

Home Affairs Committee

Oral evidence: [Post-Brexit migration policy](#), HC 857

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Members present: Yvette Cooper (Chair); Rehman Chishti; Stephen Doughty; Tim Loughton; Stuart C. McDonald; Douglas Ross; Naz Shah.

Questions 179–243

Witnesses

I: Professor Michael Ambühl, former Swiss State Secretary for Foreign Affairs, Pauline Mathewson, Managing Partner for Europe, Middle East and Africa, Fragomen LLP

II: Sir Ivan Rogers KCMG, former Permanent Representative of the UK to the European Union

Examination of witnesses

Professor Michael Ambühl and Pauline Mathewson

Q179 **Chair:** Can I welcome everybody to this session of the Home Affairs Select Committee's inquiry into post-Brexit migration options? Can I welcome our panel today and ask you each to introduce yourselves? Professor Ambühl.

Professor Ambühl: Thank you very much, Madam Chair, distinguished honourable members of the Committee. I am a former Swiss negotiator for bilateral agreements with the European Union. Now I am at ETH, where I am a professor for conflict management and negotiation and I also do, among other things, research on migration control. I am very pleased to be invited by you for this hearing.

Pauline Mathewson: Thank you for inviting me. My name is Pauline Mathewson. I am the managing partner of Fragomen Global LLP, which is the largest immigration law firm in the world; we are in about 25 countries. My responsibility is for Europe, Middle East and Africa. I am a British citizen, despite my accent. I have had a lot of experience: I am originally from Australia, I am a migrant to the UK and I live permanently in the UK.

Q180 **Chair:** Thank you very much. Can I just begin by asking you what you see as being the trade-offs between immigration and trade deals and how you think that is likely to emerge over the summer as part of the Brexit negotiations? Professor Ambühl.

Professor Ambühl: This is a very important point. I would put it under the following conditions: if market access becomes an important issue for the United Kingdom, then I think the question regarding free movement of people will become important, because as much as I know or I believe, in Brussels the opinion is very clear, that if you want to have market access, you have to take all the four freedoms and you cannot do what they call cherry-picking. If you also want to go for this market access, then free movement of people is an important issue. If this becomes an important issue in the negotiations, then of course it is the question of how you try to control or to steer the migration flow if this would be an issue for the United Kingdom.

In such a case, it would be important to know how one can have certain flexibility to negotiate such a possibility. What we proposed in a recent article published in a scientific journal—that is from my experience as a negotiator—is that it is often not very successful to question the fundamental principles of the European Union, but rather you focus on the implementation of such principles. In this case of migration, the idea of a safeguard clause or an emergency clause could be an important instrument to gain the possibility of a certain control of migration.

Chair: We would like to pursue that in some detail in a moment, but Ms



Mathewson.

Pauline Mathewson: Yes, I agree with Professor Ambühl. I was in Brussels yesterday and it is very clear how important the free movement part of the four pillars is to the EU. I think until the UK recognises that, there will be a stumbling block in any negotiations with the EU. It is also important to understand what the EU can negotiate. Until now, its only negotiations have been in long-term work permits, which is the EU Blue Card, the EU ICT and seasonal workers. Any other immigration aspect in the EU has been a party to the member states, not to the EU itself.

We need to recognise what the EU itself can do and cannot do, but the right of free movement is fundamental. Either we can accept free movement with controls or accept the possibility of a free trade agreement, which are bilateral agreements. They have inherent problems, as we can discuss later, if you want to talk about CETA or some of the other agreements from an immigration perspective.

Q181 **Chair:** What we would like to do first is to focus on both the emergency brake and other options close to the single market and then to move on to some of the CETA kinds of options.

Professor Ambühl, could you say a bit more about what kinds of restrictions on free movement you think would be possible—or possible objectives, at least—in a negotiation if the UK were to stay either close to the single market, in the single market or in a EEA style arrangement?

Professor Ambühl: Yes, exactly. I think you have received this PowerPoint slide.

Chair: We have, thank you.

Professor Ambühl: I can go through them if you like, but I can maybe be more general in the beginning.

Chair: We will look at the mathematical slides, but perhaps not go through them, if that is all right. What I was interested in most to start off with is what are the different kinds of restrictions that you think are possible, before we talk specifically about your emergency brake model?

Professor Ambühl: I personally could imagine there is a possibility for transitional regimes, meaning when you enter as a new outsider or as a country that is not a member of the European Union, even if you were in the EEA or if it would be like in the Swiss case, where you would go for a so-called bespoke agreement, then I would imagine you can certainly have a transitional period in order to smooth the entrance of a new system. As the word suggests, of course this is transitional and might not be sufficient then to say we have a certain control, because it will be maybe limited—I would say three, five, seven years, as a rule of thumb—for transitional period regimes.

On the other hand is what I would call safeguard laws, or in the UK context often the word is used, as I understand, “emergency brake”.



Then there are let's say two kinds of categories for the safeguard laws. One is a very abstract one, which exists already in the EEA agreement, which we also have in the Swiss case in the migration agreement. To be precise, this Article 14(2) that exists is in very general terms. It is also in the slides; it will be on page 4. Just very briefly, "In the event of serious economic or social difficulties, the Joint Committee shall meet and can then examine appropriate measures". That is very general. It is certainly good to have such a clause, but I would say it is most likely not very useful because—I would say "useful" is not the correct word, but it might be difficult to apply it, because it is so general. You could dispute what a serious economic social difficulty is and then you have a whole negotiation about such wording.

In the other category, maybe one we can talk later about is when you try to make a concrete clause, which defines in advance what serious economic or social difficulties could be, so that then you would be free to trigger such a clause in case the conditions are fulfilled. That would be a unilateral decision, provided that the conditions are fulfilled and then you could go ahead with taking them. That is a short answer to what kind of control possibilities I would see in regard to the context of free movement of persons with the European Union. I am not talking about third countries instruments vis-à-vis other countries of this world.

Q182 **Chair:** Your model that you have set out, do you think that would be compatible with an EEA kind of agreement?

Professor Ambühl: Yes, in the sense that in the EEA such wording I just read out to you—the Swiss wording—exists also, mutatis mutandis, in the EEA. In the EEA, one could also go for the concretisation, I would imagine. However, in the EEA you would be within the given framework of EEA by definition, and this would mean that you would always have to renegotiate the whole EEA agreement, an agreement where, even if I take the United Kingdom, it would stay in the EEA, but you would change the pillar. You would not be more on the EU side logically, but you would be on the EFTA EEA pillar side, and there you have to speak with one voice. You would have to convince the other partners also and you would have to change an existing framework, where if you go for a rather bespoke model, then you define the model, together of course with your EU partners in Brussels. Of course we would have to then also find a consensus.

Q183 **Chair:** Do you think it is better to have this kind of formula based on this precise definition of the kinds of circumstances, as opposed to the current Swiss negotiated agreement?

Professor Ambühl: Yes. In the Swiss negotiated agreement, this is the Article 14(2). I would say it is good to have it, but it is very vague, so it is not so easy to apply it because one does not have clearly defined what it means, what is the trigger and what would be appropriate measures. What I would propose is to have a clear definition of what the trigger should/could be, what would enable the country, if the conditions are



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fulfilled, to go unilaterally—without retaliatory measures from the other side—to take appropriate measures. The appropriate measures would also have to be predefined so that it is useful.

Maybe also in answering your previous question, I think there would be slightly an advantage to negotiate—if one wants to negotiate and if the EU would also be willing to go into such a negotiation—and to do it within a new framework, a bespoke framework of a bespoke agreement and not within an existing given framework, such as the EEA.

Q184 Chair: Before we explore that in more detail, Ms Mathewson, do you want to make any comment on the emergency brake model at this point?

Pauline Mathewson: From a business point of view, it would not be liked, because it puts a cap on things that cannot be foreseen in business. If we look at the rest of the world—and we can come to that later—and what other countries are doing, they are recognising that there is a lot of megadata, there is a lot of information about people movement and they want the freedom and flexibility to compensate for that in the future. I was trying to imagine what controls there would be and I presume it would be unemployment rates, it would be a cap on numbers. Those are defined models that cannot foresee what business needs in the future. The UK has an opportunity to be open for business on a world basis. I see the exit as an opportunity to align its current policies with the EU policies in the future. That may be difficult, but unless that happens, when we look at FTAs around the world, they are not very successful from an immigration point of view because of the difference between immigration for an FTA and immigration in general.

Q185 Tim Loughton: Professor, coming back to what has happened in Switzerland, it has all been a bit of a fudge, has it not, because the people of Switzerland voted against free movement and yet free movement still exists?

Professor Ambühl: I am not sure whether this is correct, to say that the Swiss voted against free movement. The Swiss population voted in 2000 in favour of free movement of persons as part of the package of what we call Bilateral I.

Q186 Tim Loughton: Yes, but the referendum last year or the year before now overturned that.

Professor Ambühl: That was accepted, then we had a couple of other referendum, especially when it was about enlargement of the European Union, the membership from 15 to 25, from 27 to 28, it was always accepted. What you are referring to I think is the initiative vote in February 2014, when the Government was asked to negotiate quotas for immigration with the European Union and then this negotiation took place and the Government solved this question by introducing a priority rule for domestic workers.

