU or EEA to do so as EU law requires marketing authorisation holders to be established in the EU and EEA. Pharma companies need to relocate a number of checks and controls to the EU/EEA along with company representatives responsible for those tests; otherwise, their products have to be re-tested in Europe.

**Kit Malthouse:** But that is not—

***Sir Ivan Rogers:*** Sorry, I want to complete this point because we cannot go on with this fiction that nothing changes as a consequence of exit in the world of pharmaceuticals.

**Kit Malthouse:** I am not saying that nothing changes but it is not correct to say that there are no arrangements. There has been a huge amount of work on pharmaceuticals in the WTO over the last 20 years to make sure that the flow of drugs can flow.

***Sir Ivan Rogers:*** The WTO's drug list has not even been updated since 2010. Newer medicines marketed since that date could be subject to tariffs because it has not even been updated in the last seven years.

**Kit Malthouse:** There are arrangements but they are just not as you would like them to be.

***Sir Ivan Rogers:*** There are certain components and active materials used in the manufacturing of medicines or in R&D that are not covered.

**Kit Malthouse:** I get the point that you want to defend your corner but your bald statement was that there were no arrangements. That is not true.

***Sir Ivan Rogers:*** No, my bald statement was that there are multiple sectors of the UK economy that are extremely economically important where "WTO rules" is essentially a meaningless concept. The WTO is not a place where rules are established; you make commitments into the WTO and they are a basis and a framework on which you can then build either bilateral or regional further commitments, but those have to be negotiated. The whole point about a single market, which we are leaving, as I say, is the tackling, erosion of and, ultimately, elimination of non-tariff barriers. People keep on obsessing about the tariff barriers but, by and large, tariff barriers, with the exception of agriculture and one or two sectors like automotive, have largely been eliminated. My point about the WTO is that the last WTO round completed at the global level—it happened to my old boss, Sir Leon Brittan, who completed it for the EU working, above all, with the Americans—was in 1994. There has not been a successful WTO round since 1994.

**Kit Malthouse:** You talked about the impact of trade—

***Sir Ivan Rogers:*** All the trade negotiation that has happened since has either been plurilateral, regional or bilateral.

Q56 **Kit Malthouse:** We are getting short on time, which is why I need to move you on. You also said that there would be practicalities around the impact of cross-Channel trade. What impact do you think the WTO trade facilitation regime that came in in February this year, and to which the EU are enthusiastic signatories, will have?

***Sir Ivan Rogers:*** Again, these are multilaterally negotiated trade facilitation initiatives. I have been part of trying to negotiate those and part of trying to push those both in the G8 and G20 fora; they do not achieve these in practical terms which facilitate trade cross-Channel in the situation we are facing over the next 18 months.

Q57 **Kit Malthouse:** Even if we are WTO members, will we not benefit?

***Sir Ivan Rogers:*** Talk to HMRC.

**Kit Malthouse:** We have had them in front of the Committee twice and they reckoned that the facilitation of trade would work.

***Sir Ivan Rogers:*** It does not deliver anything.

**Stephen Hammond:** They did not say that.

**Kit Malthouse:** They did.

**Stephen Hammond:** No, they did not.

**Kit Malthouse:** They said they were confident of being able to deal with it.

**Chair:** We should look at the record rather than remembering quotes. You have the wording there.

***Sir Ivan Rogers:*** It does not deliver anything comparable to the customs union membership. We are leaving the customs union. My proposition on that would be that, ultimately, we will have to sign a customs co-operation agreement of quite some complexity with the European Union. That will not deliver precisely what a customs union does; even what the Turkish customs union does. Could that be done over a period of years with a transitional period? Yes. Will it deliver friction-free trade in the way that a customs union does? No. I have talked to HMRC people in detail. I used to be responsible for HMRC in the Treasury.

Q58 **Kit Malthouse:** Okay. We do not have to forgive you for challenging you—that is part of the job—but we will have to agree to differ on some of those things.

On the third party arrangements, the Chancellor has said that it should be relatively simple to port the free-trade agreements or the agreements that are in existence across. Is that legally feasible?

***Professor Sir Alan Dashwood:*** It is legally feasible but it is something that is liable to take time. The fact that the UK is a party to EU trade agreements does not mean that we can simply continue as a party to those agreements once we cease to be a member state because these agreements are mostly, at least, essentially bilateral agreements between the EU and its member states, on the one hand, and the third country concerned on the other. We evidently become a less attractive trade partner if we no longer have access to the internal market of the EU.

