



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence

Brexit: enforcement and dispute resolution

Tuesday 6 February 2018

10.45 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cashman; Lord Cromwell; Lord Gold; Lord Judd; Earl of Kinnoull; Lord Lester of Herne Hill; Baroness Ludford; Baroness Neuberger; Lord Polak; Baroness Shackleton of Belgravia.

Evidence Session No. 3

Heard in Public

Questions 19 - 29

Witnesses

[I](#): Professor Catherine Barnard, Professor of European Law, Cambridge University; Mr Hugh Mercer QC, Essex Court Chambers, and Chair of the Bar Council Brexit Working Group, the Bar Council.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of Witnesses

Professor Catherine Barnard and Mr Hugh Mercer.

Q19 The Chairman: Welcome, and thank you for attending today. It is very good to see you. I remind you—I know you do not need much reminding—how these sessions work. This session is open to the public. A webcast of it will go out live and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of your evidence and put on to the parliamentary website. A few days after this evidence session, you will receive a copy of the transcript for you to check for accuracy. We would be grateful if you advised us of any corrections as quickly as possible. If, after this session, you wish to clarify, amplify, add or subtract anything or make additional points, you are welcome to submit supplementary evidence to us. We invite you to do that, but with speed, please.

Please introduce yourselves for the record, and then I will invite you to make a brief opening statement.

Mr Hugh Mercer: I am chair of the Bar Council's Brexit working group, which tries to co-ordinate the Brexit efforts of the Bar Council.

The Chairman: Thank you. We received interesting papers from the Bar Council and from the Law Society of Scotland, both of which have been helpful.

Professor Catherine Barnard: I am professor of EU law at the University of Cambridge.

The Chairman: Thank you. You might want to start by making a brief statement. You know what the remit of this set of evidence sessions relates to.

Mr Hugh Mercer: Obviously, unless you are North Korea, which does not want links with other countries, if you do want links with other countries, as we do, you have to have some system for resolving disputes. That is a total platitude, but—

The Chairman: I have made that point repeatedly in the House, but it somehow escapes certain people that if you have cross-border trading or other relationships, you inevitably have to have law to deal with any potential dispute.

Mr Hugh Mercer: Even North Korea apparently has migrant agreements with China and Russia. We cannot get away from it: if you are going to have links, you need some system that resolves disputes—in particular, one that gives an interpretation of the relevant agreement that will be accepted by everyone. So the idea that that is all one side or the other is difficult.

There is another aspect that I would stress from the beginning. At the moment within the EU, if I, as a British individual, set up a business or a home in France and the local commune whacks a tax on me that seems contrary to my rights, I can go to the French courts, get my French lawyer—sometimes with an English lawyer alongside them, who has the right to go there and do that—and the case may well reference the Court of Justice of the EU. Dispute resolution oils the wheels of

commerce and citizens establishing in other countries. It is that direct right that is of great importance and which one risks losing.

There is the alternative scenario of the Brit who goes to France, sets up and some tax is whacked on him. Some people are talking about a system whereby, in principle, there are no direct rights in that situation. You have to go back to the UK and say, "Right. Will you take action against France, because they are infringing my rights?" There is the political mechanism of trying to persuade a contracting state to an agreement to take action against a co-contracting party. That is cumbersome. It is often used in public international law agreements, but it is a severely retrograde step. The Bar Council tries to represent the rule of law, and in rule of law terms that is a major step backwards. That is the point I would stress at the outset.

Professor Catherine Barnard: Unsurprisingly, I agree with what has just been said. You might say that it is a cabal of lawyers trying to promote the interests of lawyers in advocating a court. However, I think it fair to say that the EU has perhaps the most sophisticated mechanism in the world for enforcing international agreements, specifically EU law. As we have already heard, an individual, whether it is an English man or a woman living in France, but also a local gin producer who is trying to break into the French market, can challenge any restrictions in the French court.

However, there is also an important complementary mechanism: they can complain to the Commission that the French are causing trouble. The Commission can bring enforcement proceedings under Article 258, and if France loses and still does not rectify the situation, the Court of Justice, ultimately, has the power to fine France. So there is a dual-pronged approach. What is so empowering about the EU approach is that I am not reliant on my Government or the Commission bringing proceedings; ultimately, I can take matters into my own hands in the most legal way possible and go to the local court.

Looking forward—this, I think, is the essence of your question—we know that we are leaving the European Union and that mechanism, albeit that the documents accompanying the withdrawal Bill say clearly that individuals will not lose rights or remedies. The question then is what form those rights and remedies might take going forward. There are three areas we need to look at: what are the rights and remedies under the withdrawal agreement; what are the rights and remedies under transition—that is the easiest, at the moment, as far as we can tell, because it is broadly the status quo; and what are the rights and remedies under any future trading relationship?

There is a sub-question to that: if we focus primarily on the withdrawal agreement and the future deal, we will need rules for managing the deal and the issues that come up, probably some sort of joint committee. There will also need to be rules about upholding and enforcing that deal, which may be judicial or arbitral. Also, there need to be rules on what happens if a finding is made against the UK or the EU and neither side complies. What are the sanctions?

A fourth, related, question that is sometimes wrapped up in the earlier questions is about interpretation. Who has the jurisdiction to give an authoritative interpretation of the withdrawal agreement and the final deal? Will that be the joint management committee or some other separate body? So, actually, it is a multidimensional question and it is not easy.

Q20 The Chairman: Thank you. As always, you have both presented the real gravamen of the issues.

I have a question before I ask Lord Lester to ask his. The UK Government have identified the continued jurisdiction of the Court of Justice of the European Union as a red-line issue. What will be the most workable alternatives to the European Court of Justice after we leave the EU?

Mr Hugh Mercer: This overlaps quite a lot with later questions about the EFTA Court; there is a specific question addressing that. That is obviously one possibility. There is a severe risk here that we reinvent the wheel, because we have courts set up at great expense—the CJEU on the one hand and the EFTA Court on the other—and that operate in a similar way. There are specific differences, which we will come to later, but if you set up something separate, one wonders what the marginal benefit would be of some new system where there are existing registry court buildings and some judges in post. Obviously, if we joined up to the EFTA Court, additional judges would come from the UK. My own instinct is that the EFTA Court is quite a good solution, but I am jumping ahead.

The Chairman: I do not know whether you know, but we had the former president of the EFTA Court in front of us very recently. He had been its president for 12 years until his recent retirement, and before that he had sat on the court for a significant number of years as one of its members. He presented the range of difficulties and so on to us, and while that laid out the possibilities of an alternative, it also laid out the weaknesses in it in that we have always been able to contribute considerably ourselves. I like to boast that Britain produces rather high-quality lawyers, two of whom are in front of us, and that the development of law depends on that interaction and our place at the table. I want to press you on your views about just how workable the alternatives are if we do not have that role.

Professor Catherine Barnard: The risk in trying to set up some bespoke court, as opposed to using the off-the-peg model, is that there is a very good chance that there will be a challenge to any court set up before the Court of Justice, which as we know jealously guards its autonomy. We have seen a number of examples of that, including over the forebear of the EFTA Court—what was going to be the EEA court.

If you were designing an EEA court from scratch, you might have thought that what was originally proposed was rather sensible: a couple of judges from the ECJ and judges from the EEA states—Norway, Liechtenstein and Iceland. But the Court of Justice said that, no, that was not acceptable, because the judges borrowed from the ECJ would be conflicted, as they would wear an EFTA Court hat but the EEA

agreement has somewhat different objectives from those of the EU. So the original plan, which looked sensible on the drawing board, was struck down.