Q187 Tim Loughton: So it is a fudge, because that is not what the people



voted for, is it? If you have a quota system, then you cannot say that is free movement; the two are not mutually exclusive. What Switzerland did was to come up with a rather strange unworkable fudge, where it would supposedly have to be seen to be giving first priority to Swiss residents on jobs, after which the jobs could be offered to non-Swiss residents. It was a fudge: for all intents and purposes, free movement in Switzerland continues apace. I go to Switzerland every year. When I drive, my passport is never checked at the border. The only reason I am stopped at the border is to extract 100 francs from me in order to entitle me to drive on the roads, but free movement absolutely still exists.

Professor Ambühl: Correct.

Q188 **Tim Loughton:** What you are describing, it is very interesting, your presentation. I am afraid I have to admit to not understanding it, but then I was never much good at algebra at school, which I think you need a grasp of. This would not work outside of the EU, would it? We had a shot at an emergency brake as part of the prereferendum negotiations and the EU were not forthcoming with any workable emergency brake option. They were not amenable to it within the EU and outside of the EU we have voted for an ending to free movement of people, so this therefore becomes irrelevant when we are outside of the EU, doesn't it?

Professor Ambühl: I would say in case the United Kingdom or any other outsider wants to have market access with the European Union, then Brussels will most likely say that is to have it, but the full tariff, meaning the four freedoms and not only a part of it. I am not saying that one has to go for this, but if one would go for market access, then the question arises, what do you do with free movement of people? I am not pretending here—and how could I—that you could negotiate an exception on free movement of persons. I am rather saying I believe if you go for market access, then free movement of persons will be an issue.

I am in no way pretending that what we have presented here is a full control of migration. It is not. It is just in case of certain conditions, let's say if there is excessive migration, that you would be allowed to have a certain control, provided that the two parties would agree on such a clause, which is of course not the case. Maybe I made my presentation not very clear: the Swiss did not negotiate about this. This is not a Swiss clause. You were perfectly right, the Swiss have free movement of persons with the European Union, contrary to the initiative that was voted for in 2014.

Q189 **Tim Loughton:** Correct, so referendums have not worked in Switzerland, but if a referendum is to work in the United Kingdom, we cannot continue free movement of persons. That was one of the fundamental parts of EU membership and was a fundamental reason why the British people voted the way they did. So free movement of people cannot exist after March of next year or whatever the agreements are in the transition period; I think you would agree with that. If you have quotas or you have some form of controls, that cannot be the same as free movement of people, so it is



therefore not realistic to suggest that we could engage in any relationship with the EU that is based on free movement of people. The Swiss experience would suggest that is the case, because despite voting on something, you still have free movement of people.

Professor Ambühl: I cannot of course confirm that this is the case for the United Kingdom. This is a political choice you have to take, whether you want to have more or less market access. This is of course purely a question for the United Kingdom to decide. My proposal here is only in case—underlined—the United Kingdom says, for good or bad reasons, which are absolutely outside my capacity to evaluate, “We want to have certain market access” then I could imagine this would be an instrument to have a certain control.

Q190 **Tim Loughton:** Why should market access be linked to free movement?

Professor Ambühl: I imagine, or what I hear from our friends from Brussels, they always say, “You cannot pick and choose. You cannot have cherry-picking. You have to have all the four freedoms and not only two or three”. Of course maybe this is a different case in the negotiation with the United Kingdom, but so far, as I understand it, this is not the question.

Q191 **Tim Loughton:** What other recent trade deals have the EU done with third-party countries that involve free movement of people?

Professor Ambühl: Let’s take the Canadian trade deal. It has of course no free movement of persons, but it has not the market access to the extent as it might be desirable for an outsider, like for the Swiss, the Norwegian or maybe for the United Kingdom. If this is not desirable, then the question does not arise.

Q192 **Tim Loughton:** But the answer to my question is nobody has negotiated a trade agreement recently that involves freedom of movement of people, so which country has successfully negotiated and operated an emergency brake policy?

Professor Ambühl: I do not think there are many candidates for having negotiated such a thing. It could be the EEA model or the Swiss model. Those are the only two I can refer to as possible candidates for negotiating such an emergency brake, but they did not.

Q193 **Tim Loughton:** Nobody has operated an emergency brake, so it is just not realistic, is it?

Professor Ambühl: Of course it is not up to me to decide whether this is realistic or not. The proof of the pudding is in the eating, meaning the proof of the negotiation is in the negotiation. It is the negotiation that gives the result. So there is no misunderstanding, we all know—or at least I believe I know—that there are no magic solutions and so this one is also not a magic solution. It is just an attempt to try to have on one hand market access and to fulfil the criteria of the European Union, because it is a very important player in this game, and on the other hand



to have a certain control of migration in case migration becomes a social or economic problem. That is all, but it is not to say this is the magic solution.

Q194 **Chair:** Switzerland has obviously had very recent negotiations on immigration and free movement. Why do you think Switzerland went for their current approach about advertising jobs locally, rather than exploring an option like this, like the one you have drawn up?

Professor Ambühl: I was not in the negotiating team, because I have been at ETH, the technical university in Zurich, for five years now. I would imagine the European Union is of course not keen to have a change compared to what we have now. This is Article 14(2), which is in front of you. They do not see a necessity to change this, so it was not so easy to convince them. This is an interpretation, it is not a scientific statement I am making now: I would imagine that the Brexit case question came into the negotiation in our Swiss-EU negotiations because let's say from October 2015 onwards, there was of course the possible EU-UK deal, importantly, and then this could have had disturbing effects on this negotiation, which I think were concluded by 19 February 2016, which was not an emergency brake in this sense.

Then your question, sir, why was not it possible to have a better deal in February 2016? Maybe the parties involved did not view the risk for a Brexit clearly enough.

Q195 **Tim Loughton:** But isn't the truth, Professor, that the Swiss caved to EU bullying, because the EU took exception to the Swiss people daring to vote for something that the EU did not like? They were faced with penalties, exclusion from the Erasmus project and fined, and on that basis were bullied into coming up with a complete fudge, which effectively continued free movement of people, diametrically opposed to what the people had voted for.

Professor Ambühl: You are right. Quotas is not a possibility within a room of free movement of persons. In this case, our constitutional amendment of February 2014 went too far for a possibility to find a consensus on this, because quotas are, by definition, a total contradiction with the free movement of persons area. There also may be compromises—not a magic solution, but compromises—to enforce this emergency brake, this safeguard clause, by making it more clear, more useable and not to go for quotas, which are of course, I would say, impossible.

Q196 **Chair:** A final question from me on your model: which years would your model have meant the emergency brake or the safeguard clause would have been triggered for the UK, had it been applied retrospectively?

Professor Ambühl: In case one negotiates such a model, such an emergency brake, we think one should always take the data of the three previous years and then say, "What has happened the three years before? Are we in a situation that can be—could be—assessed as a



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situation in which serious economic or social difficulties occur?" If these conditions are fulfilled, then one could take temporary measures, measures like saying that we limit migration temporarily on the level of the calculated threshold and/or we reduce the attractiveness for immigration, for example, by limiting the access to social security systems, a little bit inspired by the arrangement your previous Government had negotiated in February 2016 to say, "We limit for a certain period", to be defined what this period could be. This could be a one or two-year period and then it would return back to normal. But once again, the whole idea would be that you could trigger unilaterally under the condition that the criteria are fulfilled.

Q197 **Chair:** But as I understand, you looked back at different years and levels of migration in different years. I am interested in basically how many years of migration you have looked at and in which of those years this kind of emergency brake would have applied.

Professor Ambühl: We have not done an in-depth study because we have not had such an easy availability of data, not that they are not given, but it is also quite an amount of effort to find them. We calculated only three years in order to make a plausibility test whether this whole thing functions at all, then we did it for 2013, 2014 and 2015. If you take all the three years and you take the average, you can have a smoothening effect statistically. Just as an example, we had a threshold of 148,000 and the actual migration that has happened, according to the data we have—and these are Eurostat data—was 160,000.

Q198 **Chair:** But you have not looked further back?

Professor Ambühl: No, but that could easily be done if there is an interest.

Q199 **Naz Shah:** You talked about cherry-picking, so I am going to talk about the single market and free movement. In what ways, if any, could the UK satisfy public demand for control of immigration if it chose to continue to participate fully in the single market?

Professor Ambühl: If you choose to participate fully in the internal market—

Naz Shah: Yes. How do you think we could satisfy public demand on the control of immigration?

Professor Ambühl: This here is a possibility. This is a proposal to attempt to say with this, maybe one could say there is a certain control of migration that is possible due to such a clause, but it is not unconditional control and it is of course within limits. It is not like if you do it vis-à-vis a third country X or Y, where you would be sort of in complete freedom to do whatever you like to do, within of course the limits of agreements you have concluded with these countries.

Q200 **Naz Shah:** Professor, when you are talking about cherry-picking, you



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could not cherry-pick, but do you think free movement is a non-negotiable part of the single market or is there scope for the UK to negotiate with the EU?

Professor Ambühl: I am not from the European Union, as we all know, so it is not up to me to say what the European Union will decide or not, but as much as I know, the European Union is very strongly in favour of having a full package or none, not a pick and choose. I am not talking about the free trade agreement, which is basically then only about tariffs of goods. In such a case where it is a whole package, take it or leave it, I think it makes sense to focus the negotiation on the implementation of the principles and not on the principle as such. If I were asked, "Is the EU willing to think in such a category?" I could imagine it is not unfair to say yes, because they do it also internally, be it with Maastricht criteria, where they have quite a lot of flexibility while implementing them, or with the Stability Pact or with the distribution of refugees, where the principles are also given. But in the implementation in practice, it has quite good flexibility. Using this thinking, maybe one could have success with such an approach as I have presented here.

