

Exiting the European Union Committee

Oral evidence: The Progress of the UK's Negotiations on EU Withdrawal, HC 372

Wednesday 2 May 2018

Ordered by the House of Commons to be published on 2 May 2018.

[Watch the meeting](#)

Members present: Hillary Benn (Chair); Mr Peter Bone; Stephen Crabb; Mr Jonathan Djanogly; Richard Graham; Peter Grant; Wera Hobhouse; Andrea Jenkyns; Stephen Kinnock; Craig Mackinlay; Pat McFadden; Jeremy Lefroy; Mr Jacob Rees-Mogg; Emma Reynolds; Stephen Timms; Mr John Whittingdale; Sammy Wilson.

Questions 1489 - 1561

Witnesses

I: Jill Barrett, Visiting Reader, Queen Mary University Law School; Sir Jonathan Faull, former Director General, European Commission; Agata Gostynska-Jakubowska, Senior Research Fellow, Centre for European Reform; Lord Lisvane, former Clerk of the House of Commons.

Examination of Witnesses

Witnesses: Jill Barrett, Sir Jonathan Faull, Agata Gostynska-Jakubowska and Lord Lisvane.

Q1489 **Chair:** Good morning. On behalf of the Committee, can I express a very, very warm welcome to our witnesses this morning: Lord Lisvane, former Clerk of the House of Commons; Jill Barrett from Queen Mary University Law School; Sir Jonathan Faull, former director-general in the European Commission; and Agata Gostynska-Jakubowska from the Centre for European Reform? You are all very welcome. We have a lot of ground, and I am sure it will be very interesting ground, to cover this morning, so succinct answers as we try to understand what the future holds would be much appreciated. Please do not feel under an obligation to all answer every question. Some will be directed to particular members of the panel, on which subject I am going to begin.



HOUSE OF COMMONS

I wanted to ask you this, Ms Barrett. The withdrawal agreement, as we understand it, is going to take the form of a treaty and then everyone talks about a political declaration. Is it your understanding that that will be an annexe to the treaty, and is it the case that it will not be a treaty itself, the political declaration? In that case, what force or meaning will it have?

Jill Barrett: The kind of document envisaged in Article 50 is a political document. It is a framework, which would not be a treaty. That is my understanding of the nature of the document that it will be: it will be a political declaration on the framework for future relations; it will not be a treaty on future relations. Whether it will be physically appended to the withdrawal agreement or whether it will be a separate document, I do not know. There is not currently any indication in the withdrawal agreement that there is a gap waiting for a declaration to be inserted into it. The likelihood is that it will be a separate document, but it will not be a treaty. That means that it will be politically binding but not legally binding, not binding in international law and, therefore, not subject to the Constitutional Reform and Governance Act provisions.

Q1490 **Chair:** The political declaration would not, but the treaty itself would be.

Jill Barrett: The withdrawal agreement of course would be, yes.

Q1491 **Chair:** Colleagues will return to this. Do you have a view as to when in the process the CRaG process might be initiated?

Jill Barrett: Legally, the CRaG process can be initiated at any time, as long as it is more than 21 sitting days before the Government propose to ratify the treaty. Legally, there is no requirement that it should be before, during or after the legislative process. It could be any of those. My impression from the Government's statements is that the intention is to have the two affirmative votes in Parliament first, the meaningful votes. That will probably happen before the Bill is published. Then you will have the Bill and the CRaG process. I imagine that, because time will be tight, they will probably do those two things in parallel.

Q1492 **Chair:** Thank you very much. Lord Lisvane, the House of Lords passed amendment 49 to the EU (Withdrawal) Bill on Monday. I am not asking you to comment on the merits of it, but can you explain, if that were sustained, what the implications of it would be for the parliamentary process going forward?

Lord Lisvane: The first question to address is whether it survives and in what form. The important thing about both amendment 49 and amendment 50 is that they are not prescriptive. They are not definitive. They are canvases on which there could be amendments to the Lords amendments. There could be a rather different sort of amendment in lieu. The intention of the framers of amendment 49 was to make it clear in legislative terms that the choice that will face the House of Commons is not a purely binary one. As for the meaningful vote on a motion, and we may perhaps talk later about the validity of motions and how they might



HOUSE OF COMMONS

be approached, the motion if amended might also not be a binary choice. It is a matter of putting it in legislative terms and making it clear that there are more than two choices.

Q1493 Chair: The Secretary of State, when he appeared before the Committee a week ago, made it clear that the motion to approve the withdrawal agreement would indeed be amendable. It has been put to us that a number of different amendments might be submitted to the motion, from different parties, in the House. How would envisage, given all of your experience, the Speaker in those circumstances would seek to decide the order in which they were taken?

Lord Lisvane: There is a condition precedent that you have to address, which is that, if it is a straightforward motion with amendments down, when you hit the moment of interruption—of course, it is an open question, and there may well be a debate about how long is needed to debate the meaningful vote motion—you put the question on the amendment before the House. Then you put the contingent main question. If you want to have a choice of amendments to put, one after the other—there are questions of calls and falls, because there might be incompatible amendments—so if you want to call more than one, you will need a business order to allow more than one amendment to be called after 10 o'clock, 7 o'clock or whatever it turns out to be.

Q1494 Peter Grant: Thank you and good morning, ladies and gentlemen. Could I follow on from that and ask what happens if the motion is rejected altogether? On the one hand, David Davis said the motion will be amendable, but he also said that, if the original motion as presented is not agreed, the deal falls, as I think his words were, “in toto”, so we leave without a deal. Which of those two positions do you think is most likely to happen?

Lord Lisvane: I do not think I would risk a political prediction. In a conversation with the Chair of the Committee a little while ago, I described this as akin to the medieval mystical poem, which Mr Rees-Mogg is probably familiar with, “The Cloud of Unknowing”, because there are so many moving parts that predictions are highly speculative. Were a motion to be rejected, it would of course be perfectly possible for the Government to make time, a day or a week later, and put down a different motion, taking into account the reasons why the first one had been rejected. If that happens, the defining condition is that the clock is still ticking and time is shortening. That has to be taken into account.

Q1495 Peter Grant: On a similar theme, if Parliament gives two different answers to two different questions, for example if we vote to approve the withdrawal agreement but do not vote to approve the terms of the future partnership, does that mean we have to go back to the beginning and renegotiate the withdrawal agreement? Is it conceivable that we leave on the terms of the withdrawal agreement and we do not have any agreement as to where we are leaving for?



HOUSE OF COMMONS

Lord Lisvane: You are taking us into the fields of expertise of my colleagues on that.

Jill Barrett: If I can start by referring to Article 50, the withdrawal agreement has to take account of the framework for the future relationship with the Union. If that framework has not been agreed between the UK and the EU, it cannot take account of it. I suspect that means the withdrawal agreement would fall, with the consequences that would flow from that.

Q1496 **Peter Grant:** Finally, I have a question on the Withdrawal Agreement and Implementation Bill. You will be aware that the withdrawal Bill that is going through the Lords just now is being resisted in its current form by the Scottish Government, which said that unless it is amended they would not agree a legislative consent motion. I understand that a cross-party group of Lords has tabled amendments that are likely to allow the Scottish Government to withdraw their objection. Will the Withdrawal Agreement and Implementation Bill need legislative consent motions from Scotland and Wales?

Lord Lisvane: That depends on its content entirely. At this stage, we can guess, but it remains pretty speculative.

Q1497 **Peter Grant:** Are you saying that, depending on the exact way it is drafted, it may only need approval here or it may need an LCM from elsewhere?

Lord Lisvane: It is not fine-tuned as how it is drafted; it is what it does. If it does something that is absolutely in the shadow of the withdrawal process, it would be surprising if it did not need an LCM.

Q1498 **Mr Whittingdale:** Can I check something with you on the meaningful vote, the first one in this procedure? Steve Baker told the House of Lords, "If a resolution rejects the ratification of the treaty and if Ministers lay a Statement to explain why it should proceed, if the House of Lords objects against the Government can proceed and ratify". The meaningful vote in the House of Lords is actually slightly less meaningful than the one in the House of Commons. Is that correct in your view?

Lord Lisvane: It sounds as though you are referring to section 20 of CRaG 2010 there, and that is precisely what that provision says. It gives the House of Commons the opportunity to come back after one rejection, statement and then consider again. The House of Lords is effectively side-lined by section 20.

Q1499 **Mr Whittingdale:** The House of Lords does not have a veto on the resolution.