We know from Opinion 2/13 that the Court of Justice was very concerned about the planned accession to the European Convention on Human Rights because of the implications that would have on the judicial mechanisms that are available under EU law. So any bespoke arrangement that is set up would risk being challenged, and there is a reasonable chance that it would be struck down. That is why the EFTA Court and docking is quite an attractive model, because at least the Court of Justice has given the green light to that.

The Chairman: Some people who are watching might not have been present at or listened to the previous sessions when we discussed docking. Would you like to explain what docking means?

Professor Catherine Barnard: Essentially, it is borrowing or being given access to the EFTA Court even if we are not members of the European Economic Area.

The Chairman: It means that we can tie up our legal boat at the EFTA Court.

Professor Catherine Barnard: Yes. We borrow the institutions; we borrow the EFTA Court and the somewhat unfortunately named EFTA Surveillance Authority. In previous evidence, Baroness Ludford helpfully pointed out that “surveillance” means something slightly different in the English and French languages. Docking is borrowing.

The Chairman: And surveillance is overseeing. The Institute for Government has argued against giving in to current EU demands to give the European Court of Justice the final say over the withdrawal agreement, arguing that it would not be neutral in disputes between the UK and the EU. What is your view on that argument?

Mr Hugh Mercer: Lack of neutrality is not a charge that you could make against the Court of Justice of the EU. It operates chambers of judges, and many cases that come from the UK do not involve a UK judge on the relevant chamber. The notion that there is some lack of neutrality on the part of the judges once they arrive in Luxembourg is simply not my experience in 25 years of doing cases before the Court of Justice. That is my view on neutrality.

On the rights of EU citizens, a Frenchman coming to London 20 years ago might come on the basis that, “If anything goes wrong, I can go to the courts, and ultimately the CJEU will decide what my rights are”. That is one basis for coming to a country. You might go to the States, for example, on a different basis. There, although the Supreme Court works very well, the lower courts perhaps do not work quite as well. So the idea that you could assert your rights as a French citizen in the same way in the UK or the US is chalk and cheese from a lawyer’s perspective. The final say of the CJEU over citizens’ rights and the eight years in the December

agreement is, to a lawyer's way of thinking, a logical way to protect the acquired right, as one calls it—the legitimate expectation of EU citizens.

The problem with the balance of the agreements is one that Catherine has already mentioned: if you are dealing with EU law, the CJEU jealously guards its right to interpret EU law and does not let other bodies do it. There is consistent case law on that going back 25 or 30 years. That is a negotiating red line for them: if you are dealing with EU law, the CJEU will be the final arbiter of it. The only way to get away from that is to form a separate agreement or treaty of some sort. Once you have a separate treaty, you can then put in differing rights and obligations, and so long as it is not pure EU law you could have a different dispute resolution system. We will come on to that.

The Chairman: For members of the public, it is often quite difficult to understand the notion of judicial neutrality. We saw that in the Gina Miller challenge, when suddenly there were all sorts of attacks on judges—even on our Supreme Court judges and the Chief Justice, and so forth—about bias. The idea that a judge can park their personal views on things and deal with something as an intellectual exercise of law is often problematic for a member of the public to understand or engage with.

Mr Hugh Mercer: As a practising lawyer, that is something that you do from the very beginning. For example, a barrister has an obligation under the cab rank principle to accept any case brought to him by a member of the public if it is within his subject area and he has the time to deal with it.

The Chairman: Or she.

Mr Hugh Mercer: He or she, absolutely. I am of course teaching the learned Chairman to suck eggs—

The Chairman: I have represented all manner of very unpopular people before the courts. You do it because you are a professional.

Mr Hugh Mercer: Absolutely. When Milosevic was brought before the tribunal for the former Yugoslavia, he was prosecuted by an English barrister and defended by an English barrister. Why? Because they are the top advocates, but also because neither of them could have been criticised for taking the brief.

The idea of neutrality is in our bones. I have a very contentious case at the moment. Somebody said, "How can you represent them?" Well, because they asked me to and the other side did not ask me first.

The Chairman: Yes, that is what we do. Professor Barnard, do you want to add anything on the concern expressed about the European Court of Justice having the final say on the withdrawal Bill?

Professor Catherine Barnard: I have no doubt that it would not be neutral—that is a lot of negatives. It would do the best it could, but the reality of course is that if it

sees this as EU law, which it would be because it is under Article 50, it will borrow doctrines of EU law and use EU tools of interpretation.

The Chairman: And principles.

Professor Catherine Barnard: Of course, for lawyers, that is what we would expect. Non-lawyers might say that it is putting a European spin on a withdrawal agreement. Neutrality might not be quite the right word. I suspect that the Institute for Government was driving more at the fact that it might steer it towards an EU understanding. Of course, the EU understanding is the integrity of the internal market and all the other pillars of EU law protection, and it will of course interpret it against that background.

Q21 **Lord Lester of Herne Hill:** The two European courts, in Strasbourg and Luxembourg, go to great effort to keep in the same sphere and to respect each other. The French examples that you mentioned at the beginning could all be dealt with under French administrative and constitutional law and the European Convention on Human Rights. So when we try to get an accurate picture, although I do not disagree with anything you have said, I suggest that it needs to be supplemented in such a way. Do you agree?

Mr Hugh Mercer: I certainly agree that you would have access to the French courts, and the French administrative courts would be totally adequate for dealing with that. The question is whether you have the same rights and whether the rights under any agreement have a direct effect before those courts. I cannot remember whether the French have a monist or dualist approach—whether you can invoke international principles before the courts.

Lord Lester of Herne Hill: It is monist.

Mr Hugh Mercer: Perhaps France is a bad example, then. In a dualist country such as ours, where treaties need to be implemented in national law, it would depend on the implementation as to whether you got the same right.

Lord Lester of Herne Hill: Is the exit Minister right in suggesting that a one-solution-fits-all answer to this might be needed, or does one need different approaches for trade, for citizens' rights and so on?

Mr Hugh Mercer: There are indications that the European Commission is starting to take such an approach. It has had quite a lot of pushback. It has had pushback on Singapore and in respect of the Belgian Government reference, as well as an individual reference from a court in relation to CETA, the Canadian agreement.

One concern is about dispute resolution. Some think that trade should be under investor-state arbitration, whereas matters closer to the public interest, such as what I call the rule-of-law issues—enforcement of judgments, data protection and the European arrest warrant and so on—would come under a different dispute resolution mechanism.

The Chairman: Which would be much more transparent. Transparency is the concern, is it not? Arbitral systems tend to be much more cloaked in privacy for all kinds of commercial reasons. We want public interest justice to be conducted in public.

Mr Hugh Mercer: Indeed. That is how the Commission came around in the negotiations on the US agreement, which is now defunct. It was the debates and disputes over that which led to the Commission adopting the new idea of an investor-state court with permanent members—I forget the precise term—rather than investor-state arbitration.

Whether it is desirable to have separate bodies for different aspects is another question. As lawyers, we all think of the jurisdictional and demarcation disputes that can arise. My instinctive reaction is that perfection is the enemy of the good. The last thing you want when you have some complex dispute in a cross-border context is the additional question of whether the dispute is within the investor-state arbitration scheme or in the courts-based system. I would be slightly reticent about it, because I know that lawyers take the points that are available to take. Multiplying the number of bodies multiplies the risk of people taking points.

Professor Catherine Barnard: When we think of trade, we often think of big corporations, but one of the successes of European Union law has been to open up the market to small businesses. To go back to my little gin producer that is a small start-up operation, if I am faced with a phalanx of regulatory barriers from France, which is my obvious next target market, do I have to work out whether this counts as trade and therefore I should go down the arbitration route, about which I know nothing, or do I say, “Actually, it is a small business. I am much closer to the citizens’ rights end of the spectrum and I would really like just to be able to go the French court and complain”?