I have not been through all these agreements in detail but my understanding is that many, if not most, of them will have to be re-negotiated by us with the third country concerned. In some cases that will be easy; in others it will not be. However, we cannot simply continue on the basis of the fact that we are currently party to the agreement. That would probably be the case even where the agreements are mixed; in other words one between the EU and its member states exercising their national powers in addition to those of the Union because those powers would have been exercised with respect to the non-trade aspects of the agreement. Do you have anything further?

***Professor Barnard:*** I would just add that it is quite complicated. We need to distinguish between the transition period and beyond transition. With transition, it depends on the nature of the FTA. It depends on how we transition; whether we transition by having left and then have some ongoing relationship, because we will then no longer be a member state and some of the FTAs may refer to member states of the EU and so that would need to be addressed, and that is a particular issue with the EEA agreement—the European Economic Area agreement. For other FTAs, they may not have a similar territorial restriction but it may be that you need to have agreement with the third party—Korea, for example—about what the UK's position will be in the transition period.

Beyond transition, as you rightly say, the Chancellor has indicated that we could essentially cut and paste the EU's FTA with Korea and it becomes a UK-Korea FTA. Unfortunately, it is more complicated than that because there are, for example, EU tariff quotas. How do we deal with those sorts of things? There are 50 FTAs so it will take time. Then, of course, the *FT* has talked about 750 agreements of other sorts. This is quite a large, technical and complicated legal exercise.

Q59 **Kit Malthouse:** Presumably, much of it is about a political willingness to get it done. The Trade Minister who has just finished actually, Mark Price, is on record as saying that he has been around 75 of these Ministers and countries—I forget how many it was—and that everybody had showed a willingness to transfer across. Do you think that we could take the Minister's word that that would be achievable in the timeframe?

***Professor Sir Alan Dashwood:*** It is hard to say that it would be achievable in the timeframe. In principle, it is achievable.

***Sir Ivan Rogers:*** In principle, it is achievable. I would certainly take the Minister's word; he was an excellent Trade Minister and, as you say, he has been around all 60. In addition, as both my colleagues have referred to, there will be rules of origin questions which are extremely complex, which means that there are substantive changes that you sometimes need. There will be appetite with all those partners. Why would there not be appetite to say, "Let us try to replicate that"?

Of course, you will have to hope that they do not want to re-open the agreement and think, "In re-opening the agreement, here is an opportunity to squeeze more out of the Brits that we were not able to get when they were just part of the 28". You do not know. There is a huge amount of diplomatic work to be done around the circuit to say, "Let us just stabilise the world as it is and then we will move on with you", because ultimately, presumably, you are wanting to do better trade deals with these countries over time, or certainly with a proportion of them, than you think that you got as part of the 28. The first job is to stabilise and get the status quo. As Alan says, it is immensely difficult to stabilise all of them before exit. Of course, it depends a bit on the transition period.

One thing that is coming, to add to what I predicted earlier on on the transition period, which I would think is inevitable, consistent with what they said on 29 April, is that they will say that, "Over a transitional period of two years, whilst you remain subject to regulatory, budgetary, supervisory and judiciary enforcement structures that all still apply, you are also still not able to strike trade deals or be outside the common commercial policy". That will not be possible over those two years. In a way, of course, that gives the UK more time over those two years to sort out all these arrangements and make sure you are alright from 1 January 2021.

***Professor Sir Alan Dashwood:*** I want to add that the common commercial policy will have to be part of the interim deal.

Q60 **Kit Malthouse:** Would you advise the Government to concentrate on a "top 10 deals" to get them done first and passported over?

***Sir Ivan Rogers:*** I am not in a position to advise from the outside but, yes, you must have a rigorous prioritisation exercise and you must know as well, once you have conducted the first scrub of all these, where the problems are and what is the most difficult both in terms of partners and in terms of substance, on things like rules of origin, and which are the ones where you have the biggest problem if you do not stabilise it.

Q61 **Wes Streeting:** Thank you. I want to pick up a couple of points on topics raised by colleagues, and then move with a heavy dose of optimism with the idea that there will be a longterm deal and what that might look like. Firstly, Sir Ivan, in February, in evidence that you gave to the Brexit Select Committee, you highlighted what you described as the asymmetry of the negotiating experience between the UK and EU negotiating teams. Am I right in thinking that, back then, you were thinking primarily in terms of our administrative capability and the expertise at our disposal and the resources? If that is the case—or, if it is not, then I am interested in the alternative—at this stage, do you think that that is a bigger problem or is unity of purpose a larger challenge on our side?