Q201 **Naz Shah:** What do you think is the balance to be struck between market access and control over immigration in the future UK and EU economic partnership? What do you think is the balance?

Professor Ambühl: The balance depends on your priorities for market access or having good co-operation. Would one go for a Canadian kind of agreement, where the trade is in the centre and no real market access questions, or would you go on the other extreme to the EEA, where you have full market access, or do you go for something in between, a bespoke agreement like the one the Swiss have negotiated? Of course a bespoke agreement does not have to be a Swiss agreement, it just has to have maybe similar characteristics, that it is sectorial market access on specific areas that are of common interest on both sides, in London and in Brussels.

Q202 **Naz Shah:** But in the absence of a willingness to accept free movement as it currently operates, what type of migration arrangements could the UK pursue that might help it secure favourable market access?

Chair: Ms Mathewson, do you want to come in on that one?

Pauline Mathewson: Yes, I have thought about that quite a bit. If I look at the gaps that are going to occur when the UK leaves the EU, the gaps are low-skilled workers, seasonal workers, independent workers, trade workers, anybody that does not have a university qualification. The question is how is the UK going to address those needs, that currently those groups of people are supplied by the EU? Ironically, there is a mismatch between the demand and the supply, so the demand by the UK for unskilled workers is much higher than any demand in the EU, so my view is perhaps the EU does not care that much; they probably care, but it is not as volatile as many other issues. There could be some negotiation on allowing unskilled workers into the country, obviously with



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controls, but it seems to me that it is not as political. It is very important for the country, but I think we have to address that, because currently there is no mechanism within the general immigration programme for the UK to support anything such as unskilled workers and seasonal workers. There have been former programmes that have worked in making the UK open for business.

Whatever the UK does at this time, it should be consistent, as far as possible, an alignment between the agreement with the EU and agreement with the rest of the world, because when I look at the free trade agreement with Canada, it was the most comprehensive EU trade and free trade agreement that the EU has ever undertaken and agreed, but from an immigration point of view, it is singularly unsuccessful. The reason is it is inconsistent. To give you a simple example, an intercompany transfer into Canada has to obviously align with the EU requirements, which is a three-year period of time, yet if you go under the general intercompany transfer into Canada, you can obtain up to seven years, so why would somebody go through all this process?

I can assure you, in our firm in Canada, I think we have applied for one immigration visa under the CETA agreement, which indicates that they are consistent. When I was living in Australia, there was an E3 visa programme, which was an encouragement of a trade agreement between Australia and the US and that had a quota of 10,000 people a year from Australia to the US. It was never used, because companies like simplicity, they like to know certainty, they do not want to have to look at a model and work out what is going on. While it might be part of a free trade agreement, it would be nice if the immigration part of it, with its relationship with the EU, is consistent with the general immigration vision of what the UK wants in the future.

Q203 Stuart C. McDonald: Ms Mathewson, just as a preliminary point, is there an extent to which we are now getting to a stage where realistically, just in terms of logistics, come the end of the transition period in January 2021, it is difficult to see how the Home Office is capable of putting anything in place and business responding to anything that is radically different to what we have just now?

Pauline Mathewson: Yes.

Q204 Stuart C. McDonald: Can you therefore foresee, as the Professor suggested, a transitional period of maybe three, five, even seven years, where something along the lines of free movement with perhaps one or two adjustments is what really has to happen?

Pauline Mathewson: There would have to be a transition period, because it is such a sudden death issue for the UK as it aligns its own labour market and encourages low-skilled working. I would see a transition. As I said, thinking about it, because of the requirement, there is no demand for low-skilled workers from the UK, generally speaking, into the EU, but there is a demand the other way, so it may be an



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achievable goal as one of the low-hanging fruit of a transition arrangement.

Q205 **Stuart C. McDonald:** Returning then to the issue of free trade agreements, including the CETA agreement, what are free trade agreement provisions in relation to immigration? You were talking about intercompany transfers. What is usually included in such an agreement?

Pauline Mathewson: There would be three main categories of immigration. One would be the intercompany transfers, business travellers and independent service providers.

Q206 **Stuart C. McDonald:** You have been critical about the ICT provisions. Can you just explain again what your problem with them is? Is it because they are not aligned to the UK's own rules?

Pauline Mathewson: The EU as a whole has really only implemented three immigration programmes, which is the EU Blue Card, which is for highly-skilled workers and they can remain up to five years; there is the EU ICT, which is three years. Presuming a reciprocal agreement, it would have to be between the EU and the UK. We would expect that the intercompany transfers between the EU and the UK would be three years, but our own ICT in the UK is five years and in some cases up to nine years, so there is a mismatch and it would have to be aligned. There are salary differences; there are qualifications. For example, the UK only recognises post-graduate or graduate courses, whereas the EU recognises skills and relevant job experience for managers and specialists.

Q207 **Stuart C. McDonald:** But could those inconsistencies be ironed out in the course of negotiating that free trade agreement?

Pauline Mathewson: I would have thought so.

Q208 **Stuart C. McDonald:** What about the challenges then in terms of low-skilled migrant workers? Are there any examples of free trade agreements where that sort of issue has been addressed more comprehensively than in CETA or addressed at all?

Pauline Mathewson: In free trade agreements, they generally are not addressed. There seems to be a lack of alignment—I am speaking very generally now—between the general immigration programme of a country and a free trade agreement. There seems to be a need to negotiate agreement. Immigration is a come along in the agreement, but it tends to be not that effective. I am speaking very generally about the agreements I have looked at around the world. The conspicuous one for the UK is the CETA agreement with Canada, because it was so comprehensive and it was the first agreement that the EU has ever negotiated as a whole. We must remember that most immigration matters in the EU are not EU competencies, they are country by country, and each country has its own right to protect its sovereign rights. It is an issue.



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For example, the free movement of business travel is under a free trade agreement, but the EU has not issued a directive on business travel, so almost inadvertently, the free trade agreement with CETA has a definition of business travel, but the UK would not want to be in a position where it is negotiating with each country in the EU, the 28 countries in the EU, about the rights of a UK person to travel in and out or for them to travel with reciprocity to the UK. Business travel is very important in anything. All of the agreements that the EU have reached have been for agreements for period of over 90 days. We must look at that very important key agile period of under 90 days where companies need to move people in and out.

- Q209 **Stuart C. McDonald:** Turning to non-EU migration and the systems we have in place for that, you have already expressed a view on the requirement of some sort of transitional period. Putting that to one side, do you think, at the same time as trying to come up with a new system—if they want to—for EU nationals, the Government will also have to alongside that look at some significant reform of the non-EEA system?

Pauline Mathewson: Yes.

- Q210 **Stuart C. McDonald:** What do you think the impact would be if, as some suggest, you quite simply said we are going to apply the non-EEA system to EEA migrants?

Pauline Mathewson: Simplification of the current system needs to occur because it is too complex. It needs to think about the future, the global economy, whereas many countries, including the US, Australia, Canada are looking at the world data and seeing what is happening—I am now talking from the world of business, of course—and saying, “We need to be open for business as a country”.

At the moment, a lot of reaction to policy is very backward-looking, what happened in the past. I think with artificial intelligence and analysis of the future, a lot can be opened. Ideally, the relationship with the EU should be flexible enough that it covers the general immigration programme as a whole. There may be a transition period—there will have to be a transition period—but I think given where data is in the future, there is a lot that can be done to be forward-thinking and be open for business, with integrity, obviously. The big things that companies look for are stability and integrity and they are prepared to take responsibility.

I will give you an example. Students are included in the net migration programme, yet students bring a huge benefit, export value, to the UK. It is such a mismatch of information. They should be left out of that data. In some countries—I have seen a country where there is a restriction on students applying for long-term work permits—they are now looking at data into the future and saying that if somebody, for example, is applying for a nursing qualification, that person has a right to remain in the future, but maybe somebody else doing a more general degree has not. They are looking at prospects in the future and that helps business in the future.



Q211 **Stuart C. McDonald:** More directly in terms of the immigration system, as of January 2021, if someone was to say to you that what we are going to do is simply apply the non-EEA system to EEA nationals, what would the practical implications of that be for business?

Pauline Mathewson: For the non-EU people?

Stuart C. McDonald: Yes, for business.

Pauline Mathewson: We need to simplify, first of all, the intercompany transfer, because it is overlaid. It needs to stop changing. On our list of countries on a heat map, the UK is constantly rated as a red, which means that companies do not like doing business because it is too unpredictable. We need to stop it from changing all the time. It is quite achievable to have a substantial stable immigration programme.

Q212 **Stuart C. McDonald:** Professor Ambühl, could I turn to you now? I have a couple of questions on the formula that you have come up with in terms of a brake clause. I can see that if you did want a brake clause, having something that was objective seems attractive. However, the model you use might have some surprising results, if I understand it correctly. For example, a net migration of 300,000 might, in one group of three years, not trigger the brake clause, but in another different three-year period it could trigger it simply because the other EU countries were changing themselves. Is that a correct understanding?