The Chairman: I use a similar example, which is a small Scottish cashmere business. We know that big corporations can lawyer themselves up to the teeth in whichever jurisdiction they operate. It is about somebody who has taken their business somewhere else but who does not have that kind of resource and the rather sophisticated mechanisms available at the moment. The question is whether they can be replicated easily or readily if we pull out.

Mr Hugh Mercer: I am representing a small French producer of cooking wine. It is an excise duty case. We won in the first instance but lost in the Court of Appeal. We are now trying to get to the Supreme Court. That is a tried and tested route through. The Supreme Court might refer to Luxembourg the issue of interpretation of the excise duty rules. This company is set up in business in Hoxton and is providing 20 jobs.

The Chairman: To British people?

Mr Hugh Mercer: Yes. The managing director is French, but he is not based in the UK. In fact, the executive decisions are all taken by British people in London. That is real. The idea of investor-state arbitration for such a company seems a bit unreal.

The Chairman: Too grand.

Mr Hugh Mercer: In practice, when one sees the sort of companies that take advantage of investor-state arbitration—I am doing a case at the moment involving a bank closed down by Cyprus—you are talking billions. In access-to-justice terms, it would be preferable to avoid that.

Q22 The Earl of Kinnoull: Could we come back to the EFTA Court in greater detail? Perhaps you could give us your views on the practicalities of docking with that court in an attempt to get an efficient dispute resolution mechanism. In particular, what limitations might you see in the EFTA solution, if it is a solution?

Professor Catherine Barnard: Let us keep it simple and say that “docking” means that we borrow the jurisdiction and that it is expressly provided for in the withdrawal agreement. There are commonalities with the Court of Justice, not least because when it exercises its jurisdiction under the European Economic Area agreement, there is an obligation to apply the common terms of EU law and EEA law in a homogenous way.

That said, the EFTA Court probably takes a slightly less consumer and worker-sympathetic line than the Court of Justice, so there are nuances, but I accept that, broadly because of the duty of homogenous interpretation, the EFTA Court follows the case law of the Court of Justice. However, if the case has already been decided by the Court of Justice, the EFTA Court is unlikely to be at exactly the same point, because why litigate? So the EFTA Court will often decide new points that have not been heard by the Court of Justice.

There are subtleties in the system as is. Of course, it does not necessarily mean that a case would be carried across. Under EU law, you start a case in the national court. All national courts can refer a case to the Court of Justice; the court of last instance must refer. Under EEA law, there is no obligation to refer questions, and there is no obligation for the national court to comply with the ruling, although that is slightly disingenuous because the EFTA Surveillance Authority may come knocking at the door if the national court blatantly flouts a ruling of the EFTA Court.

The Earl of Kinnoull: Has that ever happened?

Professor Catherine Barnard: Yes. There is a case at the moment, actually, about posted workers. I do not know whether that term is familiar to you; it is where workers are sent temporarily—in this case, to Norway—to do a job and then come back. One of the vexed questions is the extent to which they are bound by, for example, Latvian terms and conditions of employment and by Norwegian terms and conditions, which are inevitably much higher.

In a case called STX, the EFTA Court ruled one way on a particular technical point. When the case went back to the Norwegian Supreme Court, it said “We’re not having any of that. We are not going to follow it up”. The EFTA Surveillance Authority is now following it up. But because the mechanism for the EFTA Surveillance Authority is slightly different from the mechanism under Article 258—the enforcement proceedings brought by the European Commission—there is much more dialogue between the EFTA Surveillance Authority and the member states. With the Article 258 enforcement proceedings which the Commission can bring against a defaulting member state, there is some dialogue but not quite the same coming and going to try to find a compromise solution.

The Chairman: Enforcement may come up as we proceed.

Baroness Ludford: I have a quick supplementary question. I wonder how much toleration the EU has for the EEA system. The original conception was that its members were en route to the EU, but this has now gone on for several decades. If the UK were to join a similar system without the clear enforcement mechanisms but with the dialogue, would it be tolerable? It is tolerable for Norway, Iceland and Lichtenstein, but is tolerable for a country the size of the UK not to have clear and direct enforcement mechanisms?

Professor Catherine Barnard: Of course, the EU would take a firm line and say no. However, we also have to recognise, first, that the UK is leaving the EU and it is far better to have the UK tethered to some sort of mechanism that works in most cases, most of the time. I would say in defence of most UK employers and most British courts that they absolutely try to comply with the law.

Sometimes, as in the STX case that I just referred to, there is a point of deep principle, which why the Norwegian court did what it did and disagreed with the EFTA Court. Sometimes that happens. We already know that the German courts are wriggling under the cosh of EU law, and that this is not confined to Germany; it is in the Czech Republic, Poland and so forth. Going forward, the EU may have to recognise that there needs to be a bit more flexibility, because the straitjacket at the moment might be just too tight.

If we had a crystal ball and looked 20 or 30 years down the line, there may also be an argument that we will eventually see emerging an inner core of eurozone states and an outer-core series of states that have a much more complex relationship with the EU. If the EU shows some vision and imagination looking forward, a slightly looser mechanism might be an endpoint for some of the other states that have this difficult relationship with the EU.

The Chairman: While one might be attracted to that looser system—it sounds very appealing—would it, unlike EFTA, involve the kind of relationship that enables British lawyers to help with its development? That is what we are at risk of losing as we leave.

British lawyers have played a really important role in developing law. You would not

think that to read some of our newspapers, but we have actually been quite insistent on standards, particularly on consumer rights but on all manner of things. Can we imagine devising a looser system in which we can be an active participant in the progress of law?

Professor Catherine Barnard: I would like to think so. I very much agree with your observations; I think the UK punches significantly above its weight in the use of access to the court. Without wishing to flatter Lord Lester, he really showed the way in those early cases on sex equality when he tested the boundaries of what can be done under Article 267 references and the scope of what is now Article 157 on equal pay.

Because we had very good and very powerful advocates, the best ones went to the court and we really shape the law, and because our advocates are used to thinking on their feet and being challenged by judges, their input at the hearing stage is really quite significant.

The Chairman: It has very much become an issue of the day. I once did a case before the ECJ on transgender rights and employment—the first such case in an international court. It had never been dealt with in an international court before, but back in 1996 it started the process of creating change.

Professor Catherine Barnard: It is what I hear most commonly when I go abroad. I was in Ireland just a couple of weeks ago and Irish lawyers were saying that this will be the biggest loss to the evolution of the jurisprudence of the European Court of Justice: that it will not have the benefit of UK lawyers.

The Chairman: Lord Kinnoull, another British lawyer.

The Earl of Kinnoull: This is all very interesting. I heard that very thing last week in Dublin, oddly, from relevant people.

I want to bring in Mr Mercer, but we have not heard anything yet about limitations. I particularly want to bring out the limitations on subject matter and the capacity of the current court, which after all looks after 5 million people, while we would be joining it as a 65 million-person jurisdiction.

Mr Hugh Mercer: I have not done cases before the EFTA Court, so I am less familiar with it than with the CJEU.

The first points I would draw out relate to its opinions. According to the treaty, it renders advisory opinions subject to conciliation, so the relationship is looser. There is a mutuality between the CJEU and the EFTA Court. The EFTA Court has taken the lead in some ways and departed from judgments of the CJEU in areas where there has been criticism of those judgments, and there have been one or two examples where the CJEU has come round.

Secondly, I would highlight that the style of reasoning is closer. When you read an EFTA Court judgment—I had to read the Holship judgment about registered

employment rights, collective bargaining, boycotts and strikes—its style of reasoning is closer to that of a UK court. It is pretty familiar; it is as if an English judge were writing it.

In terms of limitations, the court is smaller. As I understand it, it has some additional members. It has the permanent judges as well as two additional members per country, if I recall correctly, so it has some capacity. Obviously, to the extent that British lawyers have not been part of that, in the medium term there has to be a system in which British lawyers could participate fully.

One of the ironies today, as I have already said to this Committee, is that if you want EU law advice in Europe and it is not narrow competition law advice, you might go to Brussels for that. For anything else, you would be best placed in London. Indeed, when the European Commission needs advocates on cases, it tends to ring the main London chambers to find out whether they have anybody free to do those cases. I

In terms of the specific, technical limitations of the court, I see the advisory opinion aspect as a potential advantage, because it provides some sort of common ground.

If one looks at the prisoner voting rights decision of the European Court of Human Rights and the reaction of our Supreme Court, one can see that sort of active dialogue going on between the courts. This obviously demands that the CJEU tries to be less of a sort of Supreme Court, which I have never regarded it as. It is a collaborative effort, with all Supreme Courts—the EFTA Court, the CJEU and the ECHR—essentially being on the same level and having dialogue with each other.

The CJEU is ready to listen to the Supreme Courts. There has been some moderating in the last five to 10 years. There are issues on which there have been meetings between them; the UK Supreme Court or the German Supreme Court goes regularly to Luxembourg, or perhaps they come here. That is helping to promote judicial dialogue, in the same way that we see, for example, in other common-law systems. In the States, when the circuit courts of appeal differ, the Supreme Court does not necessarily take the case but says, “We’ll let the dialogue continue and see where it comes out. We may take the case in a few years”.

The Chairman: I have seen that happen.

Lord Anderson of Swansea: The same is true of the Strasbourg court.

Mr Hugh Mercer: Indeed.

The Chairman: I am anxious that those watching are clear that the European Court of Human Rights is a different court and is not involved with the European Union, because people often get confused and think that it was the European Court of Justice that decided on prisoners’ rights and deporting extremists and so forth. They are two separate courts: one involves being in the European Union and one does not. I want that to be clear in people’s minds, because they often confuse it. We are here dealing with the European Court of Justice.

There is one final matter that Lord Kinnoull wants to ask about before others come in.

The Earl of Kinnoull: The EFTA Court, of course, is where the four freedoms come into play. On docking—we have already teased out a few problems with it—would some sort of compromise by the UK be needed on the freedom of movement of people in order to join the EFTA system, or could the EFTA system take us with whatever we ended up with on the four freedoms?

Professor Catherine Barnard: If we were docking just to provide a mechanism to enforce the withdrawal agreement or the future trade agreement, it would enforce those documents rather than the European Economic Area agreement. As you rightly say, the EEA agreement has the four freedoms at its core, but it is much more focused on the free movement of workers than that of persons generally. The citizens' rights directive applies to EEA countries, but they do not have a notion of European citizenship. Nor do they have the notion of the charter of fundamental rights, which would coincide with the current Government's position as expressed in the withdrawal Bill.

If transition, or indeed any future trading relationship, has some element of the European arrest warrant or something about agriculture or fisheries—we do not know what will go into the future agreement—the jurisdiction of the EFTA court would have to be expanded to cover those areas. The ECJ might not countenance anyone other than the ECJ having the final say on something as contentious and as core as the European arrest warrant.

Baroness Ludford: It seems to me that the more flexibility you have and the looser the system, the greater the challenge there is to mutual recognition. If there is dialogue while you smooth out the differences so that eventually you achieve in one way or another the uniformity that allows mutual recognition, mutual recognition is not undermined—I understand that—but I worry about this idea of a diversity of conclusions. It is a great management challenge to know where you end up in terms of mutual recognition if there is diversity on the substance of the legal interpretations.

Mr Hugh Mercer: If we are talking about mutual recognition in relation, for example, to a UK judgment in France—

Baroness Ludford: In JHA.

Mr Hugh Mercer: We have touched on the European arrest warrant. Measures such as the European arrest warrant, the Brussels regime, family law—albeit to a lesser extent—and insolvency law all started life as intergovernmental co-operation. They were taken from the 1968 convention, which was a treaty. The European arrest warrant was under the third pillar, which was intergovernmental co-operation; it was outside the realm of EC law. It was brought in essentially under Lisbon; it is all within the EU. Just because that is now all within the EU does not lose the roots of these provisions, which were intergovernmental co-operation.

It is true that it would be quite difficult to say, “Well, we’ll take on Brussels regulation as a non-member state”, but the Brussels regulation is in the Lugano convention. The provisions are almost identical. The Lugano convention is a bit behind. One has the Brussels regulation on civil jurisdiction judgments. One has the Lugano convention on civil jurisdiction judgments. They work in parallel. The Brussels regulation is an EU regulation. The Lugano convention is a treaty between the EEA members and the EU. That is a possible model for these justice issues, as we call them at the Bar: the reciprocal enforcement and the mutual recognition.

If one had an overall treaty that covered not only civil jurisdiction judgments but criminal co-operation and civil co-operation in relation to insolvency and family judgments, the dispute resolution and the interpretation of that treaty could be organised in a similar way to the Lugano convention, where the CJEU has due regard to the decisions of the Swiss Supreme Court and the Swiss Supreme Court has due regard to the decisions of the CJEU.

Organising the mutual recognition in a separate treaty, with provisions closely shadowing those of EU law, is a real possibility. It may be more debatable in relation to the European arrest warrant, because that was difficult to negotiate; it was negotiated only really because of the terrorist attacks.

The Chairman: We have really seen a burgeoning of cross-border crime because of guns being available from eastern Europe after the end of the Cold War and the route for drugs. I see this a criminal lawyer. The European arrest warrant has become very important. Trafficking of people has become a much greater issue nowadays. The warrant has been a very effective mechanism for all that. How you would resolve that is problematic. You may have an answer to it when we get further down our questions.

I am very anxious that two of our members have to leave before midday, so I want them to get in with their questions, but I would like you, Baroness Shackleton, to hold on to the idea that we have just been hearing about: of the possibility of creating a treaty that would deal with the Brussels regulations, which help with maintenance in family cases. I would like us to pick up on that, but I need to park it for a minute, because I know that two of our members are leaving and want to get their questions in. Let us turn first to Lord Gold.

Q23 Lord Gold: I am very interested in the cost implications of all this. We have looked at different alternatives that the UK might follow, including an EFTA Court. The court at the moment is quite small. It would need to be expanded. Are there any estimates of the cost of such possibilities?

Professor Catherine Barnard: I have done a bit of digging. I discovered that when the British Supreme Court was set up and the building refurbished it cost somewhere in the region of £56 million to £59 million in 2009. At that time, they estimated the operating costs of the new Supreme Court to be £14 million a year. The EFTA Court’s budget is €5 million a year, as compared to about €400 million for the Court of Justice.

Given that the figures for the Supreme Court are now nearly 10 years out of date, you can see the order of magnitude. It is worth bearing in mind that the EFTA Court is up and running. It is a tiny operation; it really is the little sister next to what are now the gargantuan buildings of the Court of Justice. It is a pretty lean operation, but it hears only about 17 cases a year, whereas the Supreme Court would do 50 or so and the Court of Justice significantly more. So there would clearly need to be an expansion. Carl Baudenbacher, the former president of the EFTA Court, has said that we should push for two judges on the EFTA Court. The Norwegians might have something to say about that, because of course—this goes back to your point, Baroness Ludford—we would become a very large cuckoo in this nest. So there may be some pushback from the existing members.