***Sir Ivan Rogers:*** The challenge on our side was, obviously, this enormous national negotiation on a scale that the country has not conducted since the Second World War or, indeed, probably ever. The other side does negotiating for a living either against the countries or against its member states, if I can put it like that. In a sense, that is a large part of what the Commission exists to do, whether it is in aviation or whether it is in environment. The Commission is quite a small bureaucracy and quite a senior bureaucracy. It is stuffed full of negotiators. It is not a delivery organisation like many departments of state, and it is stuffed full of people who are very experienced at how you negotiate and at negotiating techniques and dealing with member states.

Alongside the vastly more experienced people coming to the table, you have the separate problem which is that there is an asymmetry of information which always works in favour of the people in Brussels, does it not, because, by definition, if they have been sitting at the heart of the spider's web for a very long time, they know the position of the 28 member states, ourselves included. If you have been dealing, in DG MOVE, with the aviation dossier, for example, you know perfectly well where the Brits are coming from and why they are coming from there and what they care about, and you know that of all your other people around the table. You are at a systematic advantage compared with your British interlocutor.

This is not something that you cannot deal with over time but there is a massive learning curve for people negotiating on the UK side of the table up against people who do this for a living and have been doing it forever and have been negotiating aviation deals with Ukraine followed by Chile and others. By definition, they know what they are doing. They have technology and they have a process. All of that has to be built on the UK side. I am sure it is being built—that is the job—but it is a huge challenge when Whitehall has plenty else to do. It cannot just have its entire time consumed by Brexit.

Q62 **Wes Streeting:** Judging from the mood and conversations you continue to have with people you know very well, how much more difficult do you think the Prime Minister's job is when she sets out a clear position in the Florence speech, for example, but then is contradicted within a matter of hours, let alone days, by people within her Cabinet, let alone the Parliament?

***Sir Ivan Rogers:*** I think I might duck that.

Q63 **Wes Streeting:** I thought you might. That is fair enough. It was worth a try. I thought you might be feeling generous. Can I turn to the lawyers then? It is widely accepted, however we voted in the referendum or indeed on the Article 50 Bill, that the EU Withdrawal Bill is an important piece of legislation and that it is in our national interest that it should pass. There are, however, a number of areas where a number of MPs would like to improve it. One of the areas of concern to me is about whether the EU Withdrawal Bill, as currently written, is compatible with our objectives for transition; particularly thinking about, for example, the role of the ECJ during a transitional period. I would like to ask the lawyers initially but, Sir Ivan, if you have a view, I am interested too. Do you think the EU withdrawal Bill as currently written is compatible with our objectives for transition and, if not, where should we seek to improve it?

***Professor Barnard:*** Do you want me to go?

***Professor Sir Alan Dashwood:*** Yes, do go.

***Professor Barnard:*** Clause 9 of the Bill is the place where there is most wiggle room. Clause 9 is entitled "Implementing the Withdrawal Agreement" and that is why it is important that any transition be done under Article 50 because then it is connected with the withdrawal agreement and thus the withdrawal Bill and thus can be brought under Clause 9.

The problem about Clause 9 is that it gives a lot of space to the executive to make provisions as the Minister considers appropriate for the purposes of implementing the withdrawal agreement. That then raises the question, going back to some of the things I mentioned before, about, if you are going to turn section 2(1) and 2(2) of the European Communities Act back on, having turned it off in Clause 1 of the Bill, can that really be done under the powers in Clause 9 of the withdrawal Bill?

**Wes Streeting:** Okay. Sir Alan or Professor Dashwood; whichever you prefer.

***Professor Sir Alan Dashwood:*** I am happy with either. Yes, it would have to be Clause 9. I am not entirely certain that the transition arrangements would necessarily have to entail switching on direct effect and primacy again. That is certainly what the EU is saying at the moment because they talk about a time-limited extension of the acquis. However, it seems to me that a solution that is satisfactory, perhaps not ideologically but substantively, would be to—I am sorry we keep coming back to it—apply the EFTA solution again here because the rules which the EFTA Surveillance Authority and the EFTA Court have to apply under the EEA agreement are the same ones as we would be seeking to extend the application of, at least so far as concerns the economic aspect of the package.

Those rules are perfectly satisfactorily implemented within the EFTA countries under the arrangement of the EEA agreement, which means without direct effect but through the implementation of EU law by the national legislators, subject to the discipline which the EFTA Surveillance Authority and the EFTA Court provide. It seems to me that this might be one solution that is more acceptable from the UK's point of view and really ought to be acceptable to the EU. After all, if we are particularly concerned not only during the interim period but in the longer term, and if the Union is particularly concerned, with protecting the rights of EU citizens in the UK and corresponding rights of UK nationals in member states, in countries like Norway, the protection of EU citizens who are resident there is guaranteed by a combination of national law and the EFTA institutions. That is something that the Union has accepted.

***Sir Ivan Rogers:*** I have very little to add and I defer to my colleagues who have vastly more expertise on it. There is politics and there is law, though, on this. Whilst that is an eminently rational answer, ultimately we get there or something like it at the end of the transitional period. Doing this at pace in the early part of 2018 and striking that agreement may be much more difficult. You have honed in on a very difficult issue. Whilst Alan is right, I am not sure you will get there in a matter of weeks, and I can see that being an extremely complex negotiation inside the 27 if we put that proposition back. I do not think it is a proposition that they will put on paper in December. They will go with full-on continuity in line with para 6 and we may not like it. That is one of the reasons why we should be very cautious about thinking we are very near striking any agreement after December.

The second thing I come back to is—colleagues have discussed the right issues—that this question of scope and ambit and what we are talking about may also be problematic, including for legislation, because I am pretty convinced that common policies, as they are called in Brussels, in other words agriculture, fisheries, environment and others, will be part of the package that the others table. I can see that posing issues both in the executive and in the legislature.

Q64 **Wes Streeting:** I will stick on this because I find what you have said particularly worrying. It is important that we have really clear expectations going into December about what could possibly emerge. The thing that is on the forefront of most of our minds is that there are businesses and sectors that are warning us that they need to make decisions between now and Christmas. They may not be the majority but there are significant businesses and sectors affected. Then, into the first quarter of the new calendar year, you have a whole tranche of other sectors, including financial services, who warn that, without a clear indication of where we are heading on transition, they will be activating their contingency plans. If I have understood correctly, you are warning that December is critical but that we may emerge from the December summit without a clear sense of scope and ambit and certainly no framework of what a transitional deal will look like. We are kind of into that territory that the Chancellor warned us about, are we not, where the value of the transitional period is evaporating because businesses will be making decisions before we even see a skeleton or an outline of what a transitional agreement will look like.

***Sir Ivan Rogers:*** I hope I am not being too pessimistic. I am of the view that probably the best outcome that is available in December is "both jumping", as I would put it; in others words, others crystallise a proposition for the kind of transition they would be prepared to offer consistent with what they think the Prime Minister asked for and outline a destination that they have in mind, which is to say, "We might not much like or might not like the implications of it. We think it is too unambitious". They are only, actually, even going to put that in print if they hear from the Prime Minister something more forward and more compelling on the past financial obligations. The risk is that, if she is unwilling or unable to do that, we may not even get a bit of paper on the transitional provisions and ultimate decision.

This may be too gloomy. Things can move very rapidly in six or seven weeks. There is a long way to go until the December Council. However, it does not seem very likely that all the steps would have happened such that not only do you have both pieces of paper, as it were—whatever we are able to say on finance and whatever they are able to say on transition—but you have also locked down an agreement and that you can promulgate something. That is a vanishingly small possibility. Businesses are expecting much clarity by December—legal clarity or legal certainty about the transitional provision—and I think they will be disappointed.

Can it be done in Q1? My gut feel is that some of these issues will be much more complex once we see what they are putting in print to fill out the para 6 of 29 April. We will see then where the cabinet goes and how they divide on the issue. I can see that being quite a difficult discussion inside the Government as to the scope and the ambit and the meaning of transition and what that does and does not permit you to do over the transitional period. I hope that that is not too pessimistic but it seems to me that there is quite a long way to go.

**Chair:** Wes, I thought you were going to cheer us up with the long-term economic relationship that we were going to get.

**Wes Streeting:** I am really sorry, Chair. That was my intention.

Q65 **Chair:** I will finish with one question to Sir Alan about dispute resolution because you very kindly shared your paper with the Committee. I want to check my understanding. I think you are talking about dispute resolution mechanisms both for the withdrawal agreement—the actual divorce, if you like—but also, potentially, dispute resolution for the ongoing agreement deal such as it is when we get there. You are very clearly stating that the UK has one view on this while the EU has another view, but there are some models that potentially might help. Do you have anything particular that you wanted to say for the Committee in terms of shaping questions that we might ask in future evidence sessions?

***Professor Sir Alan Dashwood:*** I was, I suppose, the main author of it but in fact it was published by the rather quaintly named Senior European Experts Group.

**Chair:** We like experts.

***Professor Sir Alan Dashwood:*** We are also senior in more than one sense. The paper deals with dispute resolution in the three situations: the withdrawal agreement, an interim agreement, and the longer-term agreement. The position taken in the paper, which is certainly the one that I would favour so far as my view counts for anything, is that the issue which is most sensitive from the point of view of dispute resolution in the withdrawal agreement is the enforcement of the rights of EU citizens in the UK. These are points that I made earlier. That could be quite satisfactorily guaranteed by a combination of what the Prime Minister already proposed in her Florence speech, which was to incorporate the relevant provisions of the withdrawal agreement into English law so that they are applicable directly, as English law, by our courts to include language that will encourage the courts to take account of Court of Justice judgements. Although I think that, in reality, that would be a sufficient guarantee, I fear it may not be enough to satisfy the EU side. That is why I would propose, in addition, borrowing the EFTA Court for the enforcement of those rights.

Something similar could apply to the interim arrangement. The longer term arrangement is more complex because it will have aspects where disputes will arise between the UK and the EU, and it might be appropriate for that kind of dispute to be resolved by a mechanism like the one that applies under the agreement with Ukraine; in other words, initial political consultations and, if those do not lead to a result, then compulsory arbitration with a duty for the arbitrator to refer underlying questions of EU law to the Court of Justice. That is one possibility. There is then a question of whether or not the courts really should bind the arbitrator and so on. Given the scope and the ambition of the agreement, something more will be needed in the nature of access to the EFTA Court.

I am sorry that I am going on rather long but there is one elephant not in the room, which has not been mentioned so far this afternoon, and that is security. That is a very important part of the partnership that the Prime Minister is proposing and it also seems to me to be a part of the bargain that ought to be considered attractive from the point of view of the EU 27. If we are talking about things like the European Arrest Warrant, that will probably require some kind of supranational judicial authority. The problem with the EFTA Court is that they do not have authority under the EEA agreement to deal with these matters. There is, very recently, an agreement on the arrest warrant that has been concluded between the EU and Norway and Iceland but it does not, at the moment, extend to the EFTA Court. We would have to deal with that.

The longer-term partnership will require a more highly articulated form of dispute resolution.

**Chair:** Is there a final point?

***Sir Ivan Rogers:*** I do not want to prolong it still further but I strongly echo what Alan said about the security relationship. My only caveat on this is that this is an area where the European Parliament could play a major role and could potentially be more difficult than heads of states and governments. What Alan says may well apply in both the long term and the short term and the transition period but I can well see this being a sticky issue with the European Parliament, which has tended—again, I do not want this to be read the wrong way—on the citizens' rights issues to be more maximalist than the member states. Our bigger problem on some of these issues, including issues on institutions rather than the European Arrest Warrant, will be with elements of Strasbourg than with some of the member states.

Q66 **Charlie Elphicke:** Do you think it was a mistake last summer to not just take it off the table and say, "Look, everyone is welcome to stay, end of", and that we should not have included it into any part of the negotiation?

***Sir Ivan Rogers:*** It had a torturous history both last summer and last autumn, in all honesty, and it got off to a slightly unhappy start with a number of capitals, with Brussels, probably with Berlin. The Prime Minister wanted to move this before she got into the negotiation. Part of the problem was the "no negotiation without notification" mantra, which grew up last summer and last autumn. This goes back to the Article 50 discussion. I was saying to my colleagues in Brussels and to others in capitals that there is a real danger with this. I can understand why they want solidarity for 27 and why, in the face of what looked to them like an existential challenge at the time, they wanted to demonstrate unity, purpose and so forth. It has ended up backfiring on this issue. There was goodwill in London and goodwill from the Prime Minister to try to fix this early and sort it and she did not feel it was reciprocated, and the level of trust diminished over the back end of last year and the beginning of this year.

I think she wanted to sort this earlier, and I think others could have made more of a gesture to try to sort it earlier. I am afraid that we have been in a bit of a spiral since. It is now improving again. I am very optimistic that the citizens' right thing will be sorted by December. However, we have been in a spiral over the last few months that started through last Autumn when the Prime Minister thought she was making a big forward move and she did not think it was reciprocated.

**Chair:** You have proved my conclusion right at the start of this process, which is that the people will benefit most from Brexit are the lawyers, which is good news for those who are watching and my former profession. Can I thank you very much, all of you, for being very generous with your time this afternoon in answering all of our questions? If there is anything further that you feel you want to raise—in particular there was one point that was going to be raised in writing to the Committee—please feel free to do that. We are very grateful to you for your time and expertise. Thank you.