

Exiting the European Union Committee

Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372

Wednesday 11 July 2018

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Members present: Hilary Benn (Chair); Joanna Cherry; Sir Christopher Chope; Stephen Crabb; Mr Jonathan Djanogly; Richard Graham; Wera Hobhouse; Stephen Kinnock; Jeremy Lefroy; Mr Pat McFadden; Seema Malhotra; Emma Reynolds; Stephen Timms; Sammy Wilson.

Questions 2142-2200

Witnesses

I: Allie Renison, Head of Europe and Trade Policy, Institute of Directors; Henry Newman, Director, Open Europe; and Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law, University of Liverpool.

Examination of witnesses

Witnesses: Allie Renison, Henry Newman and Michael Dougan.

Q2142 Chair: Good morning. On behalf of the Committee I express our thanks to our witnesses today for giving up your valuable time to come and give evidence to us. I introduce Henry Newman, the Director of Open Europe, Allie Renison, Head of Europe and Trade Policy, Institute of Directors, and Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law at the University of Liverpool. You are all most welcome. We meet at a very interesting time between the Chequers agreement and the White Paper that we are all eagerly anticipating. We have a lot of ground to cover, as always in the Select Committee, so it would be really helpful if you could try to keep your answers as succinct as possible.

I have some questions, which we will explore in more detail with members of the Committee as the hearing unfolds, that I want to put to each of you and, first of all to you, Ms Renison. What kind of reaction have you had from your members and what is your reaction to the outlines of the proposal that emerged from Chequers on Friday?

Allie Renison: Thank you, Chairman, and thank you to the Committee for having me. I think at the moment any progress is progress. That was also the reaction that we found from the membership with every stage forward that was taken through the process of negotiations. The outline of the agreement does reflect, certainly for goods in regulatory alignment and actual harmonisation, that it is in line with the priorities of the membership. There was a preference for alignment on goods, and also to a certain degree in services but it was particularly pronounced in goods. We published data shortly before the meeting at Chequers that highlighted that when we were presenting the two options, the maximum facilitation and an arrangement that would obviate the need for customs declarations, the vast majority, including those who do international trade and are familiar with customs processes, were in favour of the arrangement that negated the need for those customs declarations even if it took longer to put in place. In that dimension there is a warm welcome for it, but there is a lot of questions remaining that hopefully the White Paper will address, particularly in regard to services but also on labour mobility.

Q2143 Chair: You touched on the implications for business tracking in what you said a moment ago. Under this system, in the end HMRC—and indeed the EU—is going to have to be persuaded that an item that comes into the UK from outside the EU is going to end up in one of two places, either stay in the UK or go to the EU. What are the implications for businesses in respect of goods and agri-foods for the cost and the time involved in tracking to offer sufficient satisfaction to the authorities that that is where the goods have ended up so that if the duty rates differ the correct duty rate has been paid?



Allie Renison: I think that reflects the fact that there has been a limited engagement to date with companies on the so-called elements of the customs, the new customs partnership. We know that there has been—I think it is now in the public domain—limited testing of some companies through a consultancy with HMRC. Most of them have signed non-disclosure agreements, but we would need to see far more testing of that to really be able to understand what degree of complication and cost the companies would arrive at, particularly in respect of what kind of tracking mechanism would be needed. The issue is less about where the goods are coming from than where they are going on to.

Q2144 **Chair:** Professor Dougan, there is an interesting debate generally going on about where the dividing line between goods and services is to be drawn, and that is reflected in debate about whether our statistics are accurate. As an initial reaction, do you think it is possible to have a rigid distinction between, on the one hand, goods and agri-foods where the Government are indicating we will be fully aligned and if the rules change in Europe we will make the same changes here and, on the other hand, services where that commitment has not been given? The Prime Minister indicated a general wish to align in her Mansion House speech, and maybe we will see more in the White Paper tomorrow. Do you think that at a technical European level it is possible to make such a distinction, given that a number of goods these days come with a service attached; it is one package?

Michael Dougan: There are two issues to flag up. First of all, we need to see more in the detail of the White Paper about what the Prime Minister's plans are, the Government's plans are, for services. Pre the Chequers statement, the assumption was, based on previous speeches and future partnership papers, that the Government were seeking a deal on services, especially financial services, that would say equivalency of outcomes leading to mutual recognition, so effectively we continue to have a form of passporting but without necessarily having regulatory alignment. It is difficult to tell from the Chequers statement whether that will still be Government policy. I think that is one of the main things I will be looking out for in the White Paper and the EU will probably not react to that proposal terribly well. We still don't know quite what the Government have in mind after Chequers.

More specifically on whether it is possible to distinguish between services and goods, EU lawyers have to do that all the time, effectively, because we have one body of rules that governs trade in goods and we have another body of rules that governs trade in services. Although there are many similarities in the underlying principles, there are also some important differences. From a more practical perspective, with the evolution especially of the digital economy, there is a growing recognition that there is a real regulatory challenge in dividing goods from services in reality. It is often referred to as servitisation of the economy whereby people are not buying a good anymore, they are buying the service that the good represents and the good is more or less incidental to the



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performance of that service. We can think very obviously of something like a mobile phone contract where you have the phone but it is actually the mobile phone services that you are interested in. It is technically possible but it is not necessarily practically desirable to draw a very rigid distinction between the way that you deal with trade in goods and trade in services.

Q2145 Chair: Thank you very much. Mr Newman, given that services represent 80% of the British economy, what is your reaction and what do you think will be the reaction of the services sector to the focus in this proposal on goods and not so much in terms of alignment, and therefore certainty, about what the Government are seeking in the future on services?

Henry Newman: The first thing to say is that is very welcome that the Government have a plan. It has taken an extremely long time to get to a clear position, so that is very welcome. We wrote a report that came out last month called "Striking a Balance" where we looked at what sort of relationship we should have with the EU in economic terms and broadly came down in favour of an alignment on goods and a managed divergence on services. Part of the reason for that, particularly on the services side, is that even if you look at the areas where the single market in services has been most effective—financial services, for example—the pattern of our trade is still much more global than it is with goods. That is probably because of factors like language, the legal system and so on that makes it easier for us to trade outside of Europe despite the benefits that passporting and so on allows in financial services. Even in financial services, less than 40% of our trade is with the EU.

We recognise that for that very significant area of our economy it would be difficult to leave ourselves bound by rules that will continue to evolve quite quickly in some areas and services but over which we have no control. Referring back to what Professor Dougan was saying, the question of how those rules continue to evolve will be problematic and it is something that the Bank of England has also expressed concern about. We felt that the Government's idea, or Treasury's idea, of seeking mutual recognition on financial services was unlikely to be achieved and it would be better to go for some sort of enhanced equivalence approach on that basis.

Overall, I think it is very welcome to have a plan. We have not yet seen the White Paper and there is certain language in this three-page summary that we have that suggests harmonisation, as Allie Renison was saying, but equally there are other sort of weasel phrases like "covering only those necessary to provide for frictionless trade at the border". What does that mean? When we get the text of the document that Cabinet is agreeing today we will hopefully see a bit more.

Q2146 Chair: That is very helpful. You have just referred to the extent to which we sell services to other countries in the world outside of the EU and that is a growing market. Can you give us a couple of examples where our ability to do so is currently constrained by the requirement to align? If it



is a growing market, we have been successful in doing so notwithstanding those rules.

Henry Newman: That is true. With regulation, business has always adjusted to extant regulation by its very nature, but the question of where do those regulations change in the future is perhaps more appropriate. There are some examples where our banks are limited in the business that they can do in Asia by the basis of having to follow EU rules. I am not the right person to discuss all the details on this but they have made it clear that regulatory changes in the extraterritorial business they can do outside of the EU could benefit from deregulation. I think the insurance industry has also made various noises in this direction.

Q2147 **Chair:** Apart from banking and financial services, are you aware of any examples in all of the rest of the service sector where alignment with European rules has stopped us from selling?

Henry Newman: It is broadly true that the services single market is very far from complete. That has been a complaint of Britain for a very long time. There are all kinds of requirements in place at the European level that currently prevent the free movement of services across the EU and we have looked at some of this in our report.

Q2148 **Chair:** No, I understand that but I am talking about our ability to sell services outside the EU currently. The question was, apart from banking and financial services, are you able to give us any examples of where maintaining alignment thus far with European rules has stopped us selling services?

Henry Newman: I think banking and financial services would be the obvious sectors given that those are the sectors where—

Q2149 **Chair:** Are there any other examples you can think of?

Henry Newman: Not that come immediately to mind.

Chair: That is fine. That is extremely helpful.

Q2150 **Stephen Timms:** Can I pick up the points you have been making about financial services? Professor Dougan, I think you characterised the British Government's aspirations, as we understand it at the moment—as you say, no doubt it will become clearer tomorrow—as the Government want enhanced equivalence leading to mutual recognition. Can you explain what appears to be in their minds?

Michael Dougan: It might be helpful for me to point out that a couple of months ago I produced a report for the European Parliament on exactly these issues. I think a copy is probably available for the Committee to peruse. There is a lot more detail in the European Parliament report and I will summarise very briefly what that report said. This is reliant on pre-Chequers, pre-White Paper, obviously, but the Government had suggested that there should be some areas where the UK both shared the EU's policy objectives and was prepared to align with its more detailed



legislation, goods being an obvious example, and we see that reflected in Chequers still. There would be other areas in another extreme where the UK neither shared the EU's policy objectives nor any desire to regulatorily align, and free movement of persons would be an obvious example in that category. But in the middle there were fields where the Government indicated that they shared the EU's policy objectives but did not necessarily want to be bound by the more detailed regulatory standards that underpinned them, and financial services was one of the main examples that fell into that category.

The Government seemed to be suggesting—it was difficult to work it out without more detail—that as long as the UK were to keep some form of equivalence and were to stay roughly in tandem, at least on outcomes, with the EU's regulatory standards, that there should be no real obstacle to continuing mutual recognition, that services that are lawfully provided in the UK under UK law could be recognised as lawfully-provided services across the rest of the EU as well. The big problem with that proposal is that it assumes that equivalency of outcomes is enough to justify mutual recognition, and it is simply not. Mutual recognition is built on mutual trust and mutual trust is not something that generates spontaneously, it is not something that falls out of the sky and we just trust each other across borders. It is something that is the product of really difficult, controversial, sensitive processes and institutions and structures that try to make sure that countries work together in a very closely co-operative way, they trust each other, they trust each other's institutions and courts, so that they feel that their public interest can be protected even though the service is extraterritorial, in effect.

To try to have similar outcomes but without all of those standards and processes and institutions and co-operation networks, you are asking an enormous amount from the member states. In fact, what I suggest in my report is that the UK in these sectors is not just asking for special treatment as a third country, it is actually asking for better treatment than the member states give each other even within the EU, and that is not a terribly credible policy ask.

Q2151 **Stephen Timms:** But enhanced equivalence could be credible, could it?

Michael Dougan: Leading to mutual recognition? It depends on what we mean by enhanced. If what we mean is that we are describing effectively single market membership by another name and that is enhanced equivalence, yes, that should be credible if it is part of a broader package that the EU finds acceptable. Enhanced equivalence in the sense that we will still have significant policy alignment but regulatory divergence, but we will still lack, for example, the common institutions, the common networks, the common judicial oversight, the common enforcement provisions, is a very big ask. Effectively what you are saying to the member states is, "Why do you lot give up so much of your autonomy and subject yourself to this external supervision and oversight to get the



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same results as we do when we don't have to do any of those things?" That is a really difficult policy to sell to the other member states.

Q2152 **Stephen Timms:** What do you think the British Government could seek credibly on financial services for the future?

Michael Dougan: I think we have the soft and not quite so soft Brexit options. Obviously the EEA or an equivalent set of agreements and institutions is what delivers single market access as we know it today. The European Council's current offer is that if you are not willing to go down that route, we are looking at the principle of home state control, subject to WTO disciplines, together with regulatory co-operation so as to facilitate the movement of services. They are the two main offerings on the table. It will be interesting to see in the White Paper whether the Government come up with a more detailed set of proposals that might move services closer to what they have achieved on goods. I am not suggesting for a second, by the way, that I think the goods proposals in Chequers are clear or workable. I think we can probably talk about that, but it will be interesting to see whether the White Paper moves on services towards one or other of those two poles, something like the EEA or pretty much an ordinary free trade agreement rather than where we are at the moment, which is a not very credible set of proposals in between.