Lord Gold: Thank you. Of course, we have looked at the complexity of all these issues and at references to the European court. If the UK had different arrangements for different areas of law, there must be a risk of overlapping. Has there been any work on the possible costs of all this? We know that lawyers take great advantage of complexity. It seems to me that this is an area where lawyers will have a phenomenal opportunity.

Professor Catherine Barnard: As an academic lawyer, I am afraid I am not in that lucrative category, so I will perhaps—

Lord Gold: This is slightly past me as well, but there you are.

Mr Hugh Mercer: All I would say is that good lawyers try to cut through complexity. Obviously, you have to take the points—if you have points that will really help your clients, you take them—but a bad lawyer will lose his case if he takes a dozen points, because the judge does not see the wood for the trees.

On cost, when I chaired the liaison committee with the European Court of Justice for six years and it proposed some new judges for the General Court, the estimated cost was €1 million per judge, including his retinue of law clerks and secretariat; I am not quite sure what was included, but that was the rough estimate. According to the Council, it has come out slightly under that, perhaps closer to €750,000. There are costs, but compared with setting up a new court—buildings, a registry, the whole civil service—scaling up an existing operation seems more realistic.

The trouble with a new court is that reinventing the wheel is a real problem, and the taxpayer foots the bill. It is a political decision, but obviously that may not be reasonable. You have to look at the benefits from the new system.

Q24 Lord Cromwell: Good morning, and what a reminder this is of the privilege of having your talents to tap into on this very complicated area. I will resist the temptation to get myself into trouble on the issue of cost, given that today we are debating the future use of this building. I am very tempted to cross that red line, but I will not.

The EU withdrawal Bill, particularly Clause 6(1), says that “on or after Brexit day” the UK courts are not going to be bound by the CJEU or to be able to refer questions of law to it. That seems pretty clear, but unfortunately events have moved forward

since then and we are now discussing a transition and implementation period, the definitions of which vary. Does that clause need revising now to reflect that?

Perhaps I can ask all my questions in one burst. Another complication on the road is the deal that was seemingly reached in December on citizens' rights. Again, does the clause now need to be revised to incorporate what was done on that?

Professor Catherine Barnard: My understanding is that we have the withdrawal Bill, which I will call withdrawal Bill 1. There will be a second Bill, the withdrawal implementation Bill, which is referred to as withdrawal Bill 2, or the WIB, or the WAB. In chronological terms, you have the European Communities Act, which, to put it bluntly, turns on supremacy and the direct effect of EU law, plus access to the Court of Justice.

Withdrawal Bill 1 turns those things off. Withdrawal Bill 2, the WAB, will have to turn them back on for the period of transition. Presumably the transition parts of the WAB will be time limited, which means that the default position will be back with withdrawal Bill 1, except for citizens' rights, which will be incorporated in the WAB. Citizens' rights for the further eight years will then still benefit from direct effect and supremacy, and a form of references to the Court of Justice. So there will be a carve-out, it seems to me, from withdrawal Bill 1 in respect of citizens' rights and any other remedies that they come up with for the enforcement of the withdrawal agreement.

The Chairman: Could there be a carve-out for the European arrest warrant?

Professor Catherine Barnard: Possibly, and possibly for the European aviation area and the other areas that are dependent on the operation of the Court of Justice as a final arbiter.

Mr Hugh Mercer: You may have seen that the Bar Council and the Law Society have agreed on a proposed amendment to Clause 6. At the moment, the problem, as pointed out by Lord Neuberger, is the potential politicisation of the judges; you are "not bound", but may refer to them if appropriate to do so. Obviously, you, my Lords, are well placed to see the possible lack of appropriateness of that clause.

We suggested "may take into account, but is not bound by". When you are dealing with an instrument of an international agreement, and either the same international agreement or a parallel one has the same or very similar wording, the natural instinct of any lawyer or judge is obviously to look at the other treaty to see how similar it is and to look at decisions on it and the reasoning. If the reasoning assists him, the instinct is to use it, and if it does not, it is not to use it. It is not the same as there being an obligation to apply it. It is not even the same as "to take due account", because there is law on the addition of the word "due" to "account"—to take "due account of".

I gather that there may be some moves to strengthen the wording to make it clear that there needs to be a change from the existing position. To be honest, in so far as the wording "not to take account" tries to tie the judges up, it would be problematic

if in essence they are the same right. Obviously the context is different, and any judge will take account of the differing context. If, for example, retained EU law comes into English law and is then modified in some way to take account of some differences or policy preference, the judge will obviously have to take account of that. Judges do not slavishly follow what other judges say, as we see every day of the week when judges differ on very similar points.

With great respect, the Minister's instinct was right. It is expressed at the moment as "refer to the CJEU decisions if it is appropriate to do so". That instinct is that we need to leave some power to the judges to determine when it is necessary or not. We are quibbling only with the wording.

Lord Cromwell: In earlier sessions of this Committee, we met some initial resistance to the idea of "having regard to", which I think was the phrase we preferred at the time. That seems to have been eroded over time, so perhaps reality is catching up with dogma.

The Chairman: Over to you, Lord Judd.

Q25 Lord Judd: Chair, may I first declare an interest as a layman and a citizen? All this discussion about what arrangements might be made is very rational and reasonable. In the real world, unfortunately, this whole issue is being addressed in the context of emotion and prejudice. Legal minds will have to address themselves to the fact that politicians and political leaders will be looking for something that enables the British people to feel that things are accountable and under their control. I do not like that at all, but that is the reality, and we will need the best legal minds working on that, because the issues we are discussing, as you said at the beginning, are inescapable.

If the Government were to accede to the creation of some new international court structure, or to join a revised version of the EFTA Court, should UK citizens have direct rights of access to that court?

I have two subsidiary questions and to speed things up. I will ask them now and you can address them in your own time. If a direct right of access is granted, should citizens be obliged to exhaust domestic remedies? If not, should there be a reference procedure to the EFTA Court, as currently exists in the European court system?

Here, my feelings as a citizen and a layman become very relevant. If UK citizens were obliged to exhaust domestic remedies before seeking a ruling, would you have any concerns about access to justice, particularly given the appalling recent legal aid reforms?

Mr Hugh Mercer: First, as I think Lord Lester pointed out earlier, citizens already have access to courts. In the French example, you can go to the French courts, and there comes a stage when those courts may seek a ruling from the European Court of Justice. The present position, in my view as a lawyer, is that the CJEU is not a Supreme Court for Europe. You have direct access to national courts and national remedies. What the CJEU gives you, and what any substitute court should give you,

is the definitive meaning of provisions of a treaty. That is quite a stark difference from the ECHR, which is under a totally separate arrangement and, as the Chairman said, unlinked to the EU. That is a really important point.

I do not see the issue of replacing the CJEU as a matter of access to courts, because both before and after we will have access to our national courts, which have national judges who decide cases in accordance with the law. The assistance given by the CJEU is on the meaning of the law. What matters for access to justice, as I mentioned earlier, is the direct effect of rights under the agreements or treaties that are made. That is important.

I would make a distinction in relation to the intergovernmental rights. In a treaty between countries A and B, if B does not apply the rights effectively, country A has to complain to country B and it is sorted out at a state level. In the EU at the moment, and within EFTA, the idea is that citizens take over the responsibility and the cost of vindicating their own rights. The major disadvantage, it seems to me, of depriving citizens of the direct effect of rights they have now is that the state is then thought to take over those rights. State A then has to say, "Please take action against state B", given the complaints from its citizens. Then the Government have to have a whole new department to deal with sifting those complaints—"Do we or do we not take action?"—and they will bear the responsibility and the cost.