Professor Ambühl: Yes. What you say is practically possible from a mathematical point of view, but it is very unlikely, because the 500 million room of people has no such differences. To come back to a question from Madam Chair, in the Swiss case we used more data and there it was clearly visible that the changes are not that much. What we propose here once again is to try to say what is excessive migration; when can it be considered to be excessive? This is from a statistical point of view and not just from a feeling, "I think in the Tube there are now more foreigners than two years ago" because that is of course not a successful possibility.

You check what is the average in the whole room, the whole free movement of persons room, what is the average migration rate and then you say one has to be very much above this average to be excessive. One statistical measurement is the standard deviation, which asks what is the deviation from the average, from the mean. If we take two standard deviations, one can pretend, from all natural science, medicine and all these disciplines, if you are average plus two standard deviation above other countries, the normal, then you can say it is excessive. In this case you could say you want to have a measure like a capping, a temporary capping.

Q213 **Stuart C. McDonald:** To what extent does it take into account other considerations that might lead somebody to conclude that migration had reached an excessive level? For example, take 300,000 as net migration. There might be a period of three years in which that occurs and there is



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very high employment, so people might say that is not excessive in the circumstances, whereas in another three-year period there is a deep recession and there is high unemployment and 300,000 might be thought to be excessive. Does your formula take into account that sort of consideration at all?

Professor Ambühl: In our formula one could take into account not only the flow of migration in the years before, but one could also take the amount of people already here from these countries, the level of the population from the EU, which would be also a criteria. One could also discuss about a third-country population. One could take into account macroeconomic data like unemployment, as you have mentioned. One could also take into account criteria for the integration of foreign people, foreign residents. With these different parameters, which would have to be negotiated, of course, you would then have quite a set of screws, adjusting screws, to find where a reasonable threshold can be defined.

- Q214 **Stuart C. McDonald:** A final couple of questions on the possibility that labour market reforms could be used to address public concerns about immigration, looking, for example, to Norway and Switzerland. Does that suggest labour market reforms or even better labour market enforcement can be alternative means to alleviating concerns that members of the public might have about migration?

Professor Ambühl: Sorry, I did not understand that.

Stuart C. McDonald: Would labour market reform be a different way to alleviate or to address concerns that members of the public might have about migration? I am thinking in particular about how Norway and Switzerland have embarked on labour market reform in an attempt to address public concern about migration.

Professor Ambühl: Yes, I think so. This has not been something to do with this proposed formula, but of course this has an important aspect. It can have in both ways. If you have a labour reform, a very attractive one, then the attractiveness can be increased so you have a higher migration and you have a higher demand of people coming to the country.

- Q215 **Stuart C. McDonald:** In your own experience of the Swiss system, how did the EU respond to changes to Swiss labour laws? Has it tried to interfere in any way in some of the reforms?

Professor Ambühl: The EU has never interfered in this way in Swiss internal legislation.

- Q216 **Stuart C. McDonald:** Ms Mathewson, have you any views on whether labour market enforcement or labour market reform might be an alternative and perhaps better way to address concerns on immigration?

Pauline Mathewson: I think there is no evidence in the UK to say there has been abuse of the labour market. Meddling in the labour market and walking down the road that the EU currently has in countries like France



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and Belgium and so on, with very draconian labour laws, would be a disincentive for business and also, I would have thought, a burden on the Government to implement labour law requirements. For example, the Posted Workers Directive that is currently being implemented in the EU is terrible for business, terrible.

Q217 Stuart C. McDonald: Is there an extent to which you would agree that labour market enforcement in this country is pretty light touch? For example, the national minimum wage team seems to be tiny and the number of visits to premises is a fraction of what it is in other EU countries. There must be scope to increase that, without unduly placing a burden on business.

Pauline Mathewson: The way it works at the moment with the audit is quite effective. The burden on the corporation is quite significant, and you see that in other countries, where a good corporate citizen who is qualified as such has a lot of responsibility for their employees and it is very effective. I would have thought that the enforcement that the UK has—and the Home Office implementation is very effective—is making the rules about fault under that area quite significant. You can lose your right to bring in people; you have to remove people from the country. All corporates that I am aware of take it very seriously.

Q218 Chair: Ms Mathewson, your position seems to be that pretty much any option business does not like, but you are not going to get everything you want out of this process, because we have had a referendum and people very substantively voted for change, in whatever form that change takes place. If you had to choose between option 1, a substantial increase in labour market regulation in order to deal with anxieties about immigration being exploited and undercutting, or option 2, some form of emergency brake along the lines Professor Ambühl proposed, or option 3, neither of those, but a substantial reduction in the terms of trade and a poor trade deal, certainly outside the single market, which of those three options would you prefer?

Pauline Mathewson: Obviously you should keep the last option, as it is very important for the future economy of the UK.

Q219 Chair: You want to keep the single market?

Pauline Mathewson: We cannot keep the single market. I certainly believe we cannot because of the four pillars, that you have freedom of movement. I do not know, but I cannot imagine the negotiations that will go on about retaining rights to trade. Obviously anything that we can do to encourage trade between the EU and the UK must be promoted. If the people have voted against free movement, I think that is something quite separate.

I think whatever you do, obviously there will need to be some controls, but they need to be certain controls. My problem with an emergency brake is that it is not known. Business wants some form of certainty or some knowing in the future, so whatever is implemented in the future



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needs to be known as far as possible beforehand. That is the desirable outcome. If it is more labour controls, if it is labour market testing, so be it, but the concept of what we have at the moment, which is each month there is a cap, you might bring somebody in, you may not, you have a business plan and it is unworkable from a business point of view. It is certainty, but equally I understand the need for controls and integrity within the system.

Q220 Chair: A final couple of questions. Professor Ambühl, in 2012 Switzerland had a cap on long-term residents' permits for A8 nationals and then had a cap on permits for A15 member states as well. I am interested in the precedents for different kinds of restrictions within an EEA-style or single market framework. How does that previous Swiss model—not the current labour market one, but that previous 2012 one—compare to your system?

Professor Ambühl: This is clearly a transitional measure you are referring to and it is a result of the negotiation of the 1999 agreement, Switzerland-European Union, when the European Union was still 15 member states. This is the basis of our bilateral agreement, where we negotiated this transitional period of seven years and then plus three years. Then only it is total free movement of people. This model of 1999 could then be applied when there was enlargement with the eight Eastern European countries plus later with Bulgaria and Romania. However, this is basically old, this is over. Also there is in one case—it is still applicable—a transitional clause that is of no real value any more.

Q221 Chair: I can see it is not in place any more, but I am interested in terms of the precedents for negotiations with the EU. That one was agreed to and it was possible for Switzerland to introduce various measures that appeared to be very different from the normal operation of free movement. Do you think that provides any precedent or do you think that the EU are not going to be interested in any variant of that?

Professor Ambühl: I think so. All these agreements one has once negotiated are always a precedent for others in general and I would think that could be a precedent. However, in the UK case it is not exactly on the same level because you would not be new in the free movement of persons market, contrary to the Swiss case in 1999, or 2000 when it came into force, where we joined newly. In the UK case you would not join newly, you would stay in one or another form. From this point of view, one could say it is not really an analogous situation. Nevertheless, as a precedent, one can always say one wants to have whatever kind of transitional period. Normally in an important negotiation one can come to a conclusion on such things because it is not the major flexibility that is required, to have for a limited time a transitional regime, provided transitional does not mean 100 years, of course.

Chair: Thank you very much. Can I thank both of our panel members for your evidence today? We very much appreciate it, thank you. We will move on to our second panel.

Examination of witness

Sir Ivan Rogers

Q222 **Chair:** Sir Ivan, thank you very much for coming to give evidence to us, and thank you for dashing across London in order to get here in time. We very much appreciate your time this morning. We did run the previous panel slightly long in order to make sure you had time to get in through security. We do unfortunately have a very tight end deadline because of the business in the House, so we will need to finish this session at 12.30 pm precisely. We will therefore attempt to be very concise with all of our questions and would be grateful for your responses as well.

We are looking at the trade-off between immigration and trade agreements in the negotiation. Are you surprised that there has been no position from the UK Government on immigration thus far in the negotiations and do you think it will be possible to keep immigration out of the negotiations on the future partnership or not?

Sir Ivan Rogers: First of all, thank you very much for accommodating me on the timing.

No, I am not terribly surprised, because we are not at that stage in the discussions yet. The deep substantive discussions about the nature of the future relationship inevitably are still at a very, very early stage, because the withdrawal issues were put first and we are still cycling around the consequences of those withdrawal issues and the Irish border issue. I am afraid it pains me to say it, but it does not surprise me. I said it all along. We are not yet deep into any even preliminary trade discussions into which migration might fit.

In a sense, that is an option for the UK Government. They do not have to be part of the negotiations. If you say simply, "Free movement is at an end and we are not prepared to discuss our migration arrangements and those are a sovereign matter for us" you can do that. Will that then have consequences elsewhere in the trade discussions to come in 2019 and 2020? Yes, I think it will, but in a sense that is a sovereign choice to make once one is into phase 3, as I would call it.

Q223 **Chair:** If the UK decides to entirely keep immigration out of the arrangements and to agree or make no commitments on any kind of future immigration arrangements as part of the negotiations, what kind of trade agreement do you think we would be likely to get?

Sir Ivan Rogers: That brings us right back into the much wider discussion, part of which is going on today obviously around the customs union and whatever. The doctrine from the other side has been utterly predictable throughout that in response to the original four red lines the Prime Minister set out. They duly produced a sort of, "If that is where you are on free movement of people, the European Court of Justice, contributions to the budget and a sovereign autonomous trade policy, that takes you out into the mid-Atlantic, further out than Switzerland,



further out than Norway, further out than Turkey". That is the Barnier staircase graph. That did not surprise me because I was predicting more than 18 months ago that they would say, "If that is where you are, it is a bog-standard Canada dry deal".

Yes, there are ancillary negotiations with Canada around visa arrangements with individual member states, but there is a lot of free movement element to a bog-standard free trade discussion because there is mode 4 and all the kinds of things that come into free trade discussions, but there is not a deep chapter on free movement because that is obviously not relevant if you are in a bog-standard FTA. If you want more than that and deeper than that and single market access—I do not like the term because I do not think it exists—but if you want a much more single market relationship, then this issue will inevitably come back into play and then you get into the question of are the four freedoms even outside completely indivisible or is there a model that divides them in some fashion?

Q224 Chair: What sorts of options do you think there are? Suppose the UK decides to go as close as possible to membership of single market, EEA-style arrangement, as close as possible access to the single market. Suppose that became an economic objective, what options do you think there would then be in terms of restrictions on migration or reforms to free movement or reforms to immigration?

Sir Ivan Rogers: There are lots of different models. The question is is there something that is bespoke and unique and dynamic and different and British, which is somewhere between a Canada-type model and a Norway-type model? If you deal with an EEA-type model, what is the merit of the EEA? It is not bespoke, it is off the shelf and it could be done. What is the demerit? That is pretty obvious, in my view. I have never thought of the EEA as a long-term destination for the UK, although clearly had we never joined the European Union, we would probably have been in an EEA/EFTA-type relationship. That is a history we did not take.

An EEA relationship, what is the advantage of that from our point of view? Not in a customs union, clear sovereignty and autonomy on trade policy, as the EFTA states have and they have their own free trade agreements. What is the disadvantage of that across multiple sectors? Rule-taking and significant chunks, all the single market acquis. You accept lock, stock and barrel directives and regulations. You may have a role in policy shaping, but you have no role in the room. You are not making policy, so you are a rule-taker. I am from the Treasury, as you know, by background. Do I regard that as a palatable, long-term destination for a say on financial services? It seems to me to be very problematic. I have always seen an EEA model—this is probably a separate discussion you want to come back to—as implausible as the medium, longer-term destination, but not necessarily inconceivable as a short-term, transition chamber route out of the EU.



You know my longstanding view, because obviously it was very public at the point that I resigned, which is you should view leaving the European Union as a process, not as an event. It is inordinately complex across multiple sectors. We appear to be ending up heading towards whatever one wants to call it, a vassal state type transition up to the end of 2020, but then obviously all the speculation about what will not have happened by the end of 2020. I was always interested in whether there was an EEA-type exit route that would enable you at least to have a perch for a number of years where you had some of the freedoms and sovereignty that you would want. You would try, I think, as part of that to negotiate something on free movement, which would not be fully where you were going to go in the medium term, but it might have been an exit route.

I am very happy to discuss all that. I think it is the path not taken, because obviously it is not what the Government have done and it is not where the other side has reached and it is not where we are as a consequence of everything that happened in phase 1 and phase 2 of the negotiations. You can see what is happening at the moment and the two sides talking past each other on backstop and everything else. If it all broke down, could you get back into a world where EEA re-emerges in some fashion on the table? It is obviously worth pondering.

Q225 Chair: Our inquiry is into what the migration options might be. Suppose you were trying to achieve—whether through an EEA-style approach, whether through a bespoke approach—a close single market arrangement, what sort of immigration options do you think there are? What do you think about emergency brake options; what do you think about other kinds of options or not?

Sir Ivan Rogers: The key question is is EEA different or can you argue that it is different and more flexible or could be made more flexible on free movement than EU membership? Obviously I have been through the whole question of what you can get within the EU. Can you argue, on the basis of Article 112 of the EEA Agreement, there is something you could do? I think you can argue that it must in principle be different because obviously it is a provision that does not exist in the Treaty.

Article 112 starts with, "If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a contracting party may unilaterally [which is obviously different from within the EU] take appropriate measures under the conditions and procedures then laid down in Article 113". It is not really an emergency brake, it is what I would call a safeguard procedure. Incidentally, those safeguard procedures—I do not know whether Michael Ambühl has said anything about it or whether you have heard it from Norwegians or indeed Liechtensteiners—do not only apply in the area of free movement. They are generalised safeguard provisions that are part of the EEA Treaty.

Liechtenstein has a permanent arrangement. It was originally of course a transitional arrangement, but it became a permanent arrangement. There



are some who argue, as you will know, that they clearly have something that gives them materially different arrangements on free movement of people from anybody inside the European Union. There are others who argue, including Norwegians of my acquaintance, "That is all very well, but that is Liechtenstein, it is a microstate of 37,000 people. Obviously specificities of the Liechtenstein arrangements, you cannot build an architecture on that".

In a sense, you could not know what the UK could get before you got there, but you can build something. You could at least try to build something on Article 112 and say that exists. You can say that we obviously do have economic, societal or environmental difficulties arising. Then you have all the provisions in Article 113 that set out under what conditions you can take safeguard measures. You obviously have to notify the other contracting parties, which is all the EU membership and the other EFTA parties. You have to then enter into consultations, you have to give them a month's notice. Then any measures you do take and that are validated by the other side have to be reviewed on a rolling basis.

I have heard every different view expressed. The theologians at the centre, which I think will include the key people in key member states, will say, "There is nothing really very different about this from EU membership and you cannot build something on it and nothing more would be permissible via an EEA relationship than an EU relationship". There are other voices, and I have also talked to Carl Baudenbacher, President of the EFTA Court, about how free movement works in an EFTA relationship. You obviously do not have the full panoply of citizens' rights that you have within the EU. The very fact that the safeguard clause exists suggests that you must be able to use it.

Q226 Tim Loughton: Sir Ivan, I read your University of Glasgow speech, which is interesting. I kept waiting for the "this is the solution" bit, but it was 30 pages of, "We have gone to hell in a handcart and since we left our previous relationship" which is one you described as exceptionalism, which was bliss, "we have had it". Have I read the speech properly?

Sir Ivan Rogers: No, I do not think so. The exceptionalism thing, you may disagree with what I am saying there. I think we were, through my entire professional lifetime, mostly in the Treasury and inside the system, building a UK-specific version of EU membership. In fact, everybody would say that. We are not in Schengen. We are talking about EFTA member states and all of them are in Schengen. We are not in the euro and have a specific opt-out. We had a different relationship on JHA. My proposition was simply that for all the differences that I see between the Blairs and Browns and Majors and Camerons and Mays, there was a common element to what we were doing.

That came to an end in the referendum is my point. The point I was making was not that we had gone to hell in a handcart, but we do have to understand the difference between the way I was trying to describe



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the Cameron position, as I read it—probably a different language than the way he would use it—was we were trying to stay just inside the outer perimeter fence with the European Union, stay in the market, stay in the customs union, but be outside political union, fiscal union, banking union, monetary union and every other bloody sort of union. That is essentially the Cameron vision.

When you have chosen to leave, it is more difficult to have a relationship that opts you back into lots of bits of the machinery that you like than when you were in the inside. It is easier to do the carve-outs and opt-outs from within than it is to do the carve-ins from without.

Tim Loughton: I understand.

Sir Ivan Rogers: I was saying I think we then need to be clear-minded about where does that take you from the outside. I was careful not to go too far in floating propositions, but there is a proposition at the end. I think it has quite a lot of interest from other quarters and other capitals and I have had a lot of contact from people who have picked it up. I am just a punter. Now I am a citizen from the outside, I have no lockers in any of this. The backstop discussion is becoming extremely contorted and difficult and you can see the two sides talking past each other and you can see where Barnier & Co are coming from. That was all, in my view, predictable from the December agreement.

I am looking at this from the outside and thinking anything that is being proposed at the moment by the Commission in terms of the way in which they operate the backstop is obviously extremely problematic for the Prime Minister. I cannot judge how problematic. You will have a much better judgment than me. If that is the case and it is very difficult to devise a Northern Ireland-specific regime because that then creates all the political problems here that mean it cannot get through, the question is can you build a UK-wide specific regime, and if so, what does that look like? That squares off our objectives of having autonomy on trade policy, a close, deep and special relationship with the European Union and is potentially agreeable to the other side.

The proposition I ended with was something different in terms of goods than services and that points towards an ongoing, deep, customs union-type relationship on industrial goods. That raises the question of can you carve out agriculture and do you go somewhere different on services? I did not want to elaborate a model because I do not think from the outside you are capable of it.

Q227 **Tim Loughton:** To come back to the EEA that you alluded to just now, you would acknowledge, would you not, that being in the EEA or joining the EEA is not compatible with taking back control, certainly on free movement issues, is it?

Sir Ivan Rogers: I do not view the EEA as a sustainable, long-term destination, but that is primarily from a financial services type



background of why would you want to be a rule-taker in perpetuity in sectors where you are world class? That has always been the downside of the EEA from a Treasury person's perspective.

On free movement, I do not think it is a completely open and shut case because Article 112 exists. The question is what meaning does it have and do you conclude that even if you tried to pull this lever and say, "We do have serious economic and societal difficulties" and you ask what could you do on the basis of that? If you were to go around even a transitional route, you could say that for five years the UK considers that their position—on the basis of the kind of evidence you may have been getting from Michael Ambühl and the economic evidence—is so unique and our societal difficulties so severe that we propose to cap the numbers of people benefiting from free movement rights from without our former European Union partners at a number of X for the following five years.

The initial reaction to that from all the usual players I have no doubt would be horror and consternation. The question is after the horror and consternation had died down, would you get somewhere with it? Would you say, "This exists. We think it applies to us, we think we are in specific circumstances where it applies and we think therefore you should be relaxed about us going ahead with something that looked like that"? That be a sort of numerical quota.

Q228 Tim Loughton: Professor Ambühl put forward a rather complicated—which I still fail to understand—algebraic solution, which he did admit was not a magic solution. You need to know magic in order to understand how the thing works. The emergency brake, which again you are alluding to—quotas, emergency brake, however you want to dress it up—you were part of the negotiations with David Cameron, where the emergency brake idea was effectively rejected. Why on earth would the EU accept it now outside of the EU anyway? It is a non-starter, is it not? Where has an emergency brake been used? The answer is it has not.

Sir Ivan Rogers: The answer from some would be Liechtenstein, because there is a Liechtenstein model and that is now permanent. The argument against that being precedent for us would be Liechtenstein is a microstate of 37,000 people so it does not apply. The argument for it being a precedent is Liechtenstein is a contracting party and if they have been able to use it, why shouldn't the UK? I can only give you both sides of the argument. I do not think it is a slam-dunk either way. Would it be a problematic discussion? The emergency brake discussion with Cameron it is different when you are in the EU. It did not surprise me we had all the difficulties we had in the EU because it is a bit like a sacrilegious act to question free movement and the indivisibility of the four freedoms within the European Union. You then would say to me is it not a sacrilegious act right across the EEA as well? That is slightly less clear to me. I think you might well get that reaction from within the EU, but there might be a mood from some within the European Union that in return for



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a broader and deeper economic deal that was quite good for them—that is why I did it, rather deliberately, in Glasgow.

Are we saying that, come what may, they are so wedded to the indivisibility of the four freedoms, even for a non-EU player, that they are not prepared to contemplate some arrangement that gives you quasi single market type relationship on goods, something different on services and says, “You have a right to curtail and limit free movement, but not totally, and the counterparty of that is you get less market access on services”? I am only raising the question because it would be a kind of two by two division on freedoms. In their economic self-interest, if we believe in the economic self-interest of Germany, France and others, that is an interesting proposition for them. For some smaller member states I think it might have appeal.

Q229 Rehman Chishti: Sir Ivan, I have also read your speech at Glasgow. Far from being a modest punter looking at it from outside, you are in a unique position, having been in the negotiations, knowing the key stakeholders and knowing what the situation is back home in the United Kingdom. Taking you back to page 3 of your speech, you said, “Like it or not, others universally believe in the indivisibility of the four freedoms”. Is it really true that the four freedoms are indivisible?

Sir Ivan Rogers: The economic answer would be that they do not have to be and they should not necessarily be. Incidentally, if you want an academic argument for that, blessed by far better economists than me, look at the continental partnership idea that came out from Bruegel in August or September 2016. They raise exactly that point and say the four freedoms should not be indivisible and there is something different about free movement of people from the others. I think you can make a reputable economic case. The problem is, as a negotiator, you can make any reputable economic case and I made several over many years through many different Prime Ministers. The question is does anybody care and would anybody agree it?

Indivisibility has become a sacred and totemic thing, certainly within the European Union, and I heard it many times for specific European leaders I will not need to name. I heard it in person from them. This idea that it is all the creation of legal theologians, even if it is, leaders spout it and say it. I do not think it is economically terribly well-justified or rational, but as I say, as a negotiator that can be beside the point. I argued this frequently in the Cameron renegotiation to say, “You are being far too purist here, let’s look at this from an economically rational perspective” and also saying to people, “You are suffering from a brain drain that pulls out many of your best tertiary-educated people from your own economies into our economy. This is not necessarily a good thing for you either in the way it is operating”.

The question is why has it become a doctrine and is it economically fully rational? I do not think it is fully economically rational. It has become doctrine and I think if you remained as an EU member, you could never



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crack the indivisibility. I do think—which is why I am tentatively raising it in the Glasgow lecture—there is a question, especially if you are blocked on the Irish question. If we are really saying that the only way through an Irish question for the other side is what Barnier has put on the table and the only way through the Irish issue from the British side is what we have put on the table, then we are never going to meet and there is never going to be an agreement, because I can assure you I believe that the others will say, “The backstop is key and the backstop has to be permanent, not time-limited, and we do not believe in either of your options, either max-fac or new customs partnership”.

I was cudgelling my brains as an outsider, but ex-insider, thinking if we put all that together, is there a potential solution set here, which indeed tramples a bit on the sanctity of the four freedoms, but is potentially a palatable outcome for France, Germany and other key players on the other side of the table and potentially for us?

Q230 Rehman Chishti: Two points from that. On page 24 you talked about the customs union and I can come back to that in a minute. Some say we can have a deep and special partnership with the EU without some measure of free movement for EU nationals. Would you agree with that?

Sir Ivan Rogers: It depends what you mean by deep and special. As soon as you get into the business of saying we do not accept supranational law and supranational jurisdiction of any sort, which was certainly where we started in October 2016, then others say, “You are not part of the legal architecture and ecosystem anymore and therefore there cannot be a deep and special partnership that looks remotely like the one that you are describing”.

If you want the caricature of the British position from the other side of the table, if I can give it briefly to you, it is, “Now the British are going through the process of working out what they like about EU membership and they are demanding all kinds of things that they used to like about EU membership on exactly unchanged terms, but without accepting the supranational jurisdiction”. That is never going to run. I am afraid it is never going to run. You are never going to get France, Germany or others to agree that because that is basically most of the benefits of single market membership, but none of the costs and none of the obligations. They are obviously not going to agree that, I can tell you now. The Mansion House “ambitious managed divergence”, they are obviously not going to agree that.

Q231 Rehman Chishti: It all comes down to what we mean by special and deep partnership?

Sir Ivan Rogers: Yes.

Q232 Rehman Chishti: A final question. On page 24 you say, “A customs union alone does not solve either the Irish issue or the regulated goods sectors”. You just mentioned max-fac and the hybrid model. From the



two that have been put forward so far, which would you say is more likely to address those issues?

Sir Ivan Rogers: Max-fac does not solve the problem, as others see it. They do not understand why max-fac is on the table at all because, as I put it there, however facilitated the border, it is still a border and is still demonstrably different from what we have now. I do not think you will ever get max-fac agreed, personally. I will not quote all the sources I have who have told me that, but I do not think that is a runner.

The new customs partnership, as Sir Humphrey said, "It is a brave idea". It is complex, to put it mildly. We do not know whether the technology could be devised; it certainly does not exist at the moment. It involves us operating as a third-country power, policing the external border of the European Union and then an extraordinarily elaborate machinery for remitting back to importers the difference between what our tariff rates have become once we use our sovereign trade policy and what the EU's is. If you were confronted with that from the other side of the table and this was Europeans putting that to us and saying, "Could we police your external border of your external customs union and operate that?" I can imagine what the UK system's answer would be.

I am not saying this is wholly inconceivable, but I do know—and it has been widely reported in our press—that five or six key questions were asked of the UK side. The UK put this proposition on paper for the first time in August 2017. To the best of my knowledge there has been nothing since on paper from the UK. The other side directed five killer questions at it in terms of how it would operate. I allude to some of them and I do not think they feel they have had any answer from the UK authorities as to how this would be made to work.

Then it is a question of is it only a matter of technology and time. In other words, could they in principle, after a long process in which they have had involvement, agree this from a date, January 2023 or whatever or are they saying, "In principle, no, we are not prepared to allow a third-country power to police our external border and collect our duties for us"? That is, after all, their duties for the EU budget. "We are not prepared to do that on principle, it is no dice." If they are in that position and saying neither max-fac nor a new customs partnership is a runner, then you do not need to be in my shoes to think we are heading for a major crunch.

Q233 **Douglas Ross:** Sir Ivan, I too have read your Glasgow speech and have a couple of questions on it. You are going to regret having written it by the end of this Committee. We should all have gone to Glasgow perhaps.

I want to come back to an answer you gave to Tim Loughton. You said it is easier to opt out from within rather than from the outside. Also in the Glasgow speech you said, "I would characterise the Cameron renegotiation as the last of multiple attempts, dating back at least 25 years, to carve out and entrench a British exceptionalism within the EU". Based on your answer to Tim Loughton and also what you said in



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Glasgow, does it not reaffirm that it is almost impossible to get opt-outs either within or outwith the EU?

Sir Ivan Rogers: I think we had quite a lot of opt-outs with the EU.

Douglas Ross: Your words were, "Multiple attempts, dating back at least 25 years".

Sir Ivan Rogers: Yes, but we got ourselves out of Schengen and we got ourselves a very bespoke, unique relationship on JHA. It was a slightly bizarre one where we had a sort of mass opt-out from various instruments and then a five-year provision and then the then Home Secretary, now Prime Minister, was very heavily engaged, along with colleagues, in which of those 136 instruments did we want to come back into and under what circumstances. We ended up wanting to opt back into about 35 of the 135. That is totally unique. Nobody else has any relationship like that.

Q234 **Douglas Ross:** Tell if I am wrong: based on your words to Glasgow you were not saying the Cameron renegotiation was following on successful attempts to renegotiate opt-ins or opt-outs in the Europe in the past. There are some exceptions, but it has been a struggle from both within or outwith, both in or out.

Sir Ivan Rogers: It is a struggle. I do not greatly believe in a nirvana. I wish there were one where you could identify some wonderful model that none of us has so far thought of that has the best of all possible worlds. I was comparing the status of being inside, but trying to find yourself a carve-out. I think we did it very successfully in Maastricht on monetary union and have used it. We did very successfully on Schengen, which predates monetary union, and kept ourselves out of Schengen when non-EU states have gone into Schengen for their own reasons.

I think we did very well on JHA. I was the person who had to write the letters or sign off the letters, blessed by Ministers, for operationalising individual opt-outs on every instrument. It was not perfect by any means, but it did enable us to pick and choose on essentially operational grounds, which is what the current Prime Minister used to like about it because she could decide, "No, I do not want to be in this, it has no great value for the UK so it is better to opt out of that one, but I do want to be in that one because access to those databases is extremely important" and so on.

The difficulty when you are outside, as she is already finding, is saying, "I would still like all the benefits" as she sees them, say of the European Arrest Warrant or of Prüm or of access to ECRIS or whatever. That is much more difficult when you are taking yourselves out of the union and out of the jurisdiction, because other people say, "Hang on, you cannot have that when you are not part of the overall machinery". That is the problem.

Q235 **Douglas Ross:** Can I come on to your comments in Glasgow about the



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customs union? You said, "The UK debate is still characterised by extraordinary misconceptions, most inadvertent, some I fear entirely deliberate". Who is entirely deliberately misconceiving the whole debate around the customs union?

Sir Ivan Rogers: One is reading a huge amount of commentary from people, some of whom know their stuff, others of whom do not, and who have particularly—

Q236 **Douglas Ross:** You know your stuff. You spoke in Glasgow and you said to this audience in Glasgow—it is in your speech—that some people entirely deliberately provide misconceptions around the customs union. I would be interested to know who these people are and what are their entirely deliberate—those are strong words you used—misconceptions they are putting out about the customs union.

Sir Ivan Rogers: I go on to it at the end, in explaining why the customs union—after all, the customs union predates the single market and the customs union, you could argue. It was part of the common market, which predates the single market. I would say a common market is not a single market. When people say—and lots of people do and ordinary people understandably talk in those terms—"We only ever joined a common market and it has turned into something different" there is some truth in that, in that the single market project has deepened the customs union in a very radical way. You can only have a customs union that operates in the way the current customs union does if you go much deeper on regulatory alignment and harmonisation.

My point was some people say the customs union is just a customs union and just what happens at the border. It is not. A deep customs union of the sort that we have had since 1992 is underpinned by all the moves that have been made by Cockfield and others since on the single market. That is my point. Some people do deliberately—others inadvertently—blur the distinction between the customs union that existed in 1968 and the kind of customs union that we have now. We were always quite relaxed, I think. I may be wrong. I have read most of the literature and the Hansards of the 1960s and 1970s. I think people were more relaxed about the customs union issue pre-Cockfield and 1992 in the elaboration of the single market than they are now, because they see that the customs union brings with it a whole load of single market acquis.

The opponents of staying in the customs union are much more bothered, it seems to me, first about the deprivation of sovereignty on trade policy, but secondly about the ancillary stuff that is brought in along with it. You cannot dissociate the existing customs union from single market membership.

Q237 **Douglas Ross:** I know you deliberately did not tell me the answer of who are these individuals. That seemed to be entirely deliberate.

Sir Ivan Rogers: It is fascinating that both Directors General on the single market and on the customs union in Brussels are British. You



would not necessarily know it from our debate. I have talked to both at length. You should probably get them here or other committees should. They both would say you cannot easily divorce the customs union. In fact, you cannot divorce the customs union *acquis* from a single market *acquis*. Once you stay in a customs union, as the customs union has become—and it is a much deeper customs union in the way I try to explain it in the lecture than it was when it started in 1968—if it carries with it all that single market *acquis*, then my perception of parliamentarians' views, or some parliamentarians' views, is that is a bigger problem for them on sovereignty grounds than the pure customs union of 1968, if I can put it like that.

Douglas Ross: I would love to pursue that one a bit further, but we are short of time.

Sir Ivan Rogers: Outside the room.

Q238 **Douglas Ross:** If you are prepared to be off-camera, I do not know. Finally, on max-fac and hybrid, you said in an answer that hybrid was a brave idea, "This has never been done before. Whether it is max-fac or hybrid, it requires brave ideas and these will naturally not be supported initially by the other side because they have never had to look into this. They have never had to do the research, they have never had to adapt to working with either max-fac or hybrid". Would you not have expected the pushback that we are currently getting?

Sir Ivan Rogers: Yes, but I view it slightly differently, which is if you are them, why do you have to go through this pain? This is going to be highly complex, very novel, very expensive and put their own revenues, not just our revenues, at risk because we are policing their external border for them, despite having left the union. If you were in their shoes you would think, "Brave new world. They have produced an elaborate proposal, we do not yet know whether the technology could be devised and invented. We would have to track—or they would have to track for us—inside the EU 27 where goods have ended up in order to know how much to remit back to individual importers. We are allowing them outside the machinery, so they would not be part of the Parliament, the European Court of Auditors, OLAF or any of the institutions. We would be permitting the UK, as a third-country power, to collect our duties for us at what used to be their external border, but is now external border that they are policing for us".

I am a Treasury person by origin. If I were confronted the other way around with that proposal from the EU, I would be going to the Chancellor of the Exchequer or indeed discussing with the head of our National Audit Office and saying, "This looks like a rum proposition". I am not saying it cannot be done or they cannot devise the technology. If you are in their shoes, as a consequence of Brexit you are being asked to incur major public expenditure in your own jurisdictions for an untried proposition, where ultimately you cede control of your external border to a third-country power.



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Q239 **Stuart C. McDonald:** Sir Ivan, you described exiting the EU as a process, not an event, which I think puts it nicely. Would you agree that immigration policy in particular is something that is going to develop in a process and not in a one-off event? Because we have reached a stage where it is now virtually impossible for the Home Office to put in place a brand-new shiny comprehensive immigration system for January 2021 and what we are going to have must be something that is not too far removed from what we have now, at least for a transition period.

Sir Ivan Rogers: I genuinely do not know. I assume this is going to be a huge debate in this House and more broadly in the country of where are we going, what do we want and what is in the national interest and what are our economic interests and how do you balance potential economic interests of individual sectors with overall numerical control that demonstrates to the public—what is the public worried about here? Look, I do not know, but you can imagine it from the vote, they are worried about numbers, pressure on public services. They are worried about poorly-educated people coming in, low-skilled and so on, and potential wage compression consequences for themselves. Why would you not be worried about that?

That is why I was trying to make a distinction in my lecture in areas where you genuinely have sovereignty and control and can exercise judgments as to what is in the interests of your economy and areas. I do not know how similar any new regime will be to the old regime. It might be quite different and obviously there are questions then about do you have any European preference or do you not have any European preference? There are loads of big issues.

What I was saying about process, which was obviously misunderstood, most spectacularly when I said it in 2016, but is true—I would say this, wouldn't I—but it is obvious that I was right. This is going to take years to get to the other side and to a stable state at the other side. That is not messing up Brexit or undermining it or reversing it or anything. It is saying there are a huge number of areas where you are extricating yourselves from the existing relationship and the existing acquis, which is thousands and thousands and thousands of pages long. Then you are developing over time, some immediately, some less immediately, a different relationship with the EU where some bits you like—Erasmus or Horizon 2020 or whatever, Galileo, for that matter—there are loads of areas where you still want basically in and on as broadly comparable terms as you can, despite not living with ECJ jurisdiction. There are other areas where you may want autonomy, divergence and quite radical divergence over time, but you may not be able to assess in the next couple of years exactly how radical. This is a revolutionary system change. If you take Brexit seriously, which I do, you cannot say we can do all that in a jiffy. It is not going to happen.

Obviously I totally then understand the political reaction of late 2016 and subsequently of, "Is this a bunch of bureaucrats and mandarins saying it



is all inordinately complex and cannot be done?" I am not saying it cannot be done, nor am I saying you cannot extricate yourself from the customs union or plenty else. You can, but you are going to need a massively complex, phased programme to do so and you are going to have to go through every area of EU economy and society that is touched by the *acquis* and then take a sovereign decision about where you want to be.

Meanwhile, you are negotiating with people on the other side of the table, because not all of this is completely a sovereign judgment. If they in the end say, "We do not want a free trade deal that does that" or, "We do not want a comprehensive relationship that does that" all areas are going to have to be negotiated, from phytosanitary to financial services to competition policy, everything. That is not obstructive to say that, that is just saying all of this is going to be bloody difficult to do. Unless you are exactly going to replicate the status quo—in which case, what the hell are you leaving for—it is going to be difficult to create a whole set of different legal agreements.

The Swiss, if you talked to Michael Ambühl just now, have 120 different sectoral legal agreements, all of which hang together. They have spent 16 years on three successive negotiations to get there. There are very few Swiss, of whom he is one, who understand all these deals.

Q240 **Stuart C. McDonald:** Can I run very briefly through some possible end states in terms of trade and more particularly migration deals and see what your response to these are? First of all, association agreements. I think you said an association agreement might have some merit as a solution and the European Parliament has spoken about associate membership. What exactly does that mean and what would the implications be for immigration policy?

Sir Ivan Rogers: I am not sure on immigration policy I can give you a good clear answer. Association agreements are classic. In the litaney of Brussels jargon, association agreements are essentially what you give to external players, either because they are never going to get membership, but they are in a process of convergence with chunks of your economy and judicial architecture and want to move closer to the European Union—the Ukraine-type model—or because ultimately they do have an aspiration to join and this is the first step towards accustoming them to what the *acquis* will be if they ever join. Therefore my immediate instinct when people first raised an association agreement with me—which was well before the referendum, when I was thinking about these kinds of models—was to think, "This is not us, because we are a dissociation agreement". We are deliberately moving further apart. We want to diverge to a degree, so you need different machinery.

It is a Verhofstadt-type idea, but not just him in the Parliament, and serious people in the Parliament who are not, in my view, ill-intentioned towards the UK, think we need a deeper relationship with the UK than just a classic Canada dry FTA. I have talked to Verhofstadt about that,



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even since I resigned, and he said, "But that is not appropriate to the UK. We need a deeper, more textured relationship. That needs a structure and institutional mechanisms and an association agreement is something that would give you juridical structure, process structure, governance arrangements that work and have been tried elsewhere, which we are familiar with, which Parliament is familiar with and might work, which would give you a more deep and special relationship that just a Canada relationship".

Does it work across the board? I started a bit sceptical about this, but I do think we are going to have to find some things that work. I do not know where the Prime Minister will end up on the ECJ and governance questions, but there is going to have to be dispute resolution machinery of a juridical sort between the UK and the EU 27. You could go down the EFTA-type route or devise a UK-specific court that looks like the EFTA court route, and I have talked to people like Carl Baudenbacher about that and how that works and what is the difference. There is going to have to be something and if we are very uncomfortable with it ever being the ECJ or always being the ECJ—and you do have that issue running on the withdrawal agreement—we are going to have to devise something with which this House and with which the Government is comfortable and the other side can live with. That is a very big challenge.

Q241 Stuart C. McDonald: You have helpfully answered my next question, which would be about comparing an association agreement with a Canada-style free trade agreement, but is there nothing specifically on or off the table in terms of immigration deals through either of those mechanisms? Is there nothing to say you could not do whatever you want essentially, or agree whatever you want in terms of migration, regardless of which of those options you pursued?

Sir Ivan Rogers: It goes back to the original question of is this something on which you are putting it in the pot, you actively want a conversation and you are exhibiting a potential European preference and then saying, "We would like to talk to colleagues about how this would be made to work and what it means for European jurisdiction"? Ultimately even if we go completely unilateral and say, "We are exercising a sovereign choice. This is our migration policy. We will do whatever we like" I assume we will nevertheless have consultative mechanisms with former partners, as we will with other third-country players, of, "This is how we see it working. What is your reaction to that?" Then there is the big question of are we saying that we are going to have in perpetuity a preference for Europeans in terms of how they are treated with regard to access to the labour market over other players, including Commonwealth players? I do not know where we will end up on that debate, but those are all questions.

Bear in mind my Mode 4 point on third-country trade deals. The Prime Minister ran across that on the India trip, but she ran across that when the EU was negotiating with India. We were one of the biggest obstacles



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to free movement type provisions, Mode 4-type provisions in the India agreement. Other large developing countries, when they do trade deals with developed countries, stick issues about free movement of professionals and their professionals into your economy on the table. You cannot avoid that and those questions are coming.

Q242 Stuart C. McDonald: You have answered another of my questions. My final question is about labour market reform. We heard evidence earlier that there is a degree to which Norway and Switzerland have used labour market reform and enforcement as an alternative means of trying to address some of the concerns you outlined. Is that a viable alternative for the UK to take? What would the EU response be to that sort of measure?

Sir Ivan Rogers: Switzerland is an odd case and obviously Michael Ambühl has forgotten more than I will ever know about it, but they do not have a particularly open and liberal labour market and it is quite sticky. There are some elements there of national preference that they have got away with as part of this process since the 2014 referendum. They are not classic open, liberal, free market. What has our selling point been, rightly or wrongly? Obviously the politics of this have been part of what has dictated Brexit. We have never been interested in what we have regarded as protectionism on posted workers, agency workers, whatever. Across both Governments, we have always made a merit of having a very open and flexible labour market.

I would argue—but I am a Treasury guy by origin—that that has been good for the country, certainly at the macro level, but there are clearly micro and political reactions to it. You can make your labour market much stickier and less flexible and I would argue, from what I know of the Swiss labour market and the Norwegian labour market, that they are less flexible and less open than ours and the Swiss are rather closer to a French-type model of how to run an economy than they are to our type of model. They are not absolutely free market, open market people. I do not think you necessarily could be in Switzerland. Look at the extent to which they over-subsidise agriculture much more heavily than the Common Agriculture Policy does. You probably have to if you live in a mountainous, landlocked bit of Europe.

We could have done much more domestically on registration schemes and things that would have made access to our labour market more difficult for foreigners without any constraint from Europe and without being deliberately discriminatory. What we ran up against in the Cameron negotiation—which again I totally understand, but which meant we ran into a huge problem—was that he wanted to deliberately discriminate against EU nationals as compared with UK nationals and say, “Unless you had established a longstanding connection with the country, your benefit rights would be different from those of UK nationals”. That is simply not possible in the EU under the Treaty because that is direct discrimination on grounds of nationality. That is what we ran up against.

Q243 Chair: A very quick final question, Sir Ivan. As a negotiating tactic or



strategy, do you think it is better for the UK to approach this in terms of talking about existing models and then amending them or is it better to start from a blank sheet of paper? In other words, do you make more progress by talking about EEA minus or EEA amended or do you make more progress by saying, "Here are the component parts that we want in a bespoke—starting from a blank sheet of paper—agreement"?

Sir Ivan Rogers: It is a very good question and a very difficult one. It drives you potty when you are living in Brussels—and I have lived through this for a very long time—that people do think in terms of specific models and want to pigeonhole you in terms of models. This Prime Minister I know from the outset, as were previous Prime Ministers, has been very frustrated with that, saying, "We want something bespoke, unique, dynamic and British and why are these people obsessing about whether we are Ukraine or Canada or Norway or Japan? What is the matter with them? We are Britain". I get that, but the trouble is the way in which counterparts, technicians, technocrats and mandarins around Europe think of it, which is in terms of models.

They have a huge comprehension problem dealing with the UK debate, because they think, "What do these guys want?" They also have this doctrine, as you know, of parity between rights and obligations, which is endless. It has genuine meaning, although perhaps less substantial meaning sometimes than you get, but they say these things go together, so, "You cannot say you want Norwegian rights of market access to our market while not accepting any of the obligations in terms of jurisdiction, Schengen Agreement, free movement and budget contributions that the Norwegian model does". "Computer says no" is basically the European reaction to that—you cannot have that with that, you can have that with that—rights and obligations go together.

We are where we are because we have had three Prime Ministerial speeches and lots of interventions and we have gone for bespoke. I understand obviously why she has, because she says that Canada is not remotely appropriate, it is not deep enough and it is poor in terms of market access, so why would we want to live with that? We do have the rather compelling argument that we are a major strategic player, 20 miles off their shores, we are not 3,000 miles away, and we have a much deeper relationship than that. The problem is that they then immediately think, "Okay, but what is the governance relationship on that and what are the obligations that you are prepared to take that are analogous to those people who are in that pigeonhole?" I do not know whether that answers the question.

If I were thinking about an EEA-type model, and I do think that has gone probably, but if it had not gone and you were going back to an EEA model, what would you do? You would say you wanted that over a transitional period. I do not think the EEA is a reputable, serious, longer-term destination, primarily on the services side of the economy, but I may be wrong. It is not true to say that the EEA involves all the *acquis* of



the EU, so I do think that is overblown in political argument here. The EEA is a lighter acquis, but it is nevertheless considerable numbers of hundreds of directives and regulations.

You would be saying, "We want unanimous acknowledgement by all of you that we are in a specific position and we can take unilateral measures to restrict the numbers of people coming to the country for X years" or for the years of the transition, to a specific number, notwithstanding the provisions of Article 113, "and we want you to guarantee that you will not trigger the provisions of Article 114" which allow them to take countervailing action if they did not like it. You would have to have that debate because there can be reprisals under Article 114.

Say we had never joined in 1973 and instead we had stayed in an EFTA-type relationship and not gone down this route. Presumably by now we would have been in an EEA-type relationship and I think the EEA would have looked different because we would have been in it. The problem with it, which is Tim Loughton's point, I think, is that it does not give you voice and control and it is a loss of sovereignty. I agree with that. The Norwegians and others from outside tried to say, "We want a genuine voice in rule-making, not just rule-shaping"—you will have had the rule-making versus rule-shaping stuff from Michael as well, I imagine, because I have talked to him about it—"and that is not good enough for us". Ideally, in an EEA-type world we would want a series of co-ordination committees between the UK and the EU 27 to say, "We need a role in policy-shaping that goes much deeper than what the Norwegians and Swiss currently have". I think that is where you try to go.

Chair: Sir Ivan, thank you very much for your evidence. We have to close it here because the EU (Withdrawal) debate will be starting in the Main Chamber. Thank you very much.