Q2153 **Stephen Timms:** If we were to end up with something like the latter arrangement that you have described, how do you think the financial services industry in the UK would respond or what would their reaction be to that rather reduced basis for a relationship?

Michael Dougan: I wonder whether that is a question that might be better answered by Allie.

Allie Renison: I think that particularly some of the larger financial institutions are not waiting for the arrangements to ensure their market access, that is for sure. A lot of the bigger companies had to provide details of their contingency plans last July to the regulators and the Bank of England. It is particularly an issue potentially for some of the foreign banks who are here. Their presence here is largely based on their access to EU markets rather than domestic financial services providers. That is where you see more of the discussion on potential relocation of certain jobs and offshoring on to the EU market from some of the American, Japanese and Swiss banks. We know that when we asked the question of alignment of the IoD's membership, there was still a preference for alignment with single market rules in financial services but the share of those who preferred something that was more tailored to domestic needs was notably higher than some of the other areas.

Q2154 **Stephen Timms:** Professor Dougan, you have explained that the Commission is hostile to a mutual recognition arrangement. Is it possible that the UK Government might find a better response among the 27 member states than the response from the Commission itself?



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Michael Dougan: I am not sure I would say it was the Commission that is hostile. I think it is the European Council, the Commission and the European Parliament, so we are talking about the full institutional bloc of the EU. Certainly I would not describe this as being Commission resistance or Commission hostility. Within certain member states there is a greater inclination to accommodate the UK on certain issues than there would be in other member states but at the moment, looking at the guidelines, the negotiating mandates, the public speeches and documents, this is an institutional front not just the Commission.

Henry Newman: There is a small exception to that, the comments by the former Italian Prime Minister who said that it was unthinkable that any sort of future arrangement with the UK would not include an arrangement on financial services, given the predominance of the City. From memory, there are a few other such comments by EU leaders, but I broadly agree.

Q2155 **Jeremy Lefroy:** I want to follow up on Stephen's questions a little bit and give an example. A couple of weeks ago I had a letter from a bank that I bank with, which is a European Union-based bank that operates in the UK, saying, "We have now set up a UK subsidiary. Previously your banking was with, effectively, a branch. It has now become a subsidiary. We see absolutely no problems with this. Things will continue as normal". Professor Dougan, is this what you were referring to as being the kind of arrangement that financial institutions, particularly banks, would have to make in the second of your two scenarios?

Michael Dougan: I think the consequences will differ across the different fields of financial services. It is worth bearing in mind some of the basic ideas that underpin equivalency regimes at the EU level. For example, not every financial service has an equivalency regime at all. The terms on which equivalency is granted differ from sector to sector. Some equivalency regimes give relatively generous market access; others give much more limited market access. Of course, equivalency is inherently a political decision and can be withdrawn at any time for political not just legal reasons. We have to bear that in mind in the background, but otherwise I think what is true of financial services is going to be true of lots of other sectors of the economy, whether it is services or potentially goods, depending on what happens with Chequers and the White Paper.

All of these things increase costs. If you increase costs, that will either reduce your competitiveness or they have to be passed on to the consumer and that will be true in financial services but it will also be true in other services and in goods. Sometimes it is a matter of closing off markets altogether: you simply cannot provide this service anymore across that border, you are going to have to relocate your activity within the EU or open an actual branch and office or subsidiary there. Sometimes you can still provide the service but you have to go through more hoops, more bureaucracy, more requirements, more licensing, more supervision, and all of that will increase your costs. We are talking



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about market access being more costly or sealed off altogether, but it really depends on the context.

Allie Renison: I think it is worth referencing the fact that in terms of profit margins and fiscal bandwidth to do some of this, broadly speaking, without wishing to overly generalise, there is sometimes a bit more fiscal space in financial institutions than there is for manufacturing where the profit margins are 3%, 4%, 5%. That is why for manufacturing the question of whether relocation is the only option is a much more financially existential issue than it is for a bank. I think that is why you have seen a lot of the financial institutions, including some of the smaller ones, go ahead and apply for the licences. It is not going to completely upset their balance sheet in the way it potentially would by shifting production and factory in locations outside of the UK.

Q2156 **Jeremy Lefroy:** Thank you. That is very helpful. Are we seeing this work both ways? For instance, the Bank of England made it quite clear that all European Union institutions would be very welcome to set up here. As the example I gave shows, some of them are doing that and are basically saying, "We are very happy with this. This will work for us". Lloyd's of London wanted to and have made moves to open up and I think they have done in Belgium. I heard that there were some issues with that; I don't know if that is true or not. Are we seeing a similar degree of openness from our EU partners in UK institutions that have decided to set up, whether it is in Dublin or Frankfurt or Brussels or Paris, because they see this as a hedge but also as a potential opportunity in the future?

Allie Renison: I think there is no denying that it is certainly part of the package of opportunities that governments, including local governments and regional governments, across Europe are referencing in how they encourage companies to invest in their locale. It is worth mentioning, further to what you were talking about, that the Bank of England has also given comfort and succour to a certain extent in providing cover for contracts until at least the end of 2020, I think, in a way that has not been reciprocated elsewhere. In some respects, the UK is leading by example on that in the continuity period until new arrangements come into force.

Where you see that differentiation in the stable market in services is that there are different reasons for companies looking at different locales but also the requirements for third-country requirements differ from country to country. Some countries are making it very clear that this can't just be a letterbox or shell company. There has to be a substantive presence, which I think links to the question about if there is a shift and relocation of certain financial services activity, it won't necessarily be all at once. It potentially may be gradated over time, particularly reflecting on what the new provisions for third-country equivalence the EU is looking to pass in the future, particularly for derivatives clearing.

Q2157 **Jeremy Lefroy:** Mr Newman, do you have any comments on that?



Henry Newman: I broadly agree with that, yes.

Q2158 **Jeremy Lefroy:** Moving on to manufacturing, we discussed earlier the difference between manufacturing and services is becoming increasingly difficult to distinguish. We hope to see more in the White Paper as to how this is going to be tackled, but we have had very clear warnings prior to the Chequers statement about the impact on the major UK manufacturers of not having a near frictionless as possible flow of goods across borders. What kind of contingency plans have you seen among those you have been speaking with or your members as to how they will deal with such a situation if there is no agreement that brings about this kind of near frictionless trade that the Prime Minister is wanting?

Allie Renison: It is important to stress that there is a range of different ways in which people are looking at contingency plans. One of the things that we always stress is that when you contrast the number of people who are looking at drawing up or have implemented or drawn up contingency plans and then you ask the question about what activity have you done to undertake that in looking at potential relocation, the shares are much different. About half of the membership has drawn up or is planning to draw up or is implementing contingency plans whereas it is still a substantial minority but about a quarter are actively looking at relocation.

Relocation is only one of a number of different contingency options. Manufacturing is also looking at setting up shadow supply chains and changing their sourcing of customers. Some of it is just taking on extra staff to deal with potential requirements, but I think what we are finding is that manufacturing is a lot further behind financial services with contingency planning and that may also link to the fact that certain financial institutions were required to provide some of that. No one wants to take the decision of any relocation lightly and it is going to be a needs-must approach to that.

Henry Newman: It is probably the case that smaller businesses have found it even harder to put in place these contingency plans and need particularly support from Government to do so. Allie and I were at another panel event yesterday discussing exactly the same thing. From my understanding, it is a range of different options depending on the nature of the business.

Allie Renison: To add to the point about the small and large distinction, the example I always give is that if you look at leaving the EU, the GDPR, the data protection regulations that came in, is a very known quantity; people know what it is and still firms are struggling to comply. When you ask them to look at modelling different scenarios, even in some respects it potentially might be easier in some elements of planning for no deal for goods because you can model tariffs. You can't really model custom delays so you don't know how much longer that is going to need and what the ripple effect is going to be. What you are finding is a lot of companies, particularly the small ones, are just saying, "We will put in



place our changes once we know what the changes are and once we know not only what the outcome of the agreement or not an agreement is but also how that has to be implemented by various border agencies, HMRC". There is a sequencing process of how some of the smaller companies are looking at how they are able to prepare.

Michael Dougan: If we wanted to find a more complete picture, it is worth bearing in mind that all across Europe people are doing their contingency plans as well, which means that it is not just UK manufacturers being active planners, it is also UK manufacturers being the passive recipients of other people's contingency plans and whether, for example, a German company is now looking for alternative suppliers, no longer to rely on a UK supplier but simply looking for a supplier elsewhere in the Netherlands or Sweden or whatever. To get a full picture, we need to also bear in mind the contingency planning that is being done in the EU27 and its potential impact on UK manufacturing.

Q2159 **Emma Reynolds:** If I could take you back to Mr Dougan's remarks about whether the Chequers statement is workable on goods, it was mentioned earlier that the Chequers statement states, "There will be ongoing harmonisation with EU rules on goods but only those necessary to provide frictionless trade at the border". Will it be possible and practical to distinguish between rules on goods that provide frictionless trade and those that are not necessary for that purpose?

Michael Dougan: Henry mentioned this earlier and I think this is one of the key things to look out for in the White Paper. It is an incredibly significant qualification to the common rulebook but it is one that we are given almost no guidance on until we see the White Paper. I think it opens up two possibilities.

On its face—and I think this is the way that it has been understood in a lot of the public and political debate so far—the Chequers proposal for a common rulebook sounds like effectively we still want to remain within the single market for goods, but that qualification really raises quite a serious doubt about what the Government's ambition is here. It is quite possible that what the Government have in mind with that qualification is that we want to stay aligned with whatever rules are necessary to avoid physical border checks and that is not the same as being in the common market for goods. I suppose it is possible to identify what that list of rules is in the sense that the Commission published a very helpful slide a couple of months ago that summarised all of the EU measures that involve border controls. It is not just things like live animals and products made from animals. It is also the products that are subject to strict market surveillance where they have to be checked before they are allowed to be released into circulation in the market. There is a fairly identifiable list. It could evolve in the future but there is an identifiable list.

The alternative is, of course, that what the Government have in mind is that we will remain within, effectively, a common market for goods. In



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that case, the list of EU rules that would form the common rulebook would be substantially wider because there we would be talking about two main categories of things: first of all, regulatory standards that do not require actual literal border checks, of which there are large numbers, and, secondly, we need the default rules that govern trade even when there is no common rule. In a way, they are the most important rules of the lot because for large sectors of the economy there are no EU rules, there is no EU legislation. What you have is the system of mutual recognition in default of common rules. If you really want to be part of a common market for goods, you need those default rules, the free movement of goods rules.

I think there is a lot of missing detail and it is not even just detail, there is a lot of missing major information in the Chequers statement about what scope this common rulebook has and what the ambition is for trade in goods. It is totally unclear to me at the moment.

Allie Renison: A lot of those readouts is sort of how I took it. You end up going over some of these lines multiple times but the initial reference was they would maintain a common rulebook for all goods and then, pause, for harmonisation only for those necessary. I defer to the professor on this but there is the Cassis de Dijon ruling from the ECJ that basically mandates that automatic mutual recognition, and so you are wondering if this is basically the common rulebook includes harmonisation and default mutual recognition where it applies by default, but that is backed up by case law. The dispute settlement comes into effect and the institutional provision mechanism comes into question and into play very quickly on that.

Michael Dougan: It is worth adding that this choice or lack of clarity about whether we are talking about a common rulebook to avoid literal border checks or a common rulebook that would basically mean a common market for trade in goods is desperately important in itself but it has knock-on consequences for every other part of the Chequers statement. It affects the institutional provisions that might be in place, the dispute settlement mechanisms that might be acceptable to the EU or not, how far this is capable of addressing the Northern Irish problems and what might be the implications for the backstop. It interacts with the whole debate about indivisibility of the four freedoms and cherry picking. In a way, until we know the answer to this initial question of what is the scope of the common rulebook, it is very difficult to answer all of the knock-on questions about almost every other aspect of the Chequers statement.

Henry Newman: On this point on the harmonised areas versus the non-harmonised areas, one of the things that has been poorly understood coming out of Chequers is that there are many areas where goods regulations are not harmonised and how would that work if the UK was in the sort of relationship that is being discussed. On the slide that Professor Dougan referred to on the checks that are carried out at the border,



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many of the checks on regulatory standards don't need to be done at the border, they can be done in other respects with bonded warehouses and so on.