We already have direct access to remedies, and they are national remedies. Obviously, if you are in France, you go to the French courts. In England, you go to the English courts. The obligation to exhaust remedies before having some sort of reference procedure was the position under the 1968 Brussels convention. It worked tolerably well. The disadvantage in the UK is that the Supreme Court takes only issues of high principle—I am paraphrasing, but the rule is basically that. Yet you can get into the Supreme Courts of many countries almost as a matter of course. The Italian Supreme Court, for example, has tens of thousands of cases waiting to be decided, whereas the UK Supreme Court is very selective in the cases that it accepts in order to provide guidance to the law. If you have to exhaust remedies and, I suppose, go as far as the Supreme Court or the Court of Appeal, that has the disadvantage of reducing access to justice because the local county court cannot, if necessary, make the reference directly to a reference court such as the CJEU or some new CJEU-like body still to be formed. Please do come back on this.

Lord Judd's point about legal aid is well made. Nowadays, it is causing particular problems in relation to public law cases, meritorious cases of which used to get legal aid. Then there is family law. As Baroness Shackleton said, legal aid there has been cut back tremendously. We used to lead the world in our legal aid system when I started out in practice. I still do legal aid cases when they arise, but it has become extremely difficult to get them. The idea about private funding or conditional fees may apply in big commercial cases, yes, but they are not for Joe Public with a problem where he is up against the state. I do a lot of public law, which is where legal aid is really needed. At the moment, it is not really getting

there, so the idea that you have to go right of the top of the system would be sad. It is possible, but I would really regret that if it were the case.

The Chairman: Is that an area where amendments to the withdrawal Bill could make any difference, or would it have involve treaty arrangements? Where would one seek to have impact in relation to that?

Mr Hugh Mercer: It is really under the treaties to be made with the EU because, as was lucidly explained by Catherine, withdrawal Bill 1 says simply, in essence, “Right, we are taking away the European Communities Act”. It will do some supplemental things, but it is intentionally fairly minimalist, to be followed up by later Bills.

Lord Lester of Herne Hill: I have been thinking about the loss when we leave the European Union. The loss, as far as I am concerned, will be the influence of the common law system that we developed—by we, I mean we British and the Irish—when the rest of Europe was fast asleep. We developed it in the field of women’s rights, because the Equal Opportunities Commission was willing to risk its £80,000 budget in taking cases to Luxembourg. I hope the Chairman will not mind me slightly disagreeing on this, but when it came to Strasbourg our problem was that Europe was hopeless about race. We had managed to develop strength in Luxembourg on gender, so what were we going to do?

I was able to take the Roma rights case in Strasbourg to unify the jurisprudence of Strasbourg and Luxembourg only because George Soros was willing to underwrite the legal costs if we lost, both in the House of Lords and in Strasbourg. A conditional fee agreement would not have done that, so it was vital that Soros did it. The result was much criticised by dissenting judges in Strasbourg, who said that it was an American way of conducting litigation.

My sense of loss is that, when we leave, all of what British advocates have been able to do in influencing the Luxembourg court, especially via the Strasbourg court, will disappear. I cannot see any present or future Government reversing the disgraceful abolition of legal aid in this country under LASPO, so I am afraid I ask: do you share my gloom?

Mr Hugh Mercer: On the loss of the common law system, again one of the ironies is that the Court of Justice is essentially a common-law reasoning court. The law evolves under the guidance of the court, which essentially adopts a sort of common-law method. This was under the guidance of British and Irish advocates in particular, although there have been some great Belgian, French and German advocates at the court, too.

One ray of hope is possibly that all of us who do this sort of work are busy trying to find a route into a Bar. It will be sad be for the young people coming through, because they are already being told that EU law is out, whereas the EU will of course be our biggest trading partner. There is strength in the EU Bar at the moment. In Ireland, Belgium, possibly Cyprus and other places around Europe, we may be able to gain practising certificates, sometimes under friendly conditions and sometimes under not-so-friendly conditions.

As for the present crop or generation, I have chambers in Brussels and I do cases for companies all around the EU and sometimes in national courts. I have a case at the moment in the Supreme Court of Cyprus, as I said, and I lost a case recently in the Supreme Court of Switzerland. We do these cases and, provided that we can get some reasonable assistance from government on professional services so that at least there is a framework for mutual recognition of qualifications, we will continue to do these cases.

As I say, the tragedy is for the young lawyers. I did my first degree at Cambridge and my second degree in Brussels, which has a very different teaching method. In the UK, you are taught to think and to understand; you are taught by problem solving. On the continent, some places are now adopting our methods of teaching. The university in Louvain-la-Neuve, where I do some work, is adopting parts of that method, so there are more seminars and challenging discussions in which you are taught to think. Elsewhere, there is a lot of rote learning, particularly in relation to the law. Until just over a century ago, certainly not more than 150 years ago, law was not taught in law faculties in England. You learned law on the job as a pupil, eating your dinners and watching the greats like Lord Lester plead their cases in court or following courses in the evening.

The Chairman: Lord Polak, would you deal with paragraph (c) of the question that you were going to ask, as I think that we have covered some of the ground already?

Q26 Lord Polak: If I may, I will go back to the question of the EFTA Court. Mr Mercer, I was struck by what you said about looking for a practical solution. I am not a lawyer, but it seems to me that where there is a will there is a way. Might some sort of super-EFTA with British involvement—we have been talking about getting involved at an early stage to create something—go a long way towards dealing with much of the problem that we have been talking about?

Mr Hugh Mercer: As I said, I am unfortunately not an expert on the EFTA Court. What I can say is that I learn pragmatism from my clients. They ask me not for the complexities of the case but for the way through. It seems to me that the EFTA Court is a solution, particularly because, as the Chairman said, it is already accepted, whereas nothing else is.

The problem in the other agreements made by the EU is that, although they involve bright guys beaver away making a beautiful, sparkling, spanking-new dispute resolution system and giving it checks and balances, a member state will then refer it to the Court of Justice. Because the jurisdiction of the Court of Justice is very broad, any member state or EU institution can refer any public international agreement to it. The court may then have an off day and say, in the session on the ECHR, for example, “I don’t agree with that”, which is then the view that it takes. It has its case law and, although sometimes it changes it, that takes a bit of persuading.

On this issue, it will be difficult to persuade. The risk if we do not adopt something like the EFTA Court solution is that you get to the end, you have all your

agreements, you are trying to implement them, and then suddenly the Court of Justice says, “Hang on, no”.

The Chairman: “This is not fulfilling what we think is right”.

Mr Hugh Mercer: Exactly. It is back to the drawing board. That is the risk.

The Chairman: You are talking about all the money and the effort involved in what you describe as reinventing the wheel when you could adapt the wheel.

Lord Polak: The wheel is there, so we just adapt it and build on it. The principles are all there.

The other issue goes back to the EU withdrawal Bill. Are there any other provisions in that Bill that either of you believe will cause legal uncertainty? This could go on for another hour. Is the status of retained EU law sufficiently clear? You have one sentence.

The Chairman: It is your starter for 10.

Professor Catherine Barnard: I can do it in a minute. I think there are three serious areas of concern. The first is the non-carrying over of the charter, which I think will generate a lot of problems. The withdrawal Bill says that the general principles that are expressed in the charter will be carried over. The charter is at least reasonably transparent on what the rights are, but the general principles are not clear. I imagine that every lawyer in this room would come up with a slightly different list of what constitutes a general principle.

Secondly, Schedule 1 says that those general principles do not have direct effect and cannot be enforced. That is problematic, because the charter rights can be enforced in certain circumstances. Furthermore, you can get remedies for the breach of a charter right. If you cannot enforce the general principles, by definition you cannot get a remedy.

My third concern is that Schedule 1 also says that there will be no Francovich damages. I should explain to those for whom that terminology is not familiar that Francovich damages were first developed by the Court of Justice to say that if the state is in breach of EU laws—specifically, in the context of Francovich, by not implementing a directive—and I as an individual have suffered loss, I can sue the state for damages. Those are called Francovich damages.

My technical point is that the case law on that has evolved dramatically from Francovich. In fact, Francovich is largely redundant in the jurisprudence, because it was a stepping-stone case. What is not clear is the technical point: if the Bill rules out Francovich damages, does that mean Francovich in very narrow circumstances or does it mean that all the subsequent case law is ruled out?

My point of substance is that the UK Government say clearly in their documentation accompanying the withdrawal Bill that there will be no loss of rights and remedies

for businesses and for citizens, but, for the three reasons that I have given, there are losses of rights for businesses and citizens.

Lord Polak: Have you told them?

Professor Catherine Barnard: Yes, but I am not sure that they are listening to academics at the moment.

Mr Hugh Mercer: I just want briefly to underline one of Catherine's points, with which I agree. After we leave, if a Minister takes a decision on an EU regulation that is part of retained EU law and a Minister in France takes a decision on the same basis on the same day, the general principles in EU law may be used in France in order to attack that decision, whereas in the UK, under Schedule 1, the general principles of EU law will not be available to attack the Minister's decision on that regulation, yet it is the same legislation that the two Ministers are applying. That is a clear downgrading of rights. It seems to be trying to isolate the Government from judicial review and reduce access to justice at the cost of individuals and businesses.

Lord Polak: British citizens would be worse off than French ones.

Mr Hugh Mercer: Yes. British citizens would be worse off than French ones.

The Chairman: Perhaps you could write that in a letter to Lord Brown, who will stand up and make the opposite suggestion: that the charter of rights is of no substance at all and that this is all the European Convention on Human Rights. I think my friend Lord Lester might take the same view.

Lord Lester of Herne Hill: My puzzle is simply this. When we negotiated the charter, the British made it clear that it would not be enforced as a domestic instrument—that is what they tried to do. It is obviously relevant in protecting against abuses of power by EU institutions, but my difficulty—it must be my fault—is that I cannot see why, when we leave and are no longer subject to EU institutions, the charter will matter.

The Chairman: Mr Mercer, I really would like to hear your answer to that.

Mr Hugh Mercer: First, I was not talking directly about the charter but about the general principles of EU law, such as non-discrimination and legitimate expectation. Legal certainty is a definite part of English law as is legitimate expectation, up to a point. There are ways in which the general principles of law are more far-reaching than existing English law—for example, proportionality can go further in some circumstances. The Supreme Court has given some clarification on that recently.

In so far as there is a difference between EU law and English law in the scope of their general principles, in my example of the English and French Ministers taking the same decision on the same day, and according to the same legislation, after exit there will be a reduction in rights for the English party.

Specifically on the charter, almost all of its provisions that are legally enforceable—not all of them are, as we know from the Explanations, as they are called—find their parallel in the European Convention on Human Rights or in case law on that convention. But there are some ways in which they go further. There is, for example, Article 47, in relation to the Article 6 right of access to courts—Lord Lester, you have the advantage over me on this. Article 6 is not applicable in the same way in relation to public law matters. There is a distinction between resolving civil disputes between individuals on the one hand and cases against the state on the other, whereas Article 47 of the charter also applies to cases against the state.

The Chairman: Thank you very much. I am going to move us on to Lord Cashman, although we have sort of engaged with his issue already.

Q27 **Lord Cashman:** My questions were on the European Charter of Fundamental Rights and whether the European Union (Withdrawal) Bill will impact on fundamental rights. I believe you have covered that in addressing the acceptance of the EU concepts of discrimination, such as the economic unit worker, because they will be within retained EU law post exit.

The Chairman: Mr Mercer has been very helpful, but I would like to press Professor Barnard on how do you answer that question. The rights regarding anti-discrimination matters and so forth are replicated in English law, while anything not there is covered by the European Convention on Human Rights, which could itself be at risk sometime in the future. I think it has been parked for the time being, but there are sections of government that have their sights on that as well.

Let us just deal with the charter of rights. What do you feel about this business of saying, “We’ve got it all and if we’re not part of the European Union, we don’t need it”?

Professor Catherine Barnard: Lord Lester is of course absolutely right. The primary addressees of the charter are the EU institutions, but the charter goes on to say that it also applies to member states when implementing EU law. So it already largely constrains the actions of member states when they act within the field of EU law. There is of course a technical argument that we will no longer be acting within that field, but we have introduced this concept of retained EU law, which of course is EU law to all intents and purposes, albeit domesticated.

The Benkharbouche case and the Supreme Court’s recent decision on the rules on working time, for example, were interpreted alongside the rules of the charter, and the remedial structure is different. If the finding had been one of a breach of the European Convention on Human Rights through the vehicle of the Human Rights Act, there would be a declaration of incompatibility, whereas in the Benkharbouche case it said that there was a breach of the charter and that they should get damages as a result. That is the first point.

Secondly, a number of EU directives that are already implemented into UK law will become part of the corpus of retained EU law and make reference to the charter.

Presumably, there would then need to be some clause that says, “For ‘charter’, read ‘general principles’”, if we have referred to the charter in our own implementing legislation. The powers of correcting will presumably be used to remove that. But that already creates a question that was raised earlier: will there be legal issues? The answer will be yes.

Thirdly, in respect of equality matters, Article 14 of the European convention is not a free-standing right but Article 21 of the charter is free-standing and probably directly effective. We have authority on that through the AMS decision. If it is a free-standing right and can be used to challenge member states when acting in the field of EU law—I of course accept the caveat that we are leaving, so there is uncertainty over that concept—then Article 21 of the convention can be used in a way that Article 14 cannot.

The Chairman: That is very interesting. Thank you very much.

Baroness Ludford: I may be a little lost. Are we doing Question 8?

The Chairman: I was about to ask you wanted to ask anything about the charter.

Baroness Ludford: When it comes up, I want to ask about the Irish case.

The Chairman: It is just that as often happens, we have segued into other matters, so I have excised it from our journey, but perhaps you could deal with Question 8.

Q28 Baroness Ludford: Can you envisage any circumstances in which we could continue to make use of a mechanism such as the European arrest warrant while refusing to recognise the jurisdiction of the CJEU and, I might add, not entrenching the charter? A case in the Supreme Court of Ireland last week referred an EAW from the UK to Luxembourg on the grounds that the person concerned would be in custody beyond the set date of Brexit and would not enjoy the protection of the charter.

How are we going to find a way through all this while co-operating on justice and home affairs, specifically in the criminal field of the European arrest warrant? I am sure you know that the UK Government, in implementing the European investigation order, have substituted “European Convention on Human Rights” for “charter”. I have taken that up and had an answer from the Policing Minister that does not convince me. They are already ignoring that bit of an EU directive.

Mr Hugh Mercer: That is why the Bar wrote some time before Christmas to the then Lord Chancellor and to Mr Barnier in Brussels, proposing that these justice issues should not be traded in the final agreement against whether France, for example, is going to enforce our judgments. We should not be thinking about whether we are going to pay a 40% or 50% tariff to import beef from France, or whether they will pay the same. You just cannot have that, so the Bar wrote to them both and proposed a separate track for justice and rule of law issues.

What people call populism in Europe—Alternative für Deutschland, Podemos and the vote in the UK—is said to be due in part to people feeling alienated and distant. The system is not really dealing with their concerns, but the whole idea of these

justice and rule of law issues is to help people when their spouse takes the children some other country and they need to get the children back, or where they sue—

The Chairman: Or address the issue of maintenance for children.

Mr Hugh Mercer: Or maintenance. When criminals from the UK hid out on the Costa del Sol—the Costa del Crime—that seemed ludicrous to all concerned. After the bus bombing in London in 2005, the terrorist skipped to Italy and was brought back under an arrest warrant. So there is really strong interest on both sides, and we are all convinced about having a treaty to deal with these judicial co-operation matters.

As I said earlier, the Lugano convention is a small example for a big raft of measures, but it shows what is possible. It is a precedent in that the CJEU does not give definitive judgments on the Lugano convention, which other countries have to accept. If Switzerland wants to intervene in a case where the Lugano convention is before the CJEU, it is permitted to do so, and it is the same with Norway. That is part of the deal. There is that mutuality between the courts' systems.

The Chairman: The withdrawal Bill does not provide us with what the other side contributes. That reciprocity is fundamental. I should tell the witnesses, who may have seen it, that we asked the ex-president of the EFTA Court that question when he gave evidence to us. His court does not deal with the euro warrant but with trade, so I asked him his view on how new arrangements might deal with the euro warrant. He could see no way out of having the European Court of Justice there.

Mr Hugh Mercer: But, again, the provisions of the Lugano convention are almost the same as the Brussels regulation, albeit it is slightly behind in that it has not quite been updated to the latest version. In a sense, it is a fig leaf, because you have the Brussels regulation and the Lugano convention with almost identical terms. Norwegian and Swiss courts interpret that quite happily and render judgments which the CJEU then takes into account. The CJEU does the same thing with the Brussels regulation, and the Swiss and Norwegian courts take account of the decisions of the CJEU. To go back to Lord Polak's point, it is possible if the will is there.

The Chairman: In listening to you, it seems to me that, yes, we can devise other mechanisms, but the public were told, "We should not have all these foreign courts", and they said, "That's right, we shouldn't. We should be dealing with it ourselves. We've got great British courts, great British judges. We should do it ourselves". They were misled about why we need courts. It is because we are a world that is much more interconnected. If we go to the World Trade Organization, we will be involved in international legal arrangements there, too, and super-tribunals. It was never made clear to people that we need those things. Yes, we might find fig leaves to pretend that we are doing without that "awful court", but actually it is a fig leaf. Is that not what you are saying?

Mr Hugh Mercer: Indeed. If we invent our own court and put that into the agreement with the EU to provide sufficient reassurance to the EU, we are essentially reinventing the CJEU.

The Chairman: We are just pretending. We are calling it something else.

Mr Hugh Mercer: Exactly. I may have missed it, but I have seen no evidence to support the red line that we will leave the jurisdiction of the EU. The people making a lot of the political statements misunderstood the nature of the EU; they misunderstood the fact that you start in the national court. The only time you start in the CJEU is when you are challenging a decision of an EU institution. That is then judicial review, in the same way as we have judicial review in the administrative court.

When some people said that the CJEU overturns the decisions of our Supreme Court, they were possibly referring to the European Court of Human Rights. As I said earlier, the CJEU may be *primus inter pares*, but there is a duty under Article 4(3) of the Treaty on European Union whereby member states and their institutions co-operate with the EU and its institutions. It is a reciprocal duty. I had a decision in the English court where the European Commission failed to co-operate with the English court. The judge gave a judgment whereby, if the Commission continued the line that it was taking, it would be in breach of its duty of loyal co-operation under Article 4(3). That is a duty which the European institutions sometimes forget, but it is there nevertheless.

On the Chairman's point, it was misleading to have this red line. I think it went in in a conference speech. Greater examination is needed not only of the costs but the benefits. Are we really going to invent something that will cost tens, if not hundreds, of millions to replace something about which we might ask, "Is it broke?"

The Chairman: Even more than that, I hear that we will go through the pretence that we have got rid of that terrible stuff, but in fact it will all function much the same but we will call it a new name and create a fig leaf. All will be as was, but at huge expense to the ordinary citizen of the United Kingdom.

Lord Cashman: The caveat is that it is not that "terrible stuff" is being reinvented but that it is being misrepresented. The CJEU does not override and overrule the Supreme Court, as Mr Mercer has clearly said. The Bar Council's paper to us is brilliant in that regard. The opening paragraph demolishes the lie of the direct jurisdiction of the Court of Justice of the European Union.

Lord Lester of Herne Hill: The same is true of Strasbourg.

The Chairman: I want Lord Polak to come in, because his voice is very important in this. He is saying, "Look, we are where we are. Agreement has been made by the public to leave. One of the things that they feel they want to leave is this European court". What do you have to say, hearing all this?

Lord Polak: Mr Mercer, you have said that you wrote to the Government. All I want

to know is whether you have had a reply.

Mr Hugh Mercer: We have not had a substantive reply from the Government. We have had a reply from Monsieur Barnier's Cabinet, which was a polite "No, thanks" to the separate track. But what else would they say at this time? DG Justice in Brussels is very keen on the continuance of these multilateral arrangements for judicial co-operation and co-operation in relation to criminal and civil matters. Instinctively, as lawyers, we look after the rule of law in the humble way we try to do. The idea that we are going to dismantle something that is the gold standard in the world, without any case being made against it, is something I feel very committed about.

Lord Polak: It would be useful for the Committee to see a copy of your letter. If you have not had a reply from the Government, it is something, almost as evidence for us, to follow up.

Mr Hugh Mercer: It was discussed. I gather that the new chairman of the Bar Council, Andrew Walker, had a meeting with the new Lord Chancellor. I spoke to Amelia Wright from the Ministry of Justice just after that. She indicated that it is pending.

Lord Polak: It would be useful for us to know.

Mr Hugh Mercer: Indeed. Perhaps the Bar needs to improve its transparency in publishing all these papers. It was in no way a private letter. It was intended as an open letter to advance the rule-of-law issues at stake in these negotiations.

The Chairman: I want to thank you both. Would any other member of the Committee like to raise anything?

Q29 Baroness Shackleton of Belgravia: I would like to thank you very much. What you have both told us is incredibly illuminating. One factor that has not come up is the judicial co-operation that exists today, which is literally picking up a telephone. You have an abducted child sitting in your court, you pick up the phone to Spain and speak to a reciprocal judge. How on earth, after we have effectively sacked them, will that be reinvented? That sorts out all sorts of difficulties and saves huge costs. In circumstances where legal aid is being removed, it cuts through a great deal of time and produces solutions, which is what courts are there for. Do you have any idea how we could try to get that back on track?

Mr Hugh Mercer: The obvious answer is that this has to continue. From a legal perspective—I am not a politician—it has to continue. I spoke to a senior police officer recently who is involved in trying to stop the trafficking of guns. They got information on the dark web that there would be a shipment from the south of Germany to the UK and they contacted the German police through Europol. The desk officer put them in contact with the local police force, which tracked the shipment to the point of carriage. It was then observed when it arrived in the UK and tracked back to the people importing the guns. How can that be a bad thing?

The Chairman: It is happening with the trafficking of children and women, and all manner of things.

Baroness Shackleton of Belgravia: It is also the deterrent of knowing that the system works—of not doing the crime, the abduction, or not paying the maintenance. You know that you are going to be caught and put bang to rights pretty quickly. There are no statistics for how many people might have done something but did not do it because they knew they would get caught, but once a system is ambiguous and there is uncertainty there will be real problems.

Mr Hugh Mercer: Absolutely. Nowadays when I travel on the French motorways, I try to make sure that I restrict myself to 130 kilometres per hour. I am not sure that it has come in yet, but it is certainly going to.

The Chairman: This has been a very illuminating session. The quality of your work has been extraordinary. The papers that you have presented in advance were really helpful. I just want to thank you. We will be in touch. As I said earlier, if there is anything that you feel on reflection you would like to send through in the next day or two, please do. That would be very helpful. Thank you very much.