Lord Lisvane: No.

Q1500 **Mr Rees-Mogg:** Thank you to Lord Lisvane for coming in front of us, because as a peer you have no obligation to, so it is the more gracious of you to be here. Thank you. I want to follow up on Mr Whittingdale's



HOUSE OF COMMONS

question, because amendment 49 says that the House of Lords must consider the agreement that has been made. There is an obscure procedure whereby the House of Lords may remove something from the order paper and therefore deem that it has not considered something. What in your view would be the effect of that?

Lord Lisvane: I was asked this in the margins of the debate on amendment 49 a few days ago, and I had to say that I did not write that bit of Erskine May. Yes, there is that procedure but we have to look at what is politically conceivable. I do not think that that is politically conceivable. The question, of course, about the phasing of the votes clearly arises, and I imagine that business managers would be very keen for the Commons to deal with this first, so there was a formulation that they could put to the House of Lords, the House of Lords knowing that the elected House had agreed to that motion.

Q1501 **Mr Rees-Mogg:** Your political analysis is probably right, but it is interesting that the motion managed to put in something that could leave the House of Lords in a very strong position, even if it decided not to use it. This may be an unfair question: do you think the drafters of the motion knew about page 496, I think it is, of Erskine May, or only discovered it during the course of the debate? It would be wrong for those of us who want Brexit to underestimate the intelligence of those who do not want Brexit. The House of Lords has a very, very large majority of people who are not keen on Brexit. Do you think it was an accidental side-effect of their drafting or whether they knew their procedure and quite liked having this as an admittedly unlikely political backstop, but nonetheless a political backstop?

Lord Lisvane: I do not think it would be wise for me to put myself into the minds of the framers of the amendment. They well could have had that passage of May in mind, but the principal thing was that they avoided the possibility of a straightforward stand-off. If in subsection 5 of amendment 49 they had made equal provision for both the Commons and the Lords, of course that might have happened.

Q1502 **Mr Rees-Mogg:** They could have followed CRaG, which would have very straightforwardly side-lined the House of Lords at the second stage.

Lord Lisvane: Yes, indeed. It may be that, in your consideration of amendment 49, when it gets to the House of Commons, that is an option that would find favour.

Q1503 **Mr Rees-Mogg:** You said you did not write page 496. May I ask you the Thomas Docherty question, who was always looking forward to your new edition of Erskine May? Do you know when we might be getting that?

Lord Lisvane: That is out of my hands, but Thomas Docherty always used to ask about *How Parliament Works*. Rhodri Walters and I, having decided we are both out of shelf life, have handed it on to two extremely able successor editors.



HOUSE OF COMMONS

Chair: Surely not. We look forward to reading it. We always enjoyed reading the editions that you and your colleague have been responsible for.

Q1504 Mr Pat McFadden: Sir Jonathan, I would like to begin by asking you a question about how all this parliamentary process, and the way it could turn out, might be viewed in the European institutions. One of the questions that we explored with the Secretary of State when he gave us evidence last week is what would happen if, on this resolution, Parliament tried to ask the Government to go back to the table, to clarify something, change something or in some way ask for more time. On the question of timing, we have always thought of the Article 50 process as fixed, as a two-year process. Is it your view that, in the situation where Parliament asks the Government to go back and do more negotiating for whatever reason, this deadline of the end of March 2019 is set in stone, or are there circumstances where that can be extended in any way?

Sir Jonathan Faull: Article 50 itself provides for the two-year deadline and for the possibility of an extension of that deadline by unanimous agreement of all the member states of the European Union. It is not set in stone, no, but politically, as one gets to the end of the two-year period, one is up against a number of political facts. The European Parliament will be preparing for its elections, which will be only a couple of months away at the end of May. Therefore, any very late resumption of process might be complicated, but the deadline, if not extended, is the full two years.

Q1505 Mr Pat McFadden: The problem is not so much what Article 50 says; the problem is the political reality of this European Parliament winding to a close and this Commission heading to the end of its term. I am not trying to put words in your mouth, but, in terms of the way we should think about this, that is more of a real issue than the technical issue of any extension of time.

Sir Jonathan Faull: Yes, but there is no power vacuum, in the sense that there is a European Parliament until there is a new European Parliament, and there is a European Commission until there is a new European Commission. In the Council of Ministers, the Ministers are still the Ministers, whoever they may be, from the member states. There is continuity of the institutions and they will do whatever they need to do.

Q1506 Mr Pat McFadden: Can I switch subjects slightly and ask you a bit about what is in the news today? There is a great deal of coverage at the moment of different ideas on the customs arrangements. There is something called maximum facilitation. There is something called a hybrid model. There appear to be lots of documents being discussed. At the root of this are two red lines that the UK Government have adopted. One is to leave the customs union to pursue an independent trade policy, and the other is to have no hard border between Northern Ireland and the Republic. Looking at what you know about what has been discussed so far and these hybrid options—maximum facilitation or whatever they



are called—do you see anything that creates a way through those two red lines and, if not, why not?

Sir Jonathan Faull: From the Brussels point of view, the position is that they are waiting for a proposal from the British negotiators, and that that proposal would have to be examined and, I assume, tested to make sure that it can really work. In all jurisdictions, including this country after Brexit, no doubt, and the European Union today, customs rules are detailed and complicated, and moneys have to be collected and accounted for. There must be systems in place, as foolproof as possible, for the application of whatever customs rules are to be agreed between the United Kingdom, when it becomes a foreign country in EU terms, and the EU. I do not want to enter into speculation about ideas that are being discussed not very far from here today, but it is well known that there is a backstop if all else fails, and the crucial question is what else can succeed. Clarity on that is obviously very important.

Q1507 **Mr Pat McFadden:** In terms of what was agreed in December and this phrase “full alignment”, the Secretary of State, when he gave us evidence last week, talked about full alignment of outcome. By that, I think he meant this: why can we not agree that, say, on animal welfare, City of London rules or whatever it is, the UK Government say we will get to the same outcome but we will do it in our own way by different rules, different regulations or whatever? Why is that not acceptable to the EU?

Sir Jonathan Faull: The experience of mutual recognition in the EU is that it works where you have common institutions and common mechanisms for adjudicating disputes. There is indeed mutual recognition in many areas of the European Union’s work as it is today, but based on compliance with some common rules, some minimum rules, some rather comprehensive rules and the fact that there is a common enforcement mechanism. The European Commission acts as a prosecutor if necessary. The legal system provides that individuals and companies may bring litigation on the basis of European rules, and at top of the judicial pyramid is the European Court of Justice. In those circumstances, mutual recognition based on mutual trust and the sharing of institutions can work. Without that, it may be difficult to say simply that there is agreement on a series of outcomes—we all want to protect investors, the environment, workers’ rights and so on—without a discussion of the mechanism for making sure that those outcomes are properly secured.

Q1508 **Mr Pat McFadden:** Would any of your colleagues like to come in on this? I want to focus on this question of getting to the same outcome by a different mechanism, because I think we are going to hear more of this over the next few months. Why is this a sticking point when, from the UK Government’s point of view, it seems to be a reasonable offer?

Chair: Ms Gostynska-Jakubowska, would you like to come in on this point?



HOUSE OF COMMONS

Agata Gostynska-Jakubowska: Perhaps not on this point, because I am more of an expert on the EU institutions, so I would rather handle the decision-making process.

Q1509 **Chair:** On that point, can I ask you about the duty of sincere co-operation and what your understanding is of how that is going to apply to the UK during the transition period?

Agata Gostynska-Jakubowska: Yes. Thank you very much for having me today. Sincere co-operation is one of the principles embedded in EU law. As it is understood, in transition, the UK would be still bound by the EU regulations: by the current EU law, but also the future EU regulations. It is understood that it would be fulfilling its obligations as if it were a member state. There will be, if I am correct, a mechanism envisaged that would try to ensure that both parties—in this case, more the UK—respect their obligations. That is one of the roles that the joint committee will be performing.

Q1510 **Chair:** To take a specific example, there are occasions in international bodies where the UK has a separate vote, as it has had during the time of its membership of the EU, and other member states have their own votes. But the view that the EU has taken is that we should all march as one and vote in the same way. Would that application of sincere co-operation continue to apply in that area, in your opinion? I will give you an example. On CITES, which is the convention on endangered species, we have a separate vote. Would it apply there during the transition?

Agata Gostynska-Jakubowska: I cannot be certain and I cannot give you a 100% answer to that, but the UK and EU would still have in transition the possibility of consulting with each other. That is what I understand is foreseen in the draft withdrawal agreement: that, in certain areas, EU member states and the EU might consult the UK, which is, as far as I understand, the role to be played by the British Parliament in transition.

Jill Barrett: There are some provisions in the transition agreement that cover this exact point. I was trying to remember exactly what they said, but it was something along the lines that the UK may have a bit more latitude in international bodies to speak on its own behalf, provided it is not against the interests of the European Union. There would need to be consultation.

Q1511 **Mr Djanogly:** If I could go back to looking at it from the EU perspective, to the Lords Constitution Committee the Minister Steve Baker said, “I would not expect us to be in a position where the European Parliament has sought to amend the international agreement, which is the withdrawal agreement”. I suppose my first question is this: do you think that is likely to be the case, potentially or realistically?

Agata Gostynska-Jakubowska: Perhaps I should start by very briefly explaining the role of the European Parliament in negotiating



HOUSE OF COMMONS

international agreements. Basically, the European Parliament does not participate in those negotiations, but it has to be informed at every single stage of them. At the end of the process, it has to ratify international agreements. There are exceptions where it is only consulted, but association agreement would, for example, require the European Parliament's consent.

That means that the European Parliament cannot amend an international agreement that has been agreed between the parties and wrapped up. It can simply either approve it or reject it. But the European Parliament over the course of recent years has expanded its powers and used its veto rights to extract some concessions in the process of the negotiations. It has used various resolutions to say, "This is what we do not like; that should be in the draft text", but it happened in advance rather than when the European Parliament received the text.

It also happened that the European Parliament decided to reject the text on conditions or to say, "We will approve it only if a party decides to do A, B or C". I can give an example. It was in a textile with Uzbekistan, whereby the European Parliament said, "We are rejecting it, because we want the International Labour Organisation to investigate whether there is a child labour problem there. If the Uzbekistan authorities allow the ILO investigation, we will consider it again and possibly ratify it". I am not sure whether this satisfies your question.

Q1512 Mr Djanogly: To Sir Jonathan, following on from that, from what you are hearing on the ground, is it likely that the European Parliament will look for conditions?

Sir Jonathan Faull: It is too early to tell, because there is no agreement for them to bite on. I agree of course with what Agata has just said. It works in two ways. Throughout the process, there is a leveraging of the power to give and therefore not to give consent at the end. The EU negotiator, Michel Barnier, no doubt maintains good and close relations with the European Parliament leadership on this and talks to them regularly. At the end of the process, in answer to your question of whether it can put down amendments, in effect, yes, because it can say, "I shall withdraw consent or not give consent unless" or "I will give consent if". Therefore, the negotiators, or the executive, if you like, get a very clear message about what will be needed to get the consent for which Article 50 provides. It ends up in that place, yes.

Q1513 Mr Djanogly: The other possible complexity here would be a referral to the CJEU. Is that possible or likely, in your view?

Sir Jonathan Faull: It is possible. The legal text clearly provides for it. Is it likely? Again, it is simply too early to tell, because all the various parties do not have anything that looks like a final text yet on which to take positions.

Q1514 Mr Djanogly: If the European Parliament forced a renegotiation, the UK



HOUSE OF COMMONS

Government would need to decide whether any arising new deal was different from the one that Westminster voted on. In that situation, would we need to have another meaningful vote?

Sir Jonathan Faull: And vice versa, by the way.

Lord Lisvane: If the situation changes so that what is on offer or what is being discussed between the parties is no longer reflected by the terms of the meaningful vote, it is a political decision for the Government, but it is tending inexorably in the way you describe. There might need to be a second authorising resolution.

Q1515 **Mr Djanogly:** Finally, the Secretary of State's December statement on approving the EU exit agreement suggests that the future relationship will likely take the form of a number of agreements, possibly subject to CRaG. How have you interpreted that statement in terms of how the future relationship would be approved and implemented in the UK?

Jill Barrett: He points out that the future relationship may take the form of one or, as is much more likely, quite a number of agreements. He said CRaG is likely to apply, depending on the final form. That is because the various agreements could take a number of different forms. For example, in certain areas it is possible that there would be a non-binding arrangement of some kind, such as a memorandum of understanding, which is not a treaty and therefore would not be subject to the CRaG process. Another possibility is that, if there was a treaty that came into force on signature, that would not be subject to CRaG either. Those sorts of treaties are fairly common, but normally only in a case where no further implementing legislation or measures are required, and therefore the parties are able to strike a deal and bring it into force straight away. If that was the case, that would not be under CRaG.

There are other exceptions to CRaG. I am not aware that any of those are likely to apply, but section 22 of CRaG allows an exception in exceptional cases for the Secretary of State not to apply CRaG. I am not aware that it is likely to be used in this case, but I just do not know. There are also exceptions in section 23 of CRaG, but those are fairly technical and probably not applicable.

Lord Lisvane: As a footnote, it is worth bearing in mind that CRaG does not import any required debating time. We are not talking about legislation here. It would be a matter of finding time on the Floor of the House if there was pressure to do that.

Q1516 **Stephen Timms:** The European Union (Withdrawal) Bill has not yet completed its passage through Parliament, but it is clear that some things being done in that Bill will have to be undone in light of the withdrawal agreement. I am wondering if you can tell us how much of the EU (Withdrawal) Bill you think will need to be rewritten in the Withdrawal Agreement and Implementation Bill that is going to follow it.



Lord Lisvane: It is very difficult to say at this stage. Of course there is the locus classicus of clause 9, as to whether that will still be necessary or, indeed, whether what clause 9 does is more appropriately dealt with in a withdrawal and implementation Bill. Because much of the EU (Withdrawal) Bill is concerned with the exercise of ministerial powers and the extent to which those are constrained, I would think much of it would still be extant. Of course, the withdrawal and implementation Bill can do any amount of adjustment by way of amending the European Union (Withdrawal) Act. That will depend on the situation as it stands then.

Q1517 Stephen Timms: One thing that will have to be undone, or altered at least, is clause 1 of the EU (Withdrawal) Bill, which repeals the European Communities Act, because we now know that its provisions will need to apply for the duration of the transition period. The Institute for Government have looked at this and said there are three ways in which the Withdrawal Agreement and Implementation Bill could address that. Either it could repeal clause 1 for the duration of the transition period, which is described as politically incendiary. The second option would be to include provisions in the Withdrawal Agreement and Implementation Bill that are identical or near identical to what is in the European Communities Act. Thirdly, you could use new language to achieve the same outcomes as the European Communities Act, but the danger is that there would be considerable risks for legal certainty.

I wonder if you agree that there are those three ways of addressing this problem. I think the IfG is suggesting the second one would its preference, and I wonder if you have a view about which is likely to be the preferable approach.

Lord Lisvane: I thought the analysis in the IfG's paper was really rather good on that point. It was a very good paper altogether. Yes, certainly, those are the three main choices. Because repeal of the ECA 1972 is so emblematic of the process, I agree that—I am not sure I would go along with “incendiary”—it would be challenging, at any rate, if you went for option 1. Option 2 is certainly draftable. If, on the other hand, one is going to get into legal uncertainty on option 3, that could be a powerful argument against adopting it.

Q1518 Stephen Timms: I do not know how long the European Communities Act is. How much of it would you have to put into the Withdrawal Agreement and Implementation Bill to give the necessary effect?

Lord Lisvane: Not a lot. Sorry, may I just modify that? Not a lot if it was steady state, but if adaptations needed to be made, to acknowledge particular circumstances of the transition period, that might be a different matter entirely.

Q1519 Stephen Timms: Give us an example of the sort of alteration that might need to be addressed.

Lord Lisvane: I am not sure I can give you an example. If it was a straight copy across, we would not be talking about a great deal, but if



HOUSE OF COMMONS

there had to be some sort of bespoke drafting arrangement made in order to go for option 2 it might be much longer.

Q1520 Stephen Timms: My final point is that we have often been told that nothing is agreed until everything is agreed, but it is clear that our obligations under the withdrawal agreement, including the financial obligations, are likely to bite before negotiations on the long-term agreement have been finalised. In the event that we ultimately do not get a long-term deal, would it be possible for the UK to renege on commitments under the withdrawal agreement? When do the things we are signing up to under the withdrawal agreement become binding and unable to be undone?

Jill Barrett: My understanding is that the withdrawal agreement will become binding when we leave the European Union. Unless anything changes, presumably that is March 2019. It will become binding then. If there is a clear obligation in the withdrawal agreement to pay a certain sum of money, no, I do not see that the UK could renege from that. It would have to be renegotiated and then there would have to be an amendment to the treaty. Other than that, it would be a binding international obligation.

Q1521 Stephen Timms: I am right, am I not, that it is unlikely that the final legal version of the future agreement will have been completed by the end of March 2019?

Jill Barrett: Yes, I think so.

Q1522 Stephen Timms: We are going to be committed to hand over the money before we get the final agreement.

Jill Barrett: That is my understanding, yes.

Q1523 Chair: In essence, if you want to look at it this way, in order to get the transition period, the UK has to hand over the money, and that is what the withdrawal agreement says. Secondly, on the negotiations on the future deep and special partnership, the Committee in the past has expressed the view that it is very hard to see how you can complete all that in the Article 50 period. Therefore, those negotiations will in practice be taking place during the transitional period. What would you say are the chances, if those do not go well, of the EU side agreeing to the UK's request to pay less money because it does not have a good deal in that future relationship? I know it is a political question and I suspect I know what the answer would be, but it would be interesting to hear a view. Since you are smiling, Sir Jonathan, I expect I am going to direct it at you. What would you say the odds were?

Sir Jonathan Faull: I am not a gambling man. I am smiling in agreement with your position that that is a very political question. The withdrawal agreement is a standalone international agreement that takes account of whatever framework for the future relations exists at the time of its conclusion and approval. Any renegotiation of it would be just that: a renegotiation between two parties.



Q1524 Stephen Crabb: Moving on to the substance of the proposed political declaration on the future relationship, perhaps starting with you, Sir Jonathan, the Secretary of State, David Davis, has told us that he expects there to be a lot of detail in that political declaration. He has also said at different times that he expects that political declaration to be pretty binding. Do you agree with the analysis of the Secretary of State that it will contain lots of detail? Do you think that is possible? In what sense can that political declaration be pretty binding?

Sir Jonathan Faull: It seems to me highly unlikely that there will be a full new relationship agreement. That would break all known records for the negotiation, conclusion and ratification of an EU trade agreement, which is what it would be on the EU side, particularly given that it would almost certainly be what is called in EU jargon a mixed agreement, so with elements of EU responsibility and national responsibility. The national responsibility bits require national ratification. In some countries, that includes regional Parliaments. The great city of Namur would almost certainly come into play again, as the seat of the Walloon Parliament in the Kingdom of Belgium, as it did with Canada.

All of that is of unpredictable duration, at the very least. It is a reasonable political position, when starting the negotiations for the framework, to want them to be as detailed as possible. I am sure with good will a certain amount of detail can be included, but a fully-fledged agreement is not going to happen in the timeframe.

Agata Gostynska-Jakubowska: I would start from the question of whether the declaration is legally binding. In my opinion, it will not be legally binding. We might say it is politically binding, but as far as I am concerned I do not think this declaration will be legally binding. It will accompany the withdrawal agreement and the withdrawal agreement will refer to it, but I do not think it will be an integral part of the withdrawal treaty, so we cannot really say it is legally binding.

Once we have put this issue to bed I can try to respond to your question of how detailed it will be. It will depend on both negotiating parties. The declaration will be as detailed as parties want it to be. The EU has not really taken a very firm stance on this yet, maybe because, and I agree with Sir Jonathan, the EU has been waiting for the British Government to officially respond to its guidelines and to put some proposals on the table before discussions start about how detailed it should be.

There might be slightly different views on how detailed it should be. We know that the European Parliament in its recent resolution said that the declaration should be as detailed as possible. You might find different views in different member states on this one. You could argue that the more vague and general the declaration is, the easier it is going to be for the EU 27 to keep united on the issue of future relations. You could also flip the coin and say that this is a moment when the EU still has quite a big leverage over the UK, so perhaps making it very detailed would do no harm. It depends which member state you are talking to.



HOUSE OF COMMONS

I did an exercise before this session and looked into various political declarations that the EU has concluded with certain third parties. For example, a declaration was concluded with New Zealand in 2007. It mentions numerous areas of co-operation, from global and regional security to movement of people, development policy, fisheries, transport, and people-to-people contact, but it is still very vague. It is more an intention of both parties to say, "We share common values, this is the intention we have and these are the goals we want to achieve". It is difficult to compare the current situation of the New Zealand and EU declaration with the possible declaration between the UK and the EU, but it will be more binding when it comes to means than when it comes to results.

Lord Lisvane: It may be an outside chance, but the amount of detail available when the approval motion is taken may be significant, because it may impact on how meaningful that motion is seen to be. It is perfectly possible to imagine a dilatory amendment that says, particularly if there are sensitive lacunae, "We do not have enough information yet".

Sir Jonathan Faull: To go back to something we were discussing earlier, the customs relationship is an important foundation that will help or not help answer this question, because if there is a mutually acceptable arrangement for the customs relationship between the United Kingdom and the European Union to simplify the Irish land border and Dover/Calais, one will know a certain amount more about what the future relationship is likely to look like. That is particularly if, in the journey towards that understanding, one knows more about the regulatory relationship between the United Kingdom as a whole and the rest of the European Union. The more you know, the more detail you can give, and the less you know, the more difficult it is, no doubt.

Q1525 **Stephen Crabb:** Given the timing problems of finding a permanent future customs solution, it might well be that the political declaration simply creates a framework for kicking the can further down the road, right?

Sir Jonathan Faull: It has been known to be a problem for some time already.

Agata Gostynska-Jakubowska: I wanted to come back to the substance of the political declaration. It is perhaps not an ideal template, but I would draw to the attention of members of the Committee the recent resolution of the European Parliament, which voted to focus on the framework for future relations. It takes this future framework bit by bit. It is looking for pillars of this future relationship. Of course, the UK will have different priorities, but it shows what you could cover in such a political declaration.

Jill Barrett: I wanted to agree with what Agata said about the non-binding status of the political declaration and add a tiny bit. It is politically binding in the sense that it might be difficult for the UK to come



HOUSE OF COMMONS

back later and try to negotiate something else that was not in the political declaration. It would have more of a mountain to climb to present a different agenda. But, as has already been pointed out, it is a statement of intentions. It is always possible that there will not be agreement in the end when it comes to the treaty on particular areas, and they will not be in the treaty.

The other point is that there would be no legal liability if the UK did change its mind on elements in the political declaration. With non-binding political commitments of this kind, it is always understood that, if the Government have a change of policy or even if there is a change of Administration, the new Administration may not be bound to that text. There would certainly not be any legal liability if it came back at a later date to the EU and said, "Look, circumstances have changed and we would now like to negotiate something different in the future relations treaty".

Q1526 Emma Reynolds: On that point, Ms Barrett, you are saying that the political declaration, although it might be politically binding, could be not politically binding. It could be that circumstances change and one side or the other want to change substantially what has been committed to in the political declaration. Is that what you are saying?

Jill Barrett: Yes, that is right. It is a commitment made in good faith. Both sides say, "In good faith, this is our intention. This is what we promise to do", but it is understood that if political circumstances change one side or the other could come back and say, "Look, we would now like to change this, that or the other element of what was in the political declaration". That is my understanding. That is the general understanding of what a political declaration is, yes.

Q1527 Emma Reynolds: That is really helpful. It is perfectly possible and some would argue likely that, by October, when we have the content of the political declaration, it might not contain a solution on the customs union, be it on the island of Ireland or on the other border that the UK has with the rest of the EU. If it does not contain a solution to that in principle, where would the backstop for the solution to the border between Northern Ireland and the Republic of Ireland feature in what we would be looking at in Parliament?

Jill Barrett: There may be someone better qualified to answer that than I am, but the backstop provision is going to be in the withdrawal agreement, is it not? If nothing different is agreed in the future, that backstop will become legally binding as part of a withdrawal agreement. Please, correct me if I am wrong.

Q1528 Emma Reynolds: In order for that to be the case, there has to be a common understanding of what that backstop means. We heard from David Davis last week that there was some difference in interpretation. My colleague, Pat McFadden, referred to that. Following on from that, Sir Jonathan, the Government have talked about regulatory divergence. In



HOUSE OF COMMONS

her recent speech, Theresa May admitted that there would be areas where the UK would seek regulatory divergence and that would mean less access to markets in those areas. There has also been a suggestion that the Government would like a three-baskets approach, and I will briefly outline what that would be: the first basket where the Government would propose keeping all EU regulations; the second where they would keep the outcomes but modify the regulations; and the third where they would have totally different rules and regulations, and different outcomes. As I understand it, the EU institutions did not take too kindly to this three baskets approach. Could you explain why that is the case?

Sir Jonathan Faull: Clarity and certainty would be essential in any arrangement of that sort because traders, companies and citizens would need to know the legal rules applicable to their political activities and, of course, customs officials on borders would have to know what they were applying to whom, plus all the regulatory agencies behind the border on both sides. That would replace what is today a relatively simple single market system, albeit with its complexities, with a much more complicated one and one very different from anything the European Union or the United Kingdom have applied in their relations with the rest of the world. Complexity no doubt will be an issue.

The European Union already has certain rules that are applicable to its relations with foreign countries. The equivalence system is one. The so-called adequacy system, which is used in data protection, is another. All those systems would need to mesh with whatever agreement turned out to be made. I refer to the earlier conversation we had about mutual recognition, yet another, rather vaguer, term used in this area. Where physical goods are concerned and where they cross borders—everybody has focused for obvious reasons on the Irish land border, but the same applies to other borders between the United Kingdom and the European Union—it would be very necessary to have absolute clarity on what is being done to what goods and how the origin and value of goods are determined. These are all standard customs procedures, which slowly over the last half a century have been harmonised in the European Union's customs union with the rest of the world, and would now have to be replaced by something different in relations to the United Kingdom, at all its borders and all their borders.

Q1529 **Emma Reynolds:** Could I encourage you to say a little more about this second basket? It is similar to what we discussed earlier about the backstop with the situation in Northern Ireland and the Republic of Ireland, whereby the idea is that the UK would modify its regulations but retain the same outcomes. Is one of the problems not of trust? When we leave the UK, we are not part of the institutions, as you laid out earlier, but the EU is a legal entity and, if we are not part of that legal entity, that sort of option seems perhaps unlikely.

Sir Jonathan Faull: Yes, trust is very important, both as a general notion in the relationship between the countries concerned, but also, given the history of the European Union, it has been nurtured and



HOUSE OF COMMONS

buttressed by the sharing of institutions, a legal system and a judicial system. Quite how trust emerges from the Brexit process and the replacement of all those systems by something else yet to be invented, nobody can know, but it will not be an early task to rebuild it to the levels, or anywhere near the levels, that exist between member states of the European Union, given the way the European Union works.

Q1530 Emma Reynolds: Briefly, on the agencies, the Prime Minister said in her speech that she would like the UK to retain membership of some of these agencies. With regard to certain of the agencies she named, it is my understanding that within the statutes of these agencies it is not possible for third countries to join them. Is that because of single market rules or other rules? I am thinking of the medicines agency and I think the chemicals agency. Is it going to be possible for the UK to remain a member if it is a third country?

Sir Jonathan Faull: There are various types of agencies. Indeed, some of them are open to non-EU countries. Some are not because they are based on European legislation and designed to assist in the implementation of European legislation. It depends on the nature of the agency, and of course it depends on the legislative text that created it. Legislative texts can be amended of course, but there is a whole Pandora's box of administrative and judicial systems that underpin the whole regulatory system, of which agencies are a part: the Court of Justice, the role of the Commission and so on.

Q1531 Emma Reynolds: I have one last question, very briefly, on something slightly different, to Lord Lisvane. There have been reports suggesting that DExEU, the Department, would be wound up immediately after exit day. What would that mean for parliamentary scrutiny of the negotiations on the future partnership after we leave, during the transition? I think this Committee would be wound up and possibly the European Scrutiny Committee. Which committees of the House would scrutinise the work of the Government in this area?

Lord Lisvane: That will depend very much on the shape of the machinery of government after exit. As you know, there has been a consistent pattern of reflecting departmental reallocation and department responsibilities in Select Committee responsibilities, but neither House is limited to that. It will probably be determined by a better appreciation of what the task at hand is: for example, the amount of secondary legislation coming forward as a direct result of the EU (Withdrawal) Bill and further secondary legislation that will be necessary after exit. I hope both Houses would match their activity to the scale of the task.

Q1532 Craig Mackinlay: I will put aside all the complications and significant parliamentary hurdles of getting through the Withdrawal Agreement and Implementation Bill, which have been well discussed. Going back to Ms Barrett on Article 50, it says precious little. The phrase you picked out, which is always a relevant one, is "taking account of the framework for the future relationship". At some time, in October possibly, we will have



the Withdrawal Agreement and Implementation Bill. It will have in it things like money, a large amount of money possibly. We also have that phrase that Ministers have discussed for nearly two years now: "nothing is agreed until everything is agreed". We will have to, at a similar time, consider a political declaration that has very little legal basis on the framework for future partnership, which no doubt will have grand ambitions but does not amount to much of real legal value.

Do you think the "taking account" of part of Article 50 is fulfilled by two things that are inextricably linked? As parliamentarians, is it satisfactory enough that we commit a vast amount of taxpayer's money in the withdrawal and implementation Bill to agree a fairly woolly political framework? The two are inextricably linked. In my mind, I would be willing to pay a little more for something that is very good later on in the day. Are we fulfilling Article 50, and are we fulfilling our duties?

Jill Barrett: Article 50 is worded the way it is probably because it was recognised that two years is simply not long enough to negotiate all the terms of withdrawal and of future relationship. That is one thing. It is just not realistic. Also, you cannot conclude an agreement on future relations until you have left. Those are two reasons for it taking account of the framework. All the withdrawal agreement can do is take account of the framework as it has been agreed at the time. Of course, that political framework might change later. That is a problem.

Q1533 **Craig Mackinlay:** I am trying to square it with "nothing is agreed until everything is agreed". Once we have passed a Bill, it becomes an Act, yet we are still waiting on the future.

Jill Barrett: My understanding of the sequencing is that the meaningful vote happens first. At that point, there will have been agreement already on a political declaration. At least, that is what the Government are hoping. There will be the two things: a draft withdrawal agreement and a draft political declaration. There will be the meaningful vote on both things. By the time you get to the Bill, if it is agreed in the meaningful vote on the political declaration, Parliament will be passing the Bill in the knowledge of what the political declaration says. Yes, it will only be the political declaration. There will not be a future relations treaty and probably not even a draft treaty, I would not have thought, at that stage.

In terms of being willing to pay this much if we get this in the future relations treaty, and that much if we do not, I suppose you can always build conditionality into the withdrawal agreement. You can have a conditional clause in the withdrawal agreement that says, "If this is agreed in the future we will pay that, and if this is not agreed in the future we will be paying less", but you would have to negotiate that now in the withdrawal agreement.

Q1534 **Mr Whittingdale:** I wanted to follow up on Mr Mackinlay's line of questioning. You can build a conditionality into the withdrawal agreement, but it seems highly unlikely that the European Union would



HOUSE OF COMMONS

ever agree to that. As I understand it, if there is an attempt to link to the political declaration, the political declaration is non-binding anyway; it has no legal force. In theory, the European Union could fail to deliver the content of the political declaration. If it was willing, we would still be locked in to paying the agreed sum in the withdrawal agreement. That is your answer. If we failed even to achieve the political declaration and we were to seek to revisit the withdrawal agreement, would it be in breach of international law to do so?

Jill Barrett: Are you talking about after withdrawal?

Q1535 **Mr Whittingdale:** Yes, in essence, because the future arrangement can only be achieved after withdrawal.

Jill Barrett: Before the withdrawal agreement is concluded, there has to be the political framework that is agreed. You are talking about after we withdraw.

Q1536 **Mr Whittingdale:** If we fail to achieve it.

Jill Barrett: If we fail to achieve a future relations treaty based upon the framework, can we go back on the withdrawal agreement? No, not unless the withdrawal agreement contains such a conditional clause in it.

Q1537 **Mr Whittingdale:** Under international law. Even if Parliament wanted to revisit the withdrawal agreement and say, "We only agreed to go on paying into this club on the basis that we achieved a satisfactory deal with it", that would no longer be an option.

Jill Barrett: It is only an option if the withdrawal agreement builds such a review mechanism into it, which it could do. The only other method would be for Parliament to ask the Government to reopen some negotiations with the EU on basis of the change of circumstances, to seek an amendment to the withdrawal agreement, but that would be quite difficult to negotiate.

Mr Whittingdale: Both options seem highly unlikely in terms of the attitude of the European Union, I would imagine.

Q1538 **Sammy Wilson:** Along the same lines, we seem to have a contradiction here. The withdrawal agreement, once the legal text and the protocols have been drafted and agreed, is legally binding. The future trade arrangements will only be politically binding and they can be changed by the EU Parliament, according to the information we have had today. If it is a mixed agreement, they can be altered or blocked by national Parliaments. On one hand, the Government are being asked to sign up to an agreement that commits us to huge amounts of money, which potentially could split the United Kingdom because of option C, the backstop, for Northern Ireland and the Irish Republic. In return, they could have a vague political commitment to future trade arrangements that could be changed without them having any control over that change. That is hardly a situation or an arrangement that is attractive in any way.



HOUSE OF COMMONS

What kind of conditions do you believe could be attached to the withdrawal agreement to ensure that we do not pay a penny until we are sure of what we are getting for it, and we do not agree to splitting up the United Kingdom without the assurances that the EU is prepared to work with us on the arrangement at the border? Could that be done by having great detail in the political agreement, or could there be total conditionality to the withdrawal agreement?

Jill Barrett: Was that question addressed to me?

Q1539 **Sammy Wilson:** It was to any of the panel members. We have a situation, which I do not think any Government would put themselves into, where they make a commitment to paying out huge amounts of money, breaking up the United Kingdom and are not guaranteed anything other than some vague political promise that a future trade arrangement would be arrived at eventually.

Jill Barrett: To put it in context, supposing the UK were to leave the EU without an agreement, there would still be legal liabilities. The UK would still be liable in international law to pay certain sums of money for things it had already agreed to pay before leaving. Whether that amount is the same amount the UK has agreed to pay, I am not qualified to comment, but there would be a sum to pay in any case. Maybe most of the sum that has been agreed is what the UK would have to pay anyway. Maybe a bit more has been paid in expectation of other things.

If you were saying we would not want to pay a penny, you would be up against the question of legal liability in international law to pay a certain sum of money on exit whatever the circumstances, even if there was not an agreement. If your point is that we are willing to pay more if we get this in future or less if we do not, and we are only paying the minimum we are legally obliged to pay, that is the point we covered earlier: you would have to write conditionality into the withdrawal agreement, if that is possible to negotiate. That is the only way to safeguard your position.

Q1540 **Sammy Wilson:** You talk about the amount of detail that goes into the political agreement on future trade arrangements. If more detail is contained in it, does that make it, if not legally binding, more binding, because you have reached a level of detail at an early stage?

Jill Barrett: It does not make it legally binding, but it makes it politically more likely that you will be able to achieve the agreement based on it. The more it looks like a treaty, the more likely you are to have a relatively short treaty negotiation and turn it into a treaty, but it does not guarantee. It is not a cast iron guarantee.

Q1541 **Sammy Wilson:** We talk about future trade arrangements and it is quite clear that the EU is not prepared to come to an agreement with the UK that suits both parties. If there is no deal, what is the status of the withdrawal agreement?



HOUSE OF COMMONS

Jill Barrett: At the moment, it is a draft agreement. In the end, if it is not agreed, there is no withdrawal agreement. It means that the UK, unless anything changes, leaves the European Union at the end of the Article 50 period with no agreement. If the UK wanted to change that, the UK would have to go back to the EU and attempt to renegotiate the agreement, ask for an extension of the Article 50 period or withdraw its Article 50 notice.

Q1542 **Sammy Wilson:** The logic of the EU not being prepared, for example, to work towards a reasonable future trade agreement runs the risk of the withdrawal agreement, the payments that we agreed in that and the arrangements on the Irish border not being put in place, so we have to start from scratch again.

Jill Barrett: Yes, I would have thought the EU would have had every interest in wanting to achieve a good political declaration on future relations, for all the reasons you have just said.

Lord Lisvane: Returning to the purely domestic front for a moment, if there were no deal and no withdrawal agreement, it would make clause 9 of the withdrawal Bill inoperable.

Chair: Both Peter Bone and then Jacob Rees-Mogg want to come in on the specific point we were discussing and then I will bring in Stephen Kinnock.

Q1543 **Mr Bone:** Thank you, Chairman. On the last point, clause 9 will not be operable. Could you explain what that means?

Lord Lisvane: Certainly. Clause 9(1) includes Dominic Grieve's amendment 7 in this House, which makes the exercise of ministerial powers under clause 9 and related parts of the Bill dependent on the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union. If there is no material there to work with, I do not see how clause 9 could work.

Q1544 **Mr Bone:** Jill Barrett, maybe I was wrong, but I thought you said if there was no agreement the UK would still have to pay money on exiting the EU. I want to know the basis for that, if I understood you correctly.

Jill Barrett: Please correct me if I am wrong, but have the Government not already acknowledged that they have some legal liability to pay a certain amount of money on leaving, although they did not quantify that amount, on the basis of agreements they have already made, while an EU member, to make payments to certain projects for the EU? Those are existing liabilities that would have to be made good before or on leaving.

Q1545 **Mr Bone:** I am not sure that is the case. I thought the Government's case was that there was not a legal obligation and this is an offer we are making. If you were a member of—I do not know—a tennis club, and you subsidised that tennis club by billions and billions of pounds over a great number of years, when you left the tennis club, you would not be asked



HOUSE OF COMMONS

to pay for ongoing commitments, would you? I thought it was the Government's position that there was not a legal requirement, but this was something that we felt we should do.

Jill Barrett: I am sorry; I am not an expert on what the Government have said about their legal liabilities. I would pass on that one. I thought they had acknowledged some liability and simply not put a figure on it.

Chair: I think the Comptroller and Auditor General had something to say about that recently. As I recall, he said that money was going to be owed, but obviously this is a matter of debate, on which subject Jacob Rees-Mogg is going to come in.

Mr Rees-Mogg: There was a very interesting report by the House of Lords European Union Committee from March of last year. It said that the UK, if it leaves without a deal, has no UK, EU or international obligation to pay any money on the grounds that the Vienna Convention on the Law of Treaties sets out the basis for the continuation of liabilities unless the organisation of which you are a member sets out another mechanism for departing. The House of Lords committee contends that Article 50 is that other measure, which has a specific provision for how you leave in the absence of a deal, which is that after two years you leave and that is it. The Lords committee, to be fair to it, said that there may be a moral obligation, but there is no legal obligation. I wonder, Chairman, if we could enter their Lordship's report from a year ago into the evidence of this Committee, because it is the most authoritative report on this and has not been disputed, as far as I am aware, by any substantial body of legal opinion.

Q1546 **Mr Whittingdale:** On Jacob's point, the Lords committee report refers to the position prior to the passage of the withdrawal Bill. My understanding is that we create a legal liability with the passage of the withdrawal Bill because it becomes international law. Would that be correct?

Mr Rees-Mogg: The Withdrawal and Implementation Bill, not the current Bill. The liability we are accepting is voluntary, subject to an agreement, but with no agreement there is no liability. Mr Whittingdale is right that the WAIB creates the liability from a UK perspective.

Q1547 **Chair:** To help the Committee, what the Comptroller and Auditor General said to the Treasury Committee on 24 April was, "The treaty—once approved—will pass into law in time for us to leave the EU", so that will be the WAI Bill, "and then will become legally binding. Therefore the payments would fall to be paid no matter what, under international law". That is what he said, to clarify.

Q1548 **Stephen Kinnock:** Distinctions are being drawn between the withdrawal agreement and the political declaration. I wonder whether there is, to some extent, a false dichotomy being drawn here, because we know that the resolution of the issue around the Irish border is one of the withdrawal agreement issues, but the shape and nature of that resolution will dictate the shape and nature of the political declaration. There is an



HOUSE OF COMMONS

umbilical cord going from the Northern Ireland issue, which is a withdrawal agreement issue, because you cannot have a political declaration that in any way contradicts what has been agreed in that withdrawal agreement segment. Is that interpretation correct, and would you therefore agree that this whole debate is based, to some extent, on a false dichotomy?

Jill Barrett: Is that not the point of the backstop provision in the withdrawal agreement: that the political declaration could envisage a different solution for the future, which, if it is then negotiated and appears in a future relations agreement, could supersede the backstop? If it is not agreed, the backstop would have to be relied upon.

Sir Jonathan Faull: That is the default option. One has to go back to the structure of Article 50 and the way the negotiations have proceeded so far. The European Union insisted that there were three preliminary threshold issues that had to be addressed before getting into the details of the withdrawal agreement. The United Kingdom went along with that sequence. That is where we are today. Those three threshold issues are: the land border between Northern Ireland and Ireland; the fate of their respective citizens stranded on either side of the new border, when it is created, between the UK and the EU; and money. While everything is still to be agreed, and nothing is until everything is, that is the basis on which the British negotiators have agreed so far to conduct the negotiations. The “everything is agreed” bit applies to the withdrawal agreement. It obviously does not apply to the unknown future long-term agreement between the United Kingdom, having become a foreign country, and the European Union. Those negotiations will be conducted in a different legal framework and are likely to take quite some time.

The link is expressed in this notion of taking account of the framework, which of course therefore has to exist. There is an argument and negotiations to be had about how detailed the framework can possibly be. It is true, given the various red lines and the structure of this very country, that what happens on the border between Northern Ireland and Ireland will have some impact—I am not going to say how much; I simply do not know and I do not think any does at the moment—given Northern Ireland is an integral part of the United Kingdom and nobody in Brussels is suggesting it is not, on the relations between Great Britain, as the other bit of the UK, to simplify it, and the rest of the European Union. Yes, of course, there are links between each of these issues, but there is a sequence partly laid down in the treaty’s Article 50, partly agreed, however reluctantly, between the negotiators as a matter of sequencing the various steps, and we are somewhere along that journey. I am not quite sure how far.

Q1549 **Stephen Kinnock:** Lord Lisvane, would you identify this as having the potential for a major constitutional issue for Parliament? If MPs are being asked to vote on two motions, the withdrawal agreement and the political declaration, and there is potentially a fundamental contradiction between



the two where, for example, you have the Northern Ireland issue resolved in one way but a political declaration pointing in an opposite direction, how do parliamentarians resolve that potentially fundamental constitutional issue?

Lord Lisvane: There are a lot of moving parts in this. One would be whether you have separate motions on the withdrawal agreement and the political declaration, or whether they are brigaded into one. If there is a contradiction between those two elements, I would expect that to be reflected in proposed amendments to the terms of the House of Commons approval of both or each one separately.

Q1550 **Stephen Kinnock:** Turning to a different subject for Ms Gostynska-Jakubowska, there is potential for Parliament to ask the Government to go back and negotiate a different or better deal as a result of the voting in October. The knock-on effect of that could be that an extension of Article 50 is required. That would in turn probably impact on timing of the European parliamentary elections and the multi-annual financial framework, with possibly some connection to the new Commission coming in. There is obviously no precedent for a member state not participating in European parliamentary elections. Can you say a bit about how you think that might work in practice? Let us say, for example, a time-bound extension of Article 50 is agreed by unanimity in the European Council. What arrangements would be put in place? How formal would the legal agreement between the UK and the EU need to be in order to secure an extension of Article 50 in the context of the European parliamentary elections?

Agata Gostynska-Jakubowska: Thank you for this question. It is a very speculative one. I am happy to engage in this exercise, but it will be my very personal opinion on how the EU might respond. There are several questions in the one you have just asked. First of all, the EU 27 is negotiating with the British Government, not the British Parliament. If the British Parliament rejected the withdrawal agreement, then instructed the Government to, as if you have just said, extend the negotiations, the British Government would first have to come to the EU and ask for it.

The timing will be important, as you mentioned. Frankly speaking, it is quite unlikely that the EU would be willing to extend the Article 50 talks if the withdrawal agreement was already agreed between the EU 27 and the British Government. Of course, the rationale behind such an extension would matter in those negotiations. Even though the EU 27 are sad to see the UK go, there is this impression of Brexit fatigue, if I may assert this.

Stephen Kinnock: They are not the only ones.

Agata Gostynska-Jakubowska: They are sad to see the UK go, but they also respect this choice; they have turned the page; they want to move on. In some capitals, there might already be impressions that Brexit negotiations are unpleasant distractions from Europe's other



pressing challenges. If the British Government—and this is very speculative on my behalf—came to the EU 27 in December 2018 and asked for an extension, that would be unlikely, particularly because it requires unanimity, but also because of the political agenda that you just mentioned. There are elections to the European Parliament between 23 and 26 May; the date has been agreed already, and there is an entirely new political cycle. At least political leaders in the European Parliament would like to have Brexit out of the way when they gear up for the European Parliament elections.

Let us assume the extension was agreed, as you said, which is very unlikely. There would be a problem: what happens? If the extension was agreed, the UK would still be a member state. What would happen then? Would the UK participate in the EU Parliament's elections? Again, the European Parliament would be reluctant to agree to this. What is the point in agreeing which committee British MEPs should participate in, which functions they should have in the new European Parliament, when they will be leaving perhaps several months later? I understand there is a school of thought that, in theory, it is possible to send national parliamentarians to the European Parliament for this specific period of time. That was the case with new acceding countries. For example, Romania sent national parliamentarians to the European Parliament from January 2007 until November, when it held its direct elections to the European Parliament. As I have written in some of my analysis to date, it is extremely unlikely, in my personal view, that the EU 27 would allow for such an extension if there was already a withdrawal agreement on the table. Discussions about the political declaration are probably something different.

Q1551 Stephen Kinnock: Sir Jonathan, it seems clear, to most people anyway, that a lot of the negotiation about the future relationship would need to take place during the transition period. How do you see the institutional framework for that working? Presumably there will no longer be a role such as the one Monsieur Barnier has, and it will be the United Kingdom negotiating as a foreign country, just like Canada or any other non-EU country. It would go into DG TRADE and it would be conducted by the senior officials in DG TRADE as usual.

Sir Jonathan Faull: Unless special arrangements were put in place administratively, yes, indeed, that would be the case. It would be a trade negotiation with an important foreign country.

Agata Gostynska-Jakubowska: I want to supplement what Sir Jonathan just said, because I have been thinking about this question as well. It seems to me that the European Commission will probably request that the typical international-negotiations-mode mechanism is applied, but, knowing the EU institutions a bit, I would expect some wrangling in between the EU institutions. I cannot totally exclude the situation where the European Parliament comes and says, "We have had such a good framework with the Article 50 negotiations that we would like to be



similarly engaged". As you know, the European Parliament has had quite a big role in those negotiations. You will perhaps have member states saying, "We want to have a greater say as well".

Because it is not clear whether this will be one set of negotiations or whether we will have different negotiations, we have to keep in mind that, for example, in the area of common foreign and security policy, it does not have to be the European Commission negotiating. Actually, it should be a high representative. Correct me if I am wrong on this one. Those arrangements will still have to be made, but I do not think we are that far yet.

There is another question. The UK will be dealing with a totally different European Parliament and European Commission. I could argue that it is plausible that the next European Parliament might be less economically liberal without the 73 British MEPs, who across the line were pushing for this economically liberal agenda. The European Parliament might be less willing to push this forward, particularly because some of the seats of the current MEPs will go to countries like France, Spain and Italy, which you could argue, as VoteWatch has suggested in its analysis, might be slightly more protectionist in their approach. That would have an impact on the negotiations between the UK and the EU when it comes to the future relationship. Sorry, I think that was a long answer.

Q1552 Chair: No, thank you. I want to follow that up. Given, as you have said, that it could be a different team and a different structure, and there will obviously be the elections to the European Parliament and the formation of a new Commission, that might suggest that, given that the transitional period has to conclude by the end of December 2020, there is relatively little time in practice to negotiate all the issues in the future relationship. If the new Commission has to be in place, and then you need to finish in time for ratification, consultation and votes in Parliament by December 2020, you could be talking about a year and a bit. My question therefore is this: would it not be sensible in those circumstances to have the capacity within the transitional agreement to extend it? What do you see as, first, the political and, secondly, the legal obstacles to doing that? Currently, that provision is not in the transitional agreement.

Agata Gostynska-Jakubowska: Absolutely. Your analysis of the problem is the correct one. Before I get into the specific answer, it will take the British officials a while to get acquainted with a new team in the European Commission and the European Parliament. It is much more difficult when you are outside the EU machinery rather than inside it. The current text of the withdrawal agreement does not envisage any specific mechanism or any possibility to extend the transition period. We will probably agree—there are voices on both sides of the channel—that it might make sense to extend or at least leave such an option open.

To my legal mind, it seems that the withdrawal treaty would have to consist of such an instrument, allowing extension of the transition period. For the moment, as it stands, the EU 27 and the UK would not be able to



HOUSE OF COMMONS

extend this transition period after the treaty entered into force. As you probably notice, there is very little, if anything, when it comes to a revision clause. That is the question of the governance, which will have to be dealt with. I suspect that, in order to request an extension of the transition, you would need to have a special mechanism inside.

Q1553 Chair: In other words, you need that, because trying to do it when you get to November 2020 and suddenly saying, "Crumbs, we have run out of time" will be much more difficult than if you have a provision in the transitional agreement.

Agata Gostynska-Jakubowska: Yes.

Q1554 Jeremy Lefroy: As a slight extension of that point, let us say that the withdrawal agreement is roughly along the lines of how it has already been drafted, although not all of it has been agreed, particularly in respect of the border between Northern Ireland and Ireland, with the fallback position. Let us say that we come to the end of the transition period in December 2020, the future partnership agreement, free trade agreement or whatever form it takes has not yet come into place, and there are no other arrangements regarding the border. Does one therefore assume that the fallback position, option 3, automatically comes into force on 1 January 2021? Given that the UK's position is that there would be no east-west border, quite rightly, and that the same agreement would apply east-west as north-south, would that automatically apply from 1 January 2021, given that that would have been part of an Act of Parliament here and part of an international treaty?

Sir Jonathan Faull: If the withdrawal agreement provides that the default option is the backstop, as we discussed earlier, and no other option is included so it becomes what is agreed, that is what happens. The details would have to be worked out. If the transitional agreement at the end of 2020 is not replaced by a complete, new free trade agreement and has not provided itself for further extension, as we discussed a few minutes ago, the withdrawal agreement is all you have as an agreement between the United Kingdom and the European Union. Then it becomes a question of the mathematical logic of the way you put it. If Northern Ireland and Ireland do something, and Northern Ireland in most relevant respects is no different, although that is not fully the case, of course, from Great Britain in terms of its regulatory arrangements, following your logic, you end up in that situation.

Jill Barrett: That would not be automatic, in the sense that the withdrawal agreement would have the backstop provision about what happens to Northern Ireland, but it would not say anything about what happens to the rest of the UK. That would be, first of all, a political choice to be made at that time.

Sir Jonathan Faull: That is the United Kingdom.



HOUSE OF COMMONS

Jill Barrett: Does the UK want to align itself with Northern Ireland or have a border in the sea? If the UK wanted to stay in the customs union or whatever, to stay with Northern Ireland, it would have to open a new negotiation with the EU, because that would not be covered in the agreement.

Q1555 **Jeremy Lefroy:** Presumably it is within the remit of this Parliament to specifically state the corollary to what was not in the withdrawal agreement because the European Commission said it had no right to interfere in internal matters. Given that this is the United Kingdom Parliament, we would have every right to state that in the legislation implementing the withdrawal agreement, because that is our prerogative. We are not limited, as the European Commission sees itself, from intervening intra-UK. In our withdrawal agreement Bill, the WAIB, we would be able to state quite clearly that that backstop would apply to the whole of the United Kingdom and not just to Northern Ireland.

Jill Barrett: I am not sure you could just do that in legislation. If we say the whole of the UK will remain in a customs union with the EU, that has to be negotiated with the EU. We cannot just decide that unilaterally and put it in a piece of legislation.

Q1556 **Jeremy Lefroy:** Surely we could say that, as far as the UK Parliament is concerned, where we are sovereign, any arrangement applicable to Northern Ireland must apply to the rest of the United Kingdom.

Jill Barrett: If we wanted to make that provision, we would have to negotiate it now and put it in the withdrawal agreement as something that would happen, as a contingent arrangement. You cannot unilaterally decide later on that the UK wants to stay in a customs union with the EU to match Northern Ireland. That would have to be agreed.

Q1557 **Jeremy Lefroy:** I do not think the withdrawal agreement says in so many words "a customs union", does it? It has other wording regarding Northern Ireland and alignment, which is different.

Sir Jonathan Faull: This is the indefinite/definite article thing. The customs union of the European Union is the European Union's customs union. It, as a customs union, can essentially be extended to foreign countries by a trade agreement of whatever sort, but that is indeed, as Jill Barrett has said, a matter for international negotiation. With the greatest respect, it cannot simply be brought about by parliamentary fiat here. You can encourage the Government to negotiate it, ask the Government to negotiate it or resolve that it would be a desirable outcome, but there would have to be a further negotiation.

Q1558 **Jeremy Lefroy:** It is within the remit of our Government within the withdrawal agreement to extend the wording that is not there because the European Union felt it was not able to intervene with intra-UK matters. We can say, "We want that to be in there. We want that clause to say that it must be recognised that nothing can apply to Northern Ireland and not to the rest of the United Kingdom that would result in



HOUSE OF COMMONS

some kind of barrier between Northern Ireland and the islands of Great Britain”.

Sir Jonathan Faull: I am straying into internal affairs, which I swore to myself I would not do coming into this room, but if the United Kingdom Government’s position in negotiations were that whatever is agreed in relation to Northern Ireland and Ireland is the position to be negotiated between the whole of the United Kingdom and the whole of the European Union, that is a negotiating position that the Government could take and one over which you could have some influence, I suppose.

Q1559 **Chair:** One thing that has not been agreed yet in the draft withdrawal agreement is the dispute resolution mechanism, with the EU side saying it has to be the ECJ and the UK side saying, “No, it has to be recognised that this is an agreement between two parties”. Sir Jonathan, where do you see this being resolved?

Sir Jonathan Faull: Where?

Q1560 **Chair:** How do you see this being resolved? How? Who is going to move?

Sir Jonathan Faull: I am not privy to the negotiations, of course, and I see, read and hear the respective positions taken by the parties. The European Union says, “I have a very good system for adjudicating in disputes. It is called the European Court of Justice and, if you want to be part of my system in some way, that is the system we use. We have to find a way to lock you into it”. It is the agency issue. The closer you get to the single market and customs union, the more the integrity of the EU system becomes a major issue for the European Union and the European Court of Justice itself. If the ultimate relationship is looser, obviously the European Court of Justice does not have jurisdiction over Canada or Singapore, and a different mechanism would have to be developed.

That issue has been resolved in different ways with European countries that are not members of the European Union. The two most frequently cited models are the European Economic Area, which comprises then EU on the one side and Norway, Iceland and Liechtenstein on the other, where they have parallel institutions doing very similar things but with different names and different compositions. Switzerland is an example of a European country, bang in the middle of Europe, where the relationship is governed by dozens of individual agreements, and there is a constant problem of adjudicating in disputes because you fall back on traditional diplomatic committees, where people sit around a table and try to resolve the dispute. That works a lot of the time. Sometimes it does not and you have a major problem. The institutional relationship between the EU and Switzerland is a vexed one and is still controversial today.

Agata Gostynska-Jakubowska: I agree with what Sir Jonathan has said. It is probably important to distinguish between the governance of the withdrawal agreement and the governance of the future arrangement. If you ask me how much room there is for manoeuvre when it comes to the governance and dispute settlement of the



HOUSE OF COMMONS

withdrawal agreement, my answer would be that there is not much room. The EU 27 would probably be reluctant to give up on the role of the Court of Justice, mainly because it is a community of law. It has been said on many occasions that these exit negotiations are not about making concessions or offering ones. They are about making sure that the treaty is compatible with EU law.

Q1561 **Chair:** When we met the IfG for an informal discussion yesterday and the question was raised of whether Article 50 is unilaterally revocable by the UK, the answer we got was that it depends which lawyer you talk to. Would any of you dissent from that answer, without getting into a long answer? Is it easy to say it is not clear?

Sir Jonathan Faull: I am aware that different views have been expressed.

Jill Barrett: It is not clear, but the better view is that it probably is revocable.

Agata Gostynska-Jakubowska: It is revocable. I am not sure whether it is unilaterally revocable. What I know is the EU's position, and the EU's position has been that all member states need to give their consent and need to agree with this. Even more, the European Parliament said that it might be subject to some conditions. I will finish on that note.

Lord Lisvane: I would agree with my Cross-Bench colleague, Lord Kerr of Kinlochard.

Chair: He knows a bit about it, because he helped to write it. On that note, can I on behalf of the Committee thank all of you for what I think has been a really interesting and informative session this morning? We are very grateful to you for giving up your time.