The EU does have some examples of near neighbours that are not necessarily members of the single market but do participate extensively in the single market, Switzerland perhaps being the best example. In some areas Switzerland has managed to not introduce harmonised rules, for example on the REACH chemical regulations, and applies a separate regime for domestic chemicals as opposed to chemicals for export into the EU. There is some flexibility, but would the EU be willing to offer to that UK? Obviously that is a very big question. There are the overall questions of: how is conformity assessed; what conformity assessment bodies would the EU be willing to accept on the UK side; would they be willing for UK bodies to continue to assert that our goods were to an EU level?

We mentioned the idea of harmonisation and the caveat that is in the summary statement covering "only those necessary to provide for frictionless trade at the border", but the Government also go further and introduce an additional caveat, which is the parliamentary lock that we have not yet mentioned. At one level any third country would always have the ability for its Parliament to push back. There is no third country that has an automatic transfer of rules from the EU. Norway has the ability to push back although they have largely been unable to use it. The UK would clearly have some degree of parliamentary lock as a third country, but what sort of situation is the UK envisaging? That is unclear. Are we imagining a situation where Parliament would be able to say no only in extremis with very profound consequences on the relationship or perhaps more regularly? I think that will determine what the EU is willing to accept.

Allie Renison: The chemicals reference is an interesting one because in theory one of the reasons that Switzerland does not entirely permit REACH is that REACH is also about the database. That database is effectively single market and Switzerland, outside of the single market, does not have access to that database. There is overlapping areas that will depend on—it is great on the one hand to say that the proposal is to be associate members of various European regulatory agencies but that intercepts with: are you going to have access or be included in those databases and also are you going to continue to align with the various regulations that come out of it? The regulatory agencies themselves don't necessarily regulate in the way they would in the US. It is more a market surveillance kind of body in a certain respect. There are different aspects of this overlap in trying to figure out what a common rulebook actually looks like for frictionless trade. I think that Henry's point is very important to pick up: are we talking about just avoiding checks at the border or avoiding checks post-dated elsewhere altogether?

Q2160 **Emma Reynolds:** That is really helpful. Thank you very much. I want to



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ask a question about the customs proposals. Guy Verhofstadt was recently before our Committee and I asked him about this and he said, "We cannot outsource our competence on customs duties and customs arrangements". What is your view of the willingness of member states and the other European institutions—Guy Verhofstadt is the lead for the European Parliament—as to whether they would allow the UK to collect tariffs on the EU's behalf?

Henry Newman: I don't know that I have a definitive answer but I do think that there is a desire to try to find some elements of a way through and that has been seen from the Irish Government in particular. A lot of this has been driven by the question of the Irish border and going back a few weeks to the dispute between "max fac" and partnership, the Irish Government were quite keen to send signs that partnership was not totally dead from their point of view, even though at the same time the Commission was ruling it out. There may be a particular willingness to look favourably on a solution that would help in the Irish situation, but that is a sense rather than anything more definitive.

Michael Dougan: I will be slightly less optimistic on that. When I look at the Chequers statement on the facilitated customs arrangement, and pending more detail in the White Paper, I find it very difficult to see any material or appreciable differences between the Chequers proposal and what was proposed last summer. I really struggle to see. There was a hint that we could rely more on upfront payments rather than on a reimbursement mechanism but apart from that relatively minor change, I didn't see much difference. I think what that means is that all of the problems that were associated with the customs partnership remain live, potentially, in respect of the facilitated customs arrangement.

I think it is worth recalling what the main problems are from the EU's perspective. First of all, we are talking about bureaucracy and burdens for business. There is no doubt that the tracking system of whatever nature it is, whether it is upfront payments, whether it is reimbursement, is going to be bureaucratic. It is easy to focus on trusted traders and the people who play with the system. The problem with customs control are the non-trusted traders and the people who do not play with the system. They are the people who actually cause the problems and they are why we need the robust regulation. But from the EU's perspective, the first big question is, "Will we have to do this bureaucracy as well as you?" The system will only work if EU member states also have the same systems as the UK. Unless there is some clever proposal in the White Paper that we have not seen yet that would say that is not necessary, it seems quite unavoidable. Effectively what we are saying to the other member states is, "You also need to create this bureaucracy for yourselves for your business". I think that is a major issue.

The second issue is that this idea of taking back control cuts both ways. "We want control of our borders", say the EU27, "we do not contract out control of our borders to a third country". In that regard, the timing is



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pretty awful in the sense that there is the current Commission dispute with the UK about allegedly lax enforcement by the UK authorities against imports of Chinese goods affecting the financial interests of the EU as a whole. The timing is not good in creating a sense of trust that would make this system work, but it is important to remember it is not just about the finances. It is about public interest regulations for public safety, security, the environment. You have to trust not just that you are going to collect the money properly, you have to trust that you are going to do all of the regulatory enforcement properly as well.

The last problem is that there is only so much divergence that a system like that can tolerate. If we are talking about minor differences in tariffs or minor differences in regulatory standards, the system could probably accommodate that because they probably exist already in some respects anyway. The problem comes if there is significant divergence between UK tariffs or UK regulatory policy and EU standards because then the strain on the system will become much more serious. In this case, the implications are more serious than, for example, for Switzerland or an equivalent third country because of the Northern Irish problem. If this system doesn't work, it triggers the backstop to Northern Ireland and that is not a consequence that comes from Switzerland, for example.

Q2161 Wera Hobhouse: Thank you to all of you. The big elephant in the room is a dispute mechanism and how you resolve disputes. Talking about the lack of clarity, I heard somebody say this is a wonderful invitation for lots of lawyers to make lots of money. What has been said in the Chequers statement about these dispute mechanisms I understood is some sort of joint committee made up of UK judges or UK dispute regulators and EU ones, but then there is no common oversight so the dispute can go on forever. What did you read into what has been said in the statement? If I could ask you first, Mr Newman.

Henry Newman: I think they were quite clear on this. It is very clear that there will be a dispute resolution mechanism that acts as an ultimate arbitration independently between the UK and the EU in future and, therefore, it is very different from the Swiss model that does not have a judicial mechanism. There will be joint committees of officials at a political level to seek to resolve problems in the first instance, perfectly sensible, but ultimately the UK is willing to submit itself to binding independent arbitration. It says that very clearly in the text. But I think from the UK's point of view that independent arbitration cannot be provided by the ECJ. It would have to be provided by another court.

Michael Dougan: I will just pick up on Henry's point. I think at the level of the agreement the dispute settlement mechanism seems pretty clear and pretty uncontroversial. It does not deviate very much from what you expect to see in an international trade agreement: political settlement by the joint committee, the possibility of independent arbitration. I think there are three points on which we will look for greater information in the White Paper.



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The first is whether the Government have any sense yet of, because there will have to be some sort of solution to an exclusivity rule, is this that you must use the dispute settlement that was provided for in the agreement rather than, for example, going to the WTO? That is the first question: will these be exclusive dispute settlement mechanisms or will they be running in parallel with others?

The second is a recognition, which I think there is to a degree in the Chequers statement but needs to be a little clearer, that of course the jurisdiction of any independent arbitration panel is inherently limited by the requirement to respect the autonomy of EU law. That basically means that no arbitration panel can make a definitive ruling on an interpretation of EU concepts or principles or law or regulation. It cannot rule on the legality of any EU measure; it cannot express any particular opinion on the division of competence between the EU and its member states. All of those are exclusively for the jurisdiction of the European Court of Justice. What that means is that in practice, even though you can have a dispute settlement mechanism based on independent arbitration between the UK and the EU, the jurisdiction of that arbitration panel would be so limited in crucial respects that there needs to be a reference mechanism to the ECJ and the ECJ's rulings will be binding. Although the ECJ might not necessarily settle the actual dispute, it might not give the definitive answer, the ECJ has to be able to pronounce on the relevant parts of EU law and the autonomy of EU law and its rulings will be binding on the arbitration panel. That is pretty clear and there is no getting away from that. That is a constitutional requirement under EU law and there are no exceptions, no derogations. I think we will be looking for a little bit more clarity on that in the White Paper, but the real issues don't really come from dispute settlement at the level of the agreement.

The real issues come when it comes to the legal effects of this agreement within the domestic legal systems of the UK on the one hand and the EU on the other. One of the things the EU will be very worried about—and this is through hard experience, for example with the customs relationship with Turkey—is that it might be very easy for the EU to say, "We have signed this agreement. We will give it direct effect within our legal system. We will allow individuals to go to national courts and enforce this agreement against our own member states. We will implement it fully through legislation" whereas the other party doesn't do any of those things and you end up with quite a serious asymmetry where the agreement means one thing for the EU and it means something totally different for the other party.

I think what the EU will be looking for in the White Paper, and, if not, in the negotiations, are guarantees against asymmetry. For example, the Government have said there will be no direct effect of this free trade area for goods in the UK. It must be implemented by Parliament. In that case, we are guaranteed to say the EU will come back and insist. In that case, there will be an express provision saying, "We will not do the same.



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There will be no direct effect of this agreement within the EU. It has to be implemented by EU legislation”.

That guarantees symmetry but I think, coming back to the questions about business, that will have really important implications for the way that we understand trade relations as citizens, as businesses, as corporations. At the moment, if we feel that we have a dispute about whether our goods are being lawfully accepted by a member state or whether they are blocking our trade or whether they are imposing unreasonable requirements, we simply go to the national court, we challenge it and, if we have been damaged, we get compensation. It is effectively a set of individual rights. The consequence of the dispute settlement that is envisaged by Chequers means that it would all be at the level of intergovernmental disputes and unless your state positively implements those measures under national law, you as a citizen or a business basically have to go to your government and say, “Can you help me here at an intergovernmental level?” For UK business, that is a very significant change in the way that trade operates as a system.

Allie Renison: The future partnership paper that was published last August by the Government, looking at dispute settlement, outlined a range of options. I don’t think it talked about any sort of potential docking to the EFTA Court, for example, and that is a big question because there is a huge difference between relying on the Government to take your disputes forward and being able to have the direct right of legal redress even under something like the EFTA Court. I think the docking question comes into play with, if the Government were minded to consider that, can you dock to an EFTA Court just for the limited area that your agreement covers, particularly in respect of goods, but that is a separate question. At the moment, if you are able to access the EFTA Court, you can directly have that right of redress.

To give you a tangible example, and this interplays with services, we had a member who was working in construction and had won a tender to build a factory in France. He got there and his insurance was not recognised and it basically went to the Commission. This was a breach of non-discrimination, that the insurance was not being treated as like for like in reciprocity. It is not saying that that is something that every business is going to encounter but it is a substantive change to your ability to challenge those rights directly.

Q2162 **Stephen Crabb:** Going back to the question of the rulebook for trade in goods, Mr Newman, you wrote an interesting piece a few days ago reflecting on the Chequers statement where I think you were quite critical of the Government for giving too much away on alignment on sanitary and phytosanitary checks and agri-food checks. Can you explain to the Committee why Open Europe takes that view? I think in some of the reporting before the Chequers summit we got the impression that the plan that Open Europe had put forward was feeding quite strongly into Government thinking about the shape of the deal.



Henry Newman: We didn't recommend alignment on sanitary and phytosanitary measures. I don't know why the Government specifically went there but I presume it was motivated solely by the desire to keep the border completely frictionless, rather than as frictionless as possible, between Northern Ireland and Ireland. I think that is the overarching view that the UK has taken and has driven all the extent of the compromises. We had not come to a settled view on this but I thought there might have been a case for carving out Northern Ireland as a distinct phytosanitary unit, building on some existing precedents that are already in place there, but we had not reached a firm view. The Government decided that they were going for a full alignment on agri-food as well as manufactured goods. I can understand the motivations in doing so but it was not one of our specific recommendations.

Q2163 **Stephen Crabb:** Would a consequence of the Open Europe plan be effectively a harder border in the Irish Sea?

Henry Newman: With some degree of checks, yes. As I said, in our paper we carved out agri-food. We had not come to a view on that either way. We had not looked at it and I understand there is a lot of great detail on that, which I am not an expert on at all.

Q2164 **Stephen Crabb:** That would run up against one of the Government's own red lines, wouldn't it?

Henry Newman: Sure. Well, it depends to what extent you think there is already a precedent for that and, therefore, you are not changing the constitutional nature of the internal relations in the UK. If there is already a precedent for the island of Ireland as a whole being a discrete epidemiological and phytosanitary unit, you are not changing the balance by continuing to recognise that.

Allie Renison: When I landed in Belfast, people who have handled livestock have to report to the authorities in the airport. The question is what is the increased level. We have members who run some of the smaller ports in Northern Ireland and they do not have the capacity to do any additional SPS checks in opening goods and stopping them, so that is a big question mark. That is why we were pretty dead set against the EU's proposal on the backstop and trying to extend it to a UK-wide approach.

Q2165 **Stephen Crabb:** Can I ask a final question on the freedom of movement? What does the panel think would be required from the Government going into the negotiations to move us forward by compromising on what Government have said previously on not signing up to free movement?

Henry Newman: I think this is one of the very big difficulties. From the EU side, the line that is coming out of the Commission remains that the single market is an all or nothing choice. It is a binary one or zero, and yet at the same time we are being told, "If you soften your red lines a bit, we will also soften". Well, either it is a binary choice or it isn't, either



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there is some point in softening the red lines or you have to abandon the red lines entirely and agree to free movement. If that is the case, we need to be having a very different sort of negotiation from where we are now. The comments from the Taoiseach in this morning's papers suggesting that they are open to some degree of compromise are interesting but that remains an open question.

Now that the UK has a plan, it is quite important that we reflect as well on the absence of a plan from the other side. This is something that has avoided attention so far. The EU at the moment is offering a very thin FTA, Canada style, that would essentially carve out Northern Ireland into a separate regulatory regime and that would be obviously unacceptable for the UK. At the other extreme they are offering a situation that would be a closer relationship than Norway and I think that would be politically unsustainable in the medium term. The UK has taken a very long time to come up with a plan but there is cross-party agreement in the UK that free movement needs to change. Is the EU willing to recognise that?

Allie Renison: I think you hit the nail on the head. One has been put forward and I think what we hope to see out of the White Paper will be more substantive than what we have seen from the EU so far. Having said that, there are a lot of countries in the EU that when we go and have those conversations with our business counterparts in Europe or with the EU Governments, they are going to ask about what is going to replace free movement. If that is not in the White Paper, it becomes a little bit of a difficult conversation. The reference has been made to Switzerland and I would argue that that works because they have fully accepted free movement.

The question is: is this putting changes or brakes or controls on free movement? Free movement has many legal definitions of what underpins it, so are we just talking about a labour mobility scheme that is prefaced around the note for exchange of services, which the Prime Minister did refer to in responding to some of the questions after the statement in the House earlier this week. There really ideally needs to be something setting out what would replace free movement or what kind of labour mobility scheme they are proposing to be able to try to cut across to the EU member states and put forward—

Q2166 **Stephen Crabb:** Sorry, Allie, do your members want a preferential migrant scheme?

Allie Renison: Absolutely. There has been some discussion about why should we even retain a preferential scheme. I think you do have to remember that whether it is the common travel area, the Nordic passport union, the trans-Tasman arrangement, culture obviously matters but there are lots of agreements across the world that have preferential labour mobility schemes; for one, free movement between Australia and New Zealand where geography clearly is a factor. Pan-European supply chains do tend to be aided by having an ability to rapidly deploy



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engineers or consultants at a moment's notice. There is a genuine reason for geographical purposes why a preferential scheme is ideal.

Michael Dougan: Maybe I could add a few broader contextual points about this idea of the indivisibility of the four freedoms and the cherry picking. We can analyse the Chequers statement and the White Paper on its own terms. Another important set of questions is the interrelationship with the withdrawal agreement, particularly with Northern Ireland, but then we have the questions about how it interrelates with the European Council guidelines and especially the indivisibility/cherry picking provisions. In the report I did for the European Parliament I go into this in quite a bit more detail but I will just summarise the key points.

First of all, this is not a constitutional requirement of the EU. There is nothing in EU law that says the four freedoms are indivisible, there is nothing that says that you cannot enter into trade relationships that offer greater or lesser degrees of market access in certain sectors than others, so it is not a constitutional principle that the four freedoms are indivisible or that you can't cherry pick. This is really a political imperative and this is the EU basically saying, "You cannot get a better deal by leaving than you had by being in" and it is a very simple political, rational, self-interest principle.

It is worth bearing in mind that it is not new or unique to the UK. It was really first articulated in relation to Switzerland after the Swiss had their immigration referendum and wanted to introduce restrictions on free movement. There we saw the EU really for the first time, back in 2014, articulate these principles and of course the UK Government signed up to them, which is part of the reason that it feels a little bit difficult now to go back and say, "We don't agree with this anymore". But these are not new, they are not unique to the UK and they are essentially political rather than constitutional.

I think what that means is that they have to be seen as part of a package. Basically, the less the UK asks for in some sectors, the more it can get away with in others. For example, if we are talking about a fully fledged common market for goods, the EU will begin to feel uncomfortable about offering that without also extensive provisions on persons because it will destabilise the relationship with Switzerland. That is exactly what the confrontation with Switzerland was about. If the UK is effectively saying, "We can live with no common market for goods but the avoidance of literal border checks, this is simply about not having border checks primarily for Northern Ireland", the EU might say, "That is not that different from what was on offer already anyway so we can live with the mobility framework for persons". I think it has to be seen as part of a much broader package: what is it we are asking for and what is it we are prepared to give in return.

Henry Newman: The Commission's own website refers to the Ukraine agreement as allowing the Ukraine an unprecedented level of



participation in elements of the free market, single market. Obviously the Ukraine itself does not have any provisions on free movement. Equally, Switzerland participates in the single market very effectively for goods but not for services, so they have chosen to divide them. On the border point about cakeism, having it and eating it, if the UK can turn round—and the EU will also be able to say if the Chequers statement did become a plan, we are asking for fewer obligations but we are also asking for fewer rights. Clearly, taking rules on goods is a worse position than making rules on goods and, therefore, the UK is not having as good an arrangement as being a member. Equally, we would lose automatic passporting on services, we would lose the right to free flows of capital to buy French or Dutch companies. The EU, if it chose to, could construct an argument that the Chequers plan is considerably worse than membership but that is probably going to be a political call.

Allie Renison: Just to come back to Mr Crabb's original question, when you ask companies in the services sector what matters for access, it is always about people. There is some harmonisation around state aid and competition and consumer law and services. There is a huge amount of full-on—it is more to do with default mutual recognition and some sectoral services harmonisation, but the thing that matters most for our services sector economy is that movement of people. When you ask people about what matters for services access, I would say that that is what unites companies. Whether they are in manufacturing or services, that is the most important aspect.

Q2167 Sir Christopher Chope: How much confidence do you think we should have that the Members sitting at Chequers last Friday knew and understood all the ramifications that you have so expertly brought to our attention today, particularly about individual redress and what we mean by the scope of the common rulebook? Do you think they knew what they were doing when they signed up at Chequers or do you think they were doing that in the dark?

Following on from that, can I ask you about a specific aspect of this common rulebook? The Prime Minister was asked about this on Monday by one of our colleagues who was asking about what impact is all this going to have on the live export of animals for slaughter. That was one of the issues that those who were campaigning for leave made much of during the referendum, that this was going to be an example of where we could get better animal welfare standards because we would be able to have an outright ban on the export of animals for slaughter. Would that be adversely affected by this common rulebook? It didn't seem as though the Prime Minister was able to answer that question straight on Monday.

My third point is on the fall-back position, the backstop. What is there to stop the United Kingdom saying to the Republic of Ireland from 29 March next year, "There will be no restrictions on goods coming into the United Kingdom across the Irish border. There will be no tariffs, there be no quotas, you can have free flow of goods"? Then surely there will not be any friction at the border unless the EU chooses to impose some friction



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itself. Isn't that a way forward for us that is consistent with our red lines?

Henry Newman: On the live animal slaughter, I understand that George Eustice, the Agriculture Minister, addressed this yesterday but I didn't see his answer so I don't want to go there without seeing his understanding of where the policy would be left on the basis of this commitment.

On the Cabinet, I think there are legitimate questions that should be asked about the nature of decision-making in recent weeks and particularly the way that certain Ministers have been kept in the dark about policy. I think that is highly regrettable and that seems to have continued again this week with the White Paper presented to Cabinet Ministers late last night for agreement at some point this morning. I don't think that is a particularly effective way to operate, not least because the burden and the onus is not just on the Cabinet Minister him or herself to read the document but presumably their Department also needs to have time to process the document and understand all the implications within it. I think the Government should reconsider the way that they are making decisions but equally, having said that, getting the Cabinet together and having a full away day to discuss all these things was very welcome. As we referred to previously, we have a plan now, which is a good thing.

On your point about the Irish border, I don't think it would be legal in WTO terms to leave the border completely open, but my colleagues can speak to that more clearly. One interesting point is that if we did leave and the backstop kicked in whereby we would have to align on regulatory terms with the elements of the single market essentially pertaining to goods, presumably the UK would be responsible for any internal UK checks. What would happen if the UK then voluntarily continued to align on goods with the EU's rules and, therefore, there was no need for those checks to take place in the Irish Sea, and how would that then not be essentially participation in the single market for goods only?

I put this point to a very senior Commission official who admitted that this was exactly a risk and equally that the backstop on the EU's own interpretation was an example of cherry picking the four freedoms, because clearly the backstop is essentially participation in the single market for goods only. They say there are special historical circumstances and political circumstances for Northern Ireland. They say it is very small. In reality, Northern Ireland is bigger than at least four EU countries in population and size. There are difficulties that they have got into with this backstop as well and equally trying to agree a backstop that inevitably prefigures the future relationship in the first phase of the negotiations is and remains very difficult. Clearly, whatever we agree through the backstop and with the backstop has a strong chance of becoming the nature of the future relationship if a partnership like this can't be made to fly.

Allie Renison: Picking up the ban on live animal exports, this is completely grounded in WTO commitments. I think there was one



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attempt to do it by either Australia or Indonesia after a particularly horrifying case and they were challenged and had to withdraw the ban. The single market commitments are very much grounded in WTO law. Technically, if the UK was a fully independent third country, no agreement with the EU whatsoever, you could conceive of a case where—the way the WTO works is there are rules but people sometimes do things and then cases are brought against them, but I think because of the case law precedent there would not necessarily be a huge degree—it would depend on the very fine details. I know that the EU Commission has been trying to look at ways around this but not amounting to a total outright ban. It is important to say that that is very much grounded in WTO commitments.

On the second point and picking up on what Henry was saying, leaving aside the fact that the Prime Minister in her Mansion House speech said very clearly that was not the approach the Government were going to take, there are most favoured nation implications but also what you talk about in saying we are not going to have any tariffs for Ireland, you can't do that for one member state. It is treated as a bloc, obviously, so it would have to be negotiated jointly with the EU. There are certain aspects of border control that are in the purview of member states, but trade policy agreements are definitely in the purview of the Commission and the member states themselves, and I think that is worth remembering. There is also a question about import control on health measures. I would find it hard to believe that we would just disregard all those measures completely under that circumstance.

Michael Dougan: I will pick up on a couple of the questions. I don't know enough about live animal slaughter to provide a reliable answer, I am sorry. On the first point about did the people at Chequers understand the full implications, this is an incredibly complicated machine of variables and factors. I think anybody in the world who claims that they understand the full implications of what we are talking about probably needs a reality check. What I did find peculiar, I suppose, is that the reactions to the Chequers statement on both sides of the debate have perhaps been a little premature, having read and thought I just don't have enough detail here to know exactly what it means, I don't know enough about what the compromises are until we see the White Paper to know what the implications are going to be.

The second point on the Northern Irish border, I don't think it is an option for the UK simply to say, "Well, we don't want a border. It is the EU who is forcing it" for two main reasons. First of all, it would be highly problematic in WTO terms to not police your own customs border. We would find ourselves in real trouble with the WTO if we chose not to police our own customs border and impose our appropriate tariffs and all the rest of it. Also we would endanger our own public interest if we had simply an open border where goods and so on could flow into the country unchecked and unsupervised. It is not in the public interest of the United



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Kingdom to have a border like that. The real questions are what will the backstop be and how will it interrelate with the Chequers statement.

On the first question, what will be the backstop be, the Chequers statement seems to suggest but it is not entirely clear that the UK, if this is accepted, would be willing to live with the EU's backstop proposal. It is not clear but it seems to suggest that the UK could live with the EU's backstop proposal. That is a pretty big assumption. It assumes, first of all, that these proposals are acceptable and workable and I have indicated that I am not sure they will be acceptable or workable. Secondly, it assumes that it will solve the problem of the Northern Irish border. That is probably a more technical problem of just checking the list and making sure that everything that needs to avoid a hard border is on this list as well.

The third assumption is probably the most difficult one. It assumes, first of all, that trade policies do not diverge significantly in the future so the system remains stable. It assumes that Parliament effectively does not engage in the regular rejection of the common rulebook and does not regularly antagonise the system. If either of those two contingencies happen, either if the divergences become so significant in trade terms that the system does not feel workable anymore or if Parliament were to consistently reject developments in the common rulebook, we would activate the backstop. Whatever that backstop is would be the solution that has to be provided to Northern Ireland. If the Government sign up to the EU backstop it has to be in the knowledge that that backstop really is capable of coming into force. It is not a purely theoretical backstop; it could well come into force.

Chair: Interesting. It could be a forward stop in other circumstances.

Q2168 **Sir Christopher Chope:** I had not realised that the White Paper had not been produced in time for the Chequers meeting and it is only being approved today. As I understand it the previous Brexit Secretary said that there was a draft White Paper that was almost complete, which had obviously done the rounds in Whitehall and seems to have been completely discarded in favour of an alternative White Paper that is being drawn up in secret by unelected officials at the behest of the Prime Minister. Is that your understanding of what has happened as well?

Henry Newman: My understanding is that there has been several drafts of the White Paper. From speaking to officials and Ministers, I think different bits have been seen by different people at different times but my understanding is that there is a current draft of the White Paper post Chequers, because Chequers made some changes. It was reported there were some changes made to the Government's position that was presented at Chequers during the course of the day and the White Paper would inevitably have to reflect that and is now going to Ministers.

I think there is a separate problem that continues and has continued over several years, including when I was working as a special adviser in



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Government, that at times departmental officials are asked to advise on policy for the centre without the knowledge of their Secretary of State. I think personally that is constitutionally wrong. Departments have a personality through the Secretary of State and should not be independently working with the centre. That is an ongoing issue that was around under a previous Prime Minister and presumably Prime Ministers before that as well.

Chair: That is a whole other bunch of territory but we won't go down there.

Q2169 **Mr Djanogly:** I will move on to the implementation period, if I may. To all witnesses: is the implementation period long enough to negotiate, ratify and implement the future EU-UK deal?

Allie Renison: I think that is a question probably for the Government.

Q2170 **Mr Djanogly:** Can I add to Allie Renison, it would be interesting to have an update on business's changing attitudes towards the implementation period. Let's start with that.

Allie Renison: I think the question could be answered by also adding on is it long enough for business to make those adjustments and you have to figure out what the milestones are and how much progress is being disclosed as the negotiations go on. As I said, a majority of the IoD's members have said that they are going to wait for at least the withdrawal agreement but also the future arrangements to be put in place before they draw up substantive contingency plans. I think there was a reference, even if it was not the scenario the Government were envisaging, from a Treasury Minister back in January talking about the potential for an agreement on customs and VAT to be potentially done at the 11th hour at the end of 2020. How much planning can HMRC do to implement that before the details are known while it is being negotiated?

The question comes back to what I said earlier. Whatever agreement is reached on customs and regulatory measures and VAT then has to be implemented into guidance that is disseminated by various UK regulatory bodies and non-governmental bodies as well, and then businesses will make that adjustment based on that because they would rather have the hard data first. It depends on how quickly the detail of those negotiations leads to practical implementation from the domestic side and from the EU side. It depends on how much detail is produced in the negotiations early on.

I would add to that, just to append to the earlier question about the White Paper. We are all looking forward to the White Paper, but the big question is: what goes into the drafting of the political declaration that accompanies the withdrawal agreement? A lot of the EU member states are looking to see what is in the White Paper but they will also be waiting for the actual, formal draft of what the UK wants to put into that. Is it a 27 plus one document? Is it drawn up together? Is it done like the withdrawal agreement, where the EU effectively puts text and the UK has



effectively responded to that? A lot of people are focusing on the White Paper for understandable reasons, but the big question is: how much detail is going to go into that political declaration, versus waiting for once we are formally a third country and then the technical negotiations begin? It depends on how much detail is disclosed at what stage of the process.

Q2171 Mr Djanogly: In effect, you are saying business could yet change their minds on whether the implementation period is long enough? They have not taken a view?

Allie Renison: It would depend on how far we get into the negotiations on the detail. On the usefulness, when there was a provisional political agreement back in March, I think, or in January—I cannot remember when it was first discussed in the Council guidelines—that was a huge sigh of relief, but because both sides have been reiterating, not just the EU, “Nothing is agreed until everything is agreed”, businesses are not going to over-rely on that. It needs to be nailed down first.

Michael Dougan: There is a widespread assumption, first of all, that the transitional period has been sorted out. It has not been entirely. Just as with the separation issues, there are still a range of issues around the transitional period that remain open and have not yet been concluded. It is slightly misleading because the entire text is in green in the colour-coded document, but that is not an accurate reflection of the state of negotiations over transition. I have a relatively lengthy list of the open questions, if you would like them, but I will focus in on the questions—

Mr Djanogly: It might be helpful if you could send those in.

Michael Dougan: I will focus in on the question of sufficiency. Whether it is sufficient in time depends on what its objectives are, and there are two objectives to the transitional period. The first is to give everyone adequate time to prepare, not only business but also state and public authorities. Of course, what “adequate time to prepare” means depends on what the future is going to look like. Until we know what the future looks like, we do not know whether it is adequate time to prepare.

To give a couple of examples, we tend to focus on the idea of customs. Will we have enough time to get the ports ready for new customs checks? Will we have to recruit new customs staff? It is not just about that. If we are excluded from the European Medicines Agency, do we have enough time to convert our existing public regulatory bodies into an alternative European Medicines Agency, to train the staff and recruit them and resource it? A huge number of things need to be done within the transitional period, but depending on what the outcome of the future relationship might be.

Secondly and just as importantly, the purpose of the transitional period is to ensure only one regulatory change. The idea is we leave in 2019, we have the transitional period, which will be a prolongation of the status quo, and then, seamlessly, we will enter into the new relationship at the



end of the transitional period so there is only one regulatory change both for public bodies and for businesses. That is a massively optimistic assumption because, assuming that we can reach any agreement on the future relationship at all before this withdrawal agreement needs to be finalised, that needs to be converted through a set of complex multinational negotiations into a final agreement. It is very difficult to look around the world and see a precedent where such a large and complex and politically sensitive negotiation could be concluded within such a short period of time.

Equally importantly, of course, it has to be ratified by the UK Parliament, by the European Parliament, and almost certainly by the 27 parliaments of the other member states. The one regulatory change bit of the transitional period is the really optimistic one. It might well be that what we are doing is effectively postponing the regulatory cliff-edge until the end of the transitional period, and then we will have two regulatory adaptations, one to default, and then, possibly several years later, to the new relationship.

A very final point. What is really surprising, though—for me, this is one of the most disappointing parts of the withdrawal agreement as it stands in its current draft—is that there is no facility to extend that transitional period if it proves to be insufficient.

Mr Djanogly: I will come on to that, if I may.

Henry Newman: There are three points to make, one of which is that the purpose of the transition is to provide certainty to business, which I think has been welcome. That certainty is not perfect, given the state of the negotiations. There is a counter-argument that the longer a transition is potentially extended, the greater the uncertainty about when we are going to move to future relationships. That needs to be taken into account that uncertainty has significant costs for businesses trying to make investment decisions. An open-ended transition could cut the other way as well.

A second point is phasing. It is clearly the case that neither the “max fac” nor the new FCA customs arrangements would be ready by the end of 2020, but I think there would be a case for ending the standstill transition at the end of 2020 but maintaining a sort of customs union for a period beyond that so as to allow time for other customs arrangements to be phased in on both sides. That was left open by the Prime Minister back in Lancaster House. Before, she spoke about a formal standstill transition, but she did say that we could have phased exits from different elements of EU programmes. That will probably need to be thought through more carefully, but I do think there is a very strong imperative to end the standstill transition at the end of 2020 and move on with the future relationship, whatever that is going to be.

A third point. We have spent an enormous amount of time in the negotiations so far still discussing phase 1 issues with the EU, and we still



do not have agreement on the Irish border question, as we were saying, even if other areas are largely resolved. It is incumbent on the EU member states, the 27 and the Commission, under the terms of Article 50 itself, to reach agreement on the framework of the withdrawal during the Article 50 period. They are under an EU law obligation themselves, as I understand it, to reach that agreement. I do not think they are doing enough in that direction. It looks like we are going to have a relatively narrow political declaration by the end of the Article 50 period and then a lot of that will be resolved during the transition period, which will be, as we know now, an extension of the negotiation period. If you look at the terms of Article 50, it was clearly intended that the framework for the future would also be set during that time period.

Allie Renison: I wanted to come back on that. The phased reference is quite important because you see that even in the various drafts of the withdrawal agreements as they are updated. It was in the joint statement several weeks ago. You see just in terms of the withdrawal agreement that access to certain customs databases is extended beyond 2020. Some are 2021, some are 2023. That principle of phasing is already there in the withdrawal agreement, and that does call into question the idea that you are only going to have one single, sweeping regulatory change completely.

Q2172 **Mr Djanogly:** If there is not enough time during the implementation period, what are our options? Let us start off with Michael Dougan. Would it be better to bite the bullet and extend the leaving period? I think the European Union has already said it is going to be difficult to extend the implementation period because it attaches to Article 50 and there are constitutional issues. Would it be better to have another agreement to have an implementation of the implementation? Legally speaking, what are our options?

Michael Dougan: By far the preferable option would have been an explicit facility to extend the transitional period in the withdrawal agreement. The EU has said very clearly—and I think this is constitutionally correct—that Article 50 is the only legal basis for a transitional period, and it is also worth pointing out that it is being treated as an entirely exceptional competence in terms of the transitional period. They are doing things under Article 50 that would never be acceptable under other provisions of EU law. There is a bit of an unspoken consensus that in order to sort this out we are doing things under Article 50 that would not ordinarily be possible under the treaties.

It is not just that Article 50 is the sole legal basis for transition. It is also a very generous and very malleable legal basis for transition. Once we have left, Article 50 effectively has exhausted itself as a legal basis, and if we need another transition, it will have to be dealt with under the ordinary processes and competences of the EU. That just will not happen, because there we are talking about negotiating something that will be



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just as complex as the future relationship itself and require full national ratifications as well.

By far the preferable solution would be an extension facility within the Article 50 agreement.

Q2173 Joanna Cherry: Professor Dougan, I want to go back to the issue of governance and dispute resolution, which you spoke about earlier, and just to look carefully at what the Chequers agreement says and ask you a couple of questions about the language used. The Chequers agreement says, "The UK and the EU would establish a joint institutional framework to provide for the consistent interpretation and application of UK-EU agreements by both parties, and they say this would be done in the UK by UK courts and in the EU by EU courts, with due regard paid to EU case law in areas where the UK continues to apply a common rulebook". If I can just pause there, the phrase "due regard" is a term of legal art we can recognise from other treaties, is it not? Can you explain for us what "paying due regard" means in legal terms?

Michael Dougan: Yes. I think what we are looking at there is for the UK courts to take into account. They are not bound by them. They can choose whether or not to follow it. Essentially, if the ECJ case law is relevant, they can have regard to it. They can take it into account as a factor in their own deliberations. There would be inherent limits to that. It is not strictly binding, so the UK courts of their volition can decide not to follow the ECJ case law. Equally, it cannot defeat a parliamentary will. If there is a statute of Parliament that is clear and precise and requires the UK courts to interpret legislation in a way that deviates from the ECJ case law, it is not a matter of volition. It is a matter of parliamentary will.

I think the UK courts, though, will be very conscious that case law is just as capable of giving rise to trade disputes and trade barriers as legislation is. One of the rules of any joint committee in an international trade agreement is both to track legislative divergence and deal with the consequences, but also to track judicial divergence and deal with the consequences. Judges tend to be very conscious that if they reach a decision that departs from ECJ case law in a significant way that would lead to trade barriers between the two parties, the judges are creating a political "crisis" for the functioning of that trade agreement, which will have to be resolved by the joint committee. That acts as a bit of a restraint on the judges. They know that there are serious consequences to their actions.

Q2174 Joanna Cherry: Due regard means that if the courts in the United Kingdom are paying due regard to EU law, they are taking it into account. Those words "take into account" are the words that are in the Human Rights Act, are they not, in relation to the Strasbourg jurisprudence and human rights?

Michael Dougan: Effectively, we can say it is quite similar to the Human Rights Act. It is similar. There is one model that we can look to that



provides an interesting comparison, and that would be the EEA system. The EFTA Court in particular has an obligation that is quite similar to the one that is suggested in Chequers. They are bound by pre-EEA EU case law, but post-EEA agreement EU case law. I cannot remember the exact words, but it is "due account" or "due regard" or something very similar. On a voluntary basis, the EFTA Court—knowing that if it significantly diverges from the ECJ's case law it will create trade barriers and trade friction within the EEA—will strive to reach the same conclusions as the ECJ in practice. On a voluntary basis, the ECJ's case law is regarded almost as binding, but of course it is not strictly binding. I think that is probably the situation that would be the consequence of the Chequers-style deal, if it were accepted.

Q2175 Joanna Cherry: That is very helpful. Thanks. Just looking at what else the Chequers agreement says about dispute resolution, it says, "This joint institutional framework would also include robust and appropriate means for the resolution of disputes, including through a joint committee", which you mentioned earlier, "and in many areas through binding independent arbitration", which Mr Newman mentioned earlier.

Then it says, "Accommodating through a joint reference procedure the role of the Court of Justice as the interpreter of EU rules, but founded on the principle that the court of one party cannot resolve disputes between the two". It seems to envisage that there will be a joint reference procedure. Could you explain for us how that might work?

Michael Dougan: I think this partly comes back to what I said before about the autonomy of EU law. I will go over it a little bit again just for the sake of precision. We have to distinguish between dispute settlement, enforcement, interpretation, at the level of the agreement, inter-governmentally, within the terms of the agreement, and within the domestic system of each party, within the UK legal system or within the EU legal system or the legal systems of its member states. These provisions about dispute settlements or a joint committee on arbitration are about interpretation and enforcement at the level of the agreement. The "due regard" provisions are about the other context: enforcement and application within the UK legal system. The two things are very separate.

At the level of the agreement, the joint committee, the arbitration system, there is nothing in the Chequers statement that does not feel familiar and obvious, in a way. There are a few points that will need greater clarification but, in a way, it is standard stuff for an international trade agreement. The reason you need a reference procedure to the ECJ is because of the autonomy of EU law, because there are certain issues where the ECJ has an absolute monopoly on those disputes, the interpretation of EU rules or concepts or principles, the division of power between the EU and its member states, and the legality of EU action. Whether you have a dispute settlement mechanism at the level of the agreement, which is through a joint committee or through an arbitration panel, neither of those bodies can touch what belongs exclusively to the



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ECJ. They have a reference mechanism whereby they can send the dispute to the Court of Justice for a binding ruling—and it must be binding, it cannot be advisory—and then they proceed on they proceed on the basis of the court's binding interpretation or guidance. That is pretty standard stuff. There is nothing unusual about it.

There are a couple of questions about the precise design, of course. The UK, for example, says it will be a joint reference and it cannot be done unilaterally by either party. Effectively, they both have to agree to send the dispute to the ECJ. Otherwise, the system feels quite predictable.

Q2176 Joanna Cherry: That is the position. In relation to the association agreements, the EU insists on similar provisions, does it not, that ultimately, if a dispute cannot be settled politically, it is up to the Court of Justice to interpret EU legislation? That is the position in the association agreements.

Michael Dougan: It differs from agreement to agreement. There are some agreements that rely on the Court of Justice as the dispute settlement body. There is no independent arbitration panel. The independent arbitrator is the Court of Justice. There are certainly EU agreements—not many, but there are some—that use that model.

There are other models that do not have any independent arbitration at all. They rely entirely on political dispute settlement through the joint committee. In some of those agreements, the joint committee can make a direct reference to the ECJ for a binding interpretation. In others, the joint committee does not engage with the ECJ at all. There you really are relying on purely political resolution of your disputes, which will usually boil down to negotiation and compromise or sanctions and countermeasures.

Q2177 Joanna Cherry: It is important for us to understand that if there is a procedure for a joint reference for a ruling of the Court of Justice, at least so far as the European Union is concerned, that ruling would be binding.

Michael Dougan: For both parties it would be binding. The EU cannot sign an agreement that does not provide for the ECJ's rulings to be binding. If the ECJ gives a ruling, it is never advisory. It is always binding on all of the relevant parties, not just the EU side, also the UK side. The ECJ would strike down a draft trade agreement that did not explicitly provide for its rulings to be binding on all relevant parties.

Q2178 Joanna Cherry: Is it fair to say with this paragraph in the Chequers agreement, the Prime Minister has relaxed her red lines on the Court of Justice?

Michael Dougan: It is a carefully phrased formulation in the sense that it says the ECJ will not "settle" the dispute. Strictly speaking, the ECJ does not settle the dispute because it is only a reference for interpretation. The actual dispute is still settled by either the joint



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committee or the arbitration panel, but the ECJ's guidance is binding, not advisory.

Q2179 **Joanna Cherry:** That is the position as we currently stand, is it not? If a Scottish court or an English court makes a reference under EU law to the Court of Justice, the court makes a ruling but ultimately the dispute is decided by the Scottish court or the English court. In actual fact, under the Chequers agreement, we will be continuing that pattern because rulings will be coming to courts in the United Kingdom from the Court of Justice, so it is a relaxation of the red line, is it not?

Michael Dougan: It is half true. It is exactly how the system work at the moment with preliminary references from national courts. A dispute arises in the UK. You go to a UK court. It involves a matter of the interpretation of EU law. The UK court sends a reference to Luxembourg. The Court of Justice sends back its binding interpretation, and then the UK court picks it up and runs with it and applies the binding interpretation and settles the dispute. That is basically the system that applies here as well. Half of the EU system works like that and half of it does not. Of course, when you do have a direct dispute between, say, the Commission in the UK, which goes to the ECJ, the ECJ settles that dispute. It is not a purely interpretative, preliminary reference. That is a binding decision by the ECJ that finally disposes of the dispute.

Strictly speaking, the Chequers statement has been carefully crafted not to cross the red line. In practice, of course, the ECJ's rulings will be binding on the UK, as they are in the EU, but strictly speaking it is the joint committee or the arbitration panel that will settle the dispute.

Allie Renison: It does call into question how easily the references are made. I would defer to Professor Dougan on this, but it has often been talked about that the Norwegian courts do not give preliminary references as easily as some might do in order to avoid the direct jurisdiction, so to speak—indirectly, I should say—of the ECJ itself. It does depend on how willing the parties are to make those references.

Michael Dougan: A lot of these things are, I have to say, relatively theoretical because it is incredibly unusual for trade disputes between countries to end up going to the ECJ even for a preliminary reference. In a way, a lot of political capital is being spent arguing on something that is probably never going to be used in practice, or at least only very, very, very rarely.

Q2180 **Joanna Cherry:** Would I be right in understanding what will be more important for the enforcement of individual rights, whether by individuals or corporate entities, will be this phrase "paying due regard"?

Michael Dougan: If we set aside the inter-governmental dispute settlement at the level of the agreement, we are then talking about the internal legal effects within the UK legal system and every other legal system of the EU 27. That is where we will see the really major changes.



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Q2181 **Stephen Kinnock:** First of all, just a quick process question. The former Secretary of the State for Exiting the EU said that he believed that if Parliament votes on the withdrawal agreement and the political declaration and it goes through, it will be possible to start negotiations with the EU on turning the political declaration into a legally binding treaty prior to 29 March of next year; ie from the moment that Parliament votes it through, you can then start the negotiations. We have also heard evidence suggesting that you cannot really begin to turn the political declaration into a legal treaty until such time as the UK is a third country. Formally speaking, the European Commission would not set up its team for those negotiations because the team that it sets up would be based on Article 218, and you cannot have that while Article 50 is still in effect. I would welcome the panel's comments on that.

Michael Dougan: The latter interpretation is correct.

Stephen Kinnock: Thank you very much.

Allie Renison: From some of the discussions that I have had in Brussels, formal negotiations are one thing, but how much work can you do to start doing the substantive preparations for the mandate? It also comes back to the question of: how detailed do you want to make the political declaration, in a sense? We would prefer from a business perspective to see as much detail as quickly as possible, but is there a potential that trying to effectively negotiate as much detail as possible through the political declaration holds up the withdrawal agreement itself, which in turn holds up moving on to the substantive negotiations in the future? There is that legal dimension, but the substantive question about how much you want to put into the declaration now versus waiting for the formal negotiation to start is a political question, in my opinion.

Henry Newman: Drawing the same distinction that Allie Renison just made, but also to say that this takes us back to something that Professor Dougan was discussing: the limitations of Article 50 as a highly deficient mechanism, which Britain and the Commission are both now amply demonstrating. It is a very suboptimal clause in a Treaty that we are now limited in our ability to use. If it is not legally possible, that is one thing, but it obviously makes sense, as soon as the conclusion is reached on the withdrawal agreement, for formal discussions to begin. If a mechanism can be found to do that, that would be welcome.

Q2182 **Stephen Kinnock:** We note Professor Dougan's view that in practice that will not be possible because the Commission will not set up a team to make that happen until such time as the European Parliament has given its assent.

Michael Dougan: We have to distinguish between formal negotiation, which will require negotiating mandates from the Council, and those cannot be delivered until after withdrawal, and more informal negotiation.

It also depends on what the nature of the future relationship is likely to be. If we are talking about something relatively off-the-shelf, if we end



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up with a free trade agreement effectively like Canada, or if we end up with an EEA-style agreement like Norway, there we are dealing with known quantities, and we can more or less refer to them in not that much detail on the text because all the detail is known behind the text. We all know what they look like. If we are talking about something more bespoke, there has to be more detail because everyone is going to want to know what is bespoke about it. What are the safeguards, the limits? What are the institutions and the processes? In a way, the less ambitious the agreement in being bespoke, the easier it will be to have a reliable political declaration. The more ambitious and the more bespoke and special, the much more difficult it is going to be to have it detailed.

Q2183 Stephen Kinnock: Thank you. That is very clear. On the point that you made there in your initial comments, Professor Dougan, about trust and the key role that institutions play in building trust, is it not the case that an institution such as the EFTA Court, for example, provides that level of institutional stability and, therefore, trust, which would deliver much of what is being asked for in the Chequers declaration? It would be interesting to know why it is that we do not just sign up to the EFTA Court and dock to the EFTA Court.

Michael Dougan: This is true, by the way, not only the judicial side but also on the administrative side. To come back to an example that Allie used earlier, state aid. The Chequers agreement refers to a common rulebook on state aid. The defining characteristic of EU state aid rules is not the rules themselves; it is the Commission being the virtual sole enforcer of the state aid rules. Who is going to do the job of the Commission for the UK? It is very doubtful that the EU would accept that a UK public body polices UK public aid because it does not accept that for itself. It does not accept that for the EEA. It relies on the EFTA Surveillance Authority. The problems are parallel in both administrative and judicial senses.

Q2184 Stephen Kinnock: Yes. The key point there is that this is not about words on a piece of paper. It is about the institutions, and institutions that have taken decades to build. Perhaps, Mr Newman, you could comment on that. How realistic is it that we get to December 2020, the end of the transition period, and we have built a set of bespoke institutions that have the buy-in and trust that has taken decades to build across—

Henry Newman: I am personally open to docking into the EFTA Court. That was something that we recommended in our paper. Equally, as Professor Dougan was saying, there are already a series of examples of arbitration mechanisms that the EU already has in place. CETA has one, for example. I do not think it is that complicated.

The whole question around trust: I understand at one level the European Commission's concern, but equally, Britain is a very rules-based country with very powerful and independent institutions. I do not think it is really that plausible to think that Britain is suddenly going to go totally rogue



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and start ignoring commitments that we have in international or indeed in domestic law. That is just not a picture that I would recognise for this country at all, particularly after decades and decades of membership where we have followed all the rules. We have sometimes argued around the table for particular opt-outs and so on, but equally we have been very careful members. I think the Commission should take a slightly more benevolent view about our ability to be a trusted partner in the future.

Michael Dougan: Can I just come in on that, though? I think you are talking about trust at too high a level. This is not about whether you are a trustworthy country and a civilised place that plays by the rules. This is about the daily nuts and bolts of the way jobs get done. Some of the things that you see in EU law—and this is the bread and butter of my daily work—are the little failures of trust between authorities. It is when your insurance certificate is not properly recognised by a French authority. It is when your forklift truck is criticised by a Minister in Finland. It is the hundreds of little failures of trust that risk the system functioning.

Henry Newman: I accept that. That has to be resolved with clear, binding rules and so on, absolutely, but there is also a rhetoric that we see from the Commission, particularly on unattributed sources, which does speak to my wider point about the UK suddenly becoming an untrustworthy country. I just do not recognise that.

Allie Renison: There is a domestic implementation model under I think the EU-Ukraine association agreement for state aid, but the difference there is that—and I defer to the professor on this—because Ukraine is starting from here and the UK is here and talking about an actual common rulebook, I do not think Ukraine has signed up fully to the complete package of state aid rules in the way that the UK is necessarily proposing. The more you talk about a common rulebook, the more you potentially do need a surveillance authority.

Q2185 **Stephen Kinnock:** We have not really touched on the agencies. I think there are 49 or 50 EU agencies. Can you say very briefly a couple of words about how you see the Chequers statement relating to the issue of the agencies? We know that in about half the cases, the agencies have no provision for participation of third countries in any way, shape or form. Then there are a number where you have to be EEA in order to get observer status at least. I think this plays absolutely into the issue of institutions and trust. The role of the agencies in the context of the Chequers agreement: I would be grateful for your take on that.

Henry Newman: There are obviously some pretty fundamental concerns in that direction. Equally, there are examples of non-EEA states participating in certain agencies, like Switzerland and the Aviation Safety Agency. I think Professor Dougan can speak to more of the technicalities on that.



Another huge area we have not discussed—we have spent the entire morning discussing the economic relationship—and more profoundly concerning in many respects is the security relationship. That is a detail in the Chequers statement. Talking to any officials inside Government who are working on security, they are profoundly concerned by the attitude the Commission and also member states are taking. The UK is not asking to sit at the table and make decisions on internal security and so on, but we are asking to make sure that operational capabilities do not fall off. That is profoundly at risk and it is something that I hope the Commission takes very, very seriously.

Michael Dougan: Agencies are a bit like regulatory regimes in the field of financial services. There is no single model. They vary about whether it is available in the nature of participation in a relatively ad hoc way. This is one of the areas where until we know better what the common rulebook scope is meant to be—is it literal border checks or is it a common market for goods—we cannot know which agencies will be relevant and, therefore, where the legislation might fulfil the UK's aspirations or where we might need to say to the EU, "Can you change your legislation?"

Just to come back on Henry's point, it is easy to say politically this seems crazy and politically this seems unacceptable. If the legislation says, "You cannot participate", you either have to live with that legislation or you have to change it. Now we are asking the EU to change its rules to accommodate us. The politics and the law have to work constructively together there, rather than seeing one or the other as an absolute obstacle.

Q2186 **Mr Pat McFadden:** I will try to keep it brief because we have covered a lot of the ground. The heart of the Chequers proposal is the idea that you can separate things. You can separate goods and services. You can separate from the rulebook things like employment and environmental and consumer rights. You can separate from all of this questions of freedom of movement and money. At the general level before asking about some of these particulars, how likely do you think it is that the European Union side of the table will agree to that basic concept that you can separate all these things out?

Allie Renison: On goods and services particularly, that depends on what comes out of the White Paper. I think you are talking about differentiated levels of access, rather than separating them entirely. The bigger question is around movement of persons that again, to the Professor's point, since particularly 2014 has been seen as pretty inextricably linked at least to goods in the arrangement that Switzerland has. It is not so much the separation. It is the separation of regulatory alignment and the separation of access. There are examples that they have done, but it depends on to what extent we are going to put—that is why it would be helpful, but I am not holding out a huge amount of hope that there will



be a huge amount of talking about what replaces freedom of movement in the White Paper.

Michael Dougan: It is always possible to separate these things out, and lawyers love it because it means that we will have a lifetime of income arguing about the separation. The separation in itself is not a problem.

The real issues are twofold. First of all, it is about the overall package. We talked about that before. What is it we are asking for and what is it we are prepared to give? Until we see the White Paper, we do not know what the overall package will look like and, therefore, whether it will be acceptable from an indivisibility or cherry-picking point of view.

The other factor to bear in mind is the impact on the EU's wider relations with third countries. We have mentioned Switzerland before. Can the EU really give the UK an extensive deal on goods but not on persons, when the Swiss might immediately turn around and say, "You refused to do that for us"?

Equally, for example, on customs. At the moment the Commission has already asked the Council for a negotiating mandate to renegotiate the customs relationship with Turkey. The Commission and the other member states will be very sensitive about whether what the UK has asked for and what the UK might be given could end up with the Turkish DIT saying, "We want some of that as well. Why can't that work for us?" It is about the package between the UK and the EU, but it has to be located within the wider network of relations. The EU will be quite sensitive about destabilising relations with other third countries or leading them to say, "We want special treatment, too".

Henry Newman: There is a lot to agree with with that. The Swiss example offers in many senses the best precedent for what the UK is trying to seek. We are asking for something quite different from the Swiss because we are asking for this to be governed by essentially a single partnership, rather than many different meshing bilateral agreements. We are also saying very clearly that there will be a dispute resolution mechanism, including binding arbitration. In that respect, it should be more acceptable to the EU side.

Fundamentally, this is an unknown. This is a political decision for the Council ultimately to take. It is fighting on many different fronts. It has profound concerns about the instability in the eastern part of the Union, as well as its relationship with member states, as well as what is happening in Italy and so on. At some level we are asking quite a lot of the Council at a time when it has many other profound distractions. At the same time, resolving in a fair and sustainable way its relationship with the continent's second biggest economy is crucial, and Britain is not going to go away as a "problem" for the EU. Equally, there are very profound problems within the EU around movement of persons more generally. Those are not exactly the same problems that the UK is asking to resolve, but there are broader issues and broader questions.



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Of course the legal details are extremely important and the EU as a legally-based institution will see things through those mechanisms. On the deep, strategic thinking, how is this relationship is going to work on this continent, which we are all sharing as a result of geography, over the next few decades? How we can find a relationship with the UK that works in the medium to long term, rather than the UK being forced into it in the short term? It is profoundly important. I do not think when I speak to diplomats and officials at senior level in France or Germany that they have really given that this much thought. They are looking for a way through and they are essentially leaving a lot of this to the Commission, but they admit themselves that they do not have a plan for what they want to do with us.

I hope very much that the EU takes this very seriously because, clearly, given the resignations this week, this has been a profound compromise for the Government to have made. They should recognise how far the Government have moved. If they throw it back in the Prime Minister's face, that could be very difficult. I am worried about how that could then go forward.

Q2187 Mr Pat McFadden: I agree with you that the closest existing parallel to what the Government want after last weekend is probably Switzerland, where there has been some separation of at least goods and financial services, which is not part of their arrangement. We know what the price of that has been for Switzerland, in the sense that there has been an insistence on freedom of movement and there has been an insistence on some payments. Just on those fronts, on free movement, what is the difference between free movement and a mobility partnership with preferential access for EU citizens? Is there a danger that we get caught up too much in what things are called, or is a mobility partnership with preferential access for EU citizens really free movement where you fill in some forms?

Michael Dougan: They are different things.

Allie Renison: They could be substantively different. If the only basis for the labour mobility scheme or any preferential scheme for EU nationals and vice versa is mode 4, that predominantly deals with temporary movement and intercorporate transfers. Free movement itself has very clear legal underpinnings in non-discrimination, access to social security and so on. That is a very different question about a preferential labour mobility scheme. That is why there is this big question about: is there going to be free movement with controls—I think the Home Secretary said something in the last few days that there was going to be no free movement derivative or anything like that—or is it just going to be something that is based around mode 4?

There is the opportunity in some respects for the UK and the EU to agree the most ambitious mode 4 agreement that has ever been created, because there has not been much progress on that between countries or certainly at the WTO level. That deals with temporary professional



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movement, and that is very different from having a general scheme that says, "You are entitled still to come here, even if you do not have a job offer". That is effectively, even though there are limitations within free movement, the three-month self-sufficiency rule. That is very different to what free movement entails.

Henry Newman: Very briefly, the Swiss model provides an example but there are others as well. Jersey has a particular relationship that also divides goods and services. Equally, we talked previously about the Ukraine, Georgian and Moldovan association agreements. There are other agreements that the EU has made with states that were acceding to the Union—the Czech Republic or Czech-Slovak agreement originally—that separated free movement of goods and people, albeit for a time-limited period. The indivisibility point has been bridged previously, but that is a political judgment for the EU side to make.

Q2188 Mr Pat McFadden: Can I ask a final question on something else? Christopher Chope has gone now, but he was asking you about machinery of government issues. Where do you think DExEU stands after the last week? We have a selfish interest in this because we are the Committee that shadows it, but from the outside it looks like DExEU was downgraded the day that Ollie Robbins left and went to the centre, to No. 10 in the Cabinet Office, to be the key person on this. Where does DExEU stand in this going forward, and is there a point to having DExEU?

Henry Newman: The Government decided there is a point to having it. There needs to be a co-ordinating function in Whitehall. My personal view was that this should have been driven out of the Cabinet Office from the beginning. There already was the European Secretariat there, and it would have made sense simply to use that.

Once Ivan Rogers departed, Ollie Robbins was trying to do several different roles simultaneously: provide advice to the Prime Minister, provide advice to the Brexit Secretary, in some cases different advice, but also serving as a permanent secretary running a Department. That was spreading him, I think, far too thinly.

DExEU nonetheless has a role. It has decided that there needs to be somebody doing some co-ordination work. I heard earlier in the week from officials in DExEU that there were plans to take some powers away from the Department and to make further moves towards bolstering the team in the Cabinet Office at the expense of DExEU. I had that very strongly denied from people in No. 10, but that was my understanding previously.

Q2189 Richard Graham: Good morning to all three of you. Allie Renison, can I just check with you? In your excellent February paper, the IoD talked about the opportunities for free trade agreements, including important tariffs on food and wider agricultural items that critics of the customs union routinely point to. Clearly, the inclusion of agricultural products in the common rulebook in the Chequers proposals rules that out. Is your



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understanding that basically that is the case?

Secondly, do you accept that if that is, it is because it is the price of a solution for Northern Ireland that preserves the integrity of the UK and allows for manageable border arrangements?

Allie Renison: I will take the questions in turn. I would agree to a certain extent with Henry that a lot of the desire to remain aligned on SPS measures does derive from not agreeing to the backstop as currently drafted by the EU as the option for the future relationship, although I would say that, listening to various farming groups, there is a keen desire to maintain—it is a reputational issue as well. For example, there have been agreements between, belatedly, the Agricultural and Horticultural Development Board and its counterpart in China to talk about export licensing for the pork industry, and that has lots of references to EEA law. There is a question mark about whether, with the international recognition of UK law, that would be sufficient to replicate it. Independent of the Northern Irish question, there are actual, genuine desires to remain aligned.

I think the report was looking chiefly but not totally independent of tariff alignment. In the Turkish customs union arrangement, they are obliged to follow EU rules on industrial standards. It would be a matter for debate whether, if you had regulatory alignment on SPS measures, that would necessarily extend to tariff alignment. I see those two things as broadly different.

Q2190 **Richard Graham:** Thank you. Do you agree that having an alignment here on agricultural products will make it easier to roll over the existing EU free trade arrangements?

Allie Renison: Yes and no. Presumably, you are specifically talking about regulatory issues in respect to agriculture. On the one hand, yes, but on the other hand, no. A lot of the references in some of these trade agreements do specifically reference EEA law. You do have to look in some areas, cutting and pasting words, but the point is you cannot just continue to be party to things because you are not formally party to the EEA agreement anymore.

It is also important to recognise that some of these agreements are also not necessarily under the purview of DIT. Some of the wine and spirits agreements that we have done are independent of EU agri-food rules and more to do with what has been negotiated on geographical indications, for example.

Q2191 **Richard Graham:** Thank you. Professor Dougan, in terms of how things go forward from here, I think you have rightly said that the key decision is going to be a political one rather than a legal one. Nonetheless, as we know, the Commission is very focused on processes. My question is: what is there that you have seen so far in the Chequers proposals that you think is likely to cause most concern to the Commission in processes, and what do you see as the likely way through that? For example, could the



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Commission issue new negotiating guidelines that the Council of Ministers signs up to long before the October meeting?

Michael Dougan: On what I think the Commission will be looking for in the White Paper, what we have already said several times: what is the scope of this common rulebook? Is it border checks or is it a common market for trading goods? Will the customs proposals be workable? Will they be actually capable of functioning without creating undue bureaucracy and without creating undue burdens, not only for UK business and authorities but for EU business and authorities?

Something that we have not touched on yet is the scope of the level playing field guarantees. The Chequers statement mentions a few areas but does not mention all of the relevant ones. It does not deal with, for example, corporate taxation or public procurement or intellectual property protection, and it does not talk about the future evolution of environmental or employment or consumer standards. There will be deep questions about the level playing field guarantees.

Institutionally, I think they will feel happy with the idea of the joint committee and the arbitration panel with the reference procedure. They will want guarantees about asymmetry in the domestic legal effects of the agreement between the UK and the EU. They will want to know whether the Northern Irish backstop can now be signed on the basis of the EU proposals, rather than the UK's alternative. Finally, they will want to know about the cherry picking. They will want to see the overall deal and match whether it amounts to something that feels like the UK is not trying to have its cake and eat it. There is a long checklist of things that the EU as a whole will be looking out for.

There are a couple of other important questions that will need to be clarified. For example, the Chequers statement does not say anything about the UK's potential input into the future evolution of the common rulebook. In the case of the EEA and the case of Turkey, their officials are consulted by the Commission, they attend many of the expert meetings, and they do have opportunities to feed into the development of both primary and secondary legislation at the EU level. They will want to know what the British ideas are for UK input into EU decision making and rule making as well. There are a range of things that I would be looking out for if I worked for the Commission or for another member state.

Q2192 **Richard Graham:** Thank you. Lastly, Henry Newman, everything we have said today comes down to the question of how the Chequers proposals and the White Paper are received in Europe. You have said that the risks have been raised either for an unsustainable deal or no deal at all. You worked for Vote Leave, and of course some of those who voted leave do not really want to see a deal at all. For those who want to respect the referendum and allow minimal disruption of lives and jobs, is there anything that you have seen in the Chequers proposals that justifies the cries of betrayal?



Henry Newman: The Chequers proposal is a very substantial compromise. That is clearly the case. It is a lot closer to the European Union than many Brexiteers would have wanted. I would not necessarily choose the words you have just used, and people have to judge whether they think this is an appropriate compromise to make or broadly in the right position. From my point of view, a compromise is need. Parliament is divided. The country is divided. We need a way through. We need a plan. We need a plan that is also negotiable not just around the Cabinet table and in Parliament but also with the EU itself. I think this is a fair and reasonable offer to make to the European side. Of course, they might turn around and say, "No, thank you", in which case, as you said, other options are becoming more likely.

Allie Renison: I would like to come back to one of the opening questions that the Chair was asking. One of the things that has not really come up substantively yet is this question about: how much does X alignment constrain your ability to negotiate in future trade agreements?

First, I think you cannot only see this through the perspective of what you can do in future trade agreements. We know from the survey work we do with our own membership that the priority by almost five to one is the EU negotiations over new trade agreements for the time being.

Secondly, it is really important to try to explore that. If you look at some of the trade agreements that Iceland has signed with China—and Iceland is fully in the single market for goods and services—it is still able to negotiate on technical barriers to trade. Trying to figure out what actually poses a constraint and what does not is probably quite important.

Similarly, Norway is in the single market and has adopted the data protection rules. In the negotiations on TiSA, on the trade in services agreement, the plurilateral agreement, it put in a different offer to the EU on data transfers. It is important to tease out what the constraints do place and what they do not do in future trade policy.

Q2193 **Richard Graham:** Indeed. The reason I did not ask you about that was simply because time was scarce, and I personally am very convinced there are huge opportunities for trade agreements, and the Prime Minister has highlighted the Trans-Pacific Partnership, which is probably the most exciting of them all.

Henry Newman: Just briefly, as Allie said at the very start, if the FCA customs arrangement is accepted by the other side, it would allow us to alter tariffs on agricultural products, and of course Switzerland has been able to make trade deals with other countries independently while still broadly following agricultural rules and the "common rulebook on goods". There are options there that I think should be helpful.

Q2194 **Seema Malhotra:** Thank you for a very, very interesting session today. I want to just follow up on a couple of the points raised by my colleague and in a sense come back to where we started. At the very end of the



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Chequers statement in the preparedness section it says, "But we also concluded that it was responsible to continue preparations for a range of potential outcomes, including the possibility of no deal". I want to just ask you some very specific questions in relation to that. If we assume for a minute that we leave without a deal, what will life look like on the day after Brexit day? What are the consequences, therefore, of no deal? In reality, how much is business spending on preparing for no deal?

Allie Renison: Could I assume that you are asking about no withdrawal agreement, rather than no future deal on the relationship? There are different potential incidence rates for when no deal actually kicks in, just to be clear.

Seema Malhotra: Let us assume both for the purposes of a scenario.

Allie Renison: The point of the withdrawal agreement, in a way, is the insurance policy that if there was no deal on the future relationship, this is what it defaults back to. I would say it is maybe, potentially a step up from just relying on WTO rules, which do not cover huge areas. It does go into detail about what happens on aviation and sets out very clear transition times for when things would end. I would say that a withdrawal agreement but no deal on the future relationship, in a way, is an orderly transition to no deal, in a sense, and that provides at least some certainty for what happens, not necessarily on the next day, sea-changes, because it does talk about extended transition times to when UK participation in various databases is phased out.

Q2195 **Seema Malhotra:** Let us just imagine a scenario, because there are some people who believe either that it would be right or that it would be possible in a scenario where, in a sense, we do not even have a withdrawal agreement agreed. What would be the consequences of no deal? How much preparation needs to happen and how much is it likely to cost?

Michael Dougan: I try not to imagine the consequences, myself. I think we can split the issues into three. The state of UK domestic preparations: will we be able to say that there will not be widescale and systematic regulatory and administrative malfunctions within the country, with spill-over effects into public services and private behaviours? The EU Withdrawal Act is now in place. There needs to be an enormous amount of secondary legislation adopted pursuant to that legislation, but we also need to have an agricultural policy, a fisheries policy and an immigration policy. This Parliament would have an enormous amount of work to do to make sure that on 29 March 2019, sectors of the economy and society would not experience systematic regulatory or administrative function with all of them.

Q2196 **Seema Malhotra:** What could that mean? What would that mean, say, for citizens and consumers?

Michael Dougan: It depends on what goes wrong. The European Medicines Agency, in a way, is a good example. If we do not have a body



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that exists, is staffed, is resourced and is capable of making decisions about the placing of medicines on the market, that will have knock-on consequences for the health service and for people's wellbeing. That is the first set of issues: the domestic preparations, making sure it is right. That is still a huge amount of work even though the European Union Withdrawal Act is on the statute book.

The second set of issues relates to the actual separation issues. In a way, the separation issues can be dealt with unilaterally. We can decide what to do with currently lawfully resident EU citizens. We can decide what to do with contracts that might otherwise be disrupted. We can make a lot of those decisions unilaterally. It adds to the workload, but the main problem would be Northern Ireland. If there is no agreed solution on Northern Ireland, that would be the real separation problem and challenge that will need to be dealt with.

The third set of issues, if we have domestic preparations, we have the orderly withdrawal, the separation, is then we have the external dimension. At the moment, I am not quite sure what the state of play is with those hundreds of international agreements between the EU and third countries and international organisations, which the UK will no longer be party to after we leave. For example, I am aware that we still have not regularised our membership of the WTO, despite consistent attempts to do so. At least as far as I am aware, that still has not been sorted out. There are hundreds of agreements where we are relying on the transitional period and effectively the goodwill of third countries not to see relationships disrupted, and not just in trade: on security, on the environment, on transport. That will become a major challenge as well because at the moment the transitional period is offering a temporary solution, albeit one that still is not sorted out yet. If we do not even have a temporary solution, that again just adds to the disruption, the uncertainty and the potentially disorderly chaos.

Allie Renison: To the question about business preparations, it is fair to say that no deal is the only baseline scenario for most companies who are doing those preparations. When we have done the survey work, about half say that they would be ready for a no deal scenario, and half would not. That is the baseline scenario that companies are using to prepare for. A lot of companies would be relying not just on what is formally agreed or not agreed, if there is an agreement not to agree, effectively, but they are waiting for the domestic implementation of that from the regulatory bodies like HMRC, like Port Health, like Border Force, to understand what that would mean.

Henry Newman: I think we will have a clearer sense when we get a little bit further. We have seen from the Government on their interpretation of how the backstop would work on customs. We have not seen their interpretation on how the backstop would work on regulation. If we get agreement overall on the backstop, I think it is highly likely we will get through March 2019 with implementation.



Q2197 Seema Malhotra: I do appreciate that. My question was just very specifically on this scenario because that is a scenario advocated by some and it is a risk that it may—

Henry Newman: It is far from a preferred scenario and it would be obviously very damaging for both sides, probably for the UK more but also for Ireland. Equally, there are certain things that the UK has been planning to do in that scenario; those plans need to be further developed. For example, we discussed the question of the Irish border, whether the Irish border could be unilaterally opened. No. Equally, the UK could relax customs tariffs as long as it did it on an MFN basis. There are certain options that would be available in extremis. I am not advocating that path, but overall it is important that the UK does make preparations for no deal, not least because upgrading customs systems and so on will be useful in many different scenarios, including when we get out of the customs union, and the technology that is required to trace goods through FCA and so on will be needed anyway.

Q2198 Sammy Wilson: All three members seem to have fallen into the same trap as the Government have fallen into, giving this unprecedented importance to the Northern Ireland Irish border, a border which, by the way, currently is policed without the infrastructure that the EU says would be necessary once we leave the customs union and the single market. Taxes are collected. Animals are examined, away from the border. Different regulations are capable of being imposed without any disruption. We probably will not have time to get on to that discussion now.

What I want to ask is, first of all, given the proposals that the Government have now made around the commitments on the common rulebook and the customs union, Professor Dougan, especially in light of what you have said about—maybe you can give some examples of it—the non-harmonised rules that you feel would also have to be applied if we wanted to have this common market, how likely is it that the backstop arrangement as currently seen by the EU could be avoided with the proposals that we have at present?

Michael Dougan: I think I mentioned before that there are three contingencies that would need to come into play or not come into play, as I will say. First of all, on their own terms, the Chequers proposals have to be workable, credible and acceptable. If we just set aside Northern Ireland entirely, as a set of proposals, the Government want to resolve the Northern Irish border question through the overall UK-EU relationship. Is the overall proposal for the UK-EU relationship in customs and trading good terms workable, credible and acceptable? I think we spent quite a lot of time talking about that.

We then have the second question. Will it address the issues that have been identified in relation to border controls in Northern Ireland? There we will just have to go through it as a checklist and say, “Yes, that is fine, yes, that is fine”. That is the sort of detailed work that would have to be



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done. If there are little gaps where the UK proposals, when we see the detail, do not quite address all of the Northern Irish issues, we might have to think about Northern Irish-specific questions. We do not know that until we see the detail and do the checklist.

The third and probably the most important contingency is: these proposals, even if they are acceptable and workable and credible at the moment, have to remain so in for indefinite duration. Like we said before, if UK trade policy so diverges from EU trade policy that the system simply is no longer sustainable, if the UK Parliament decides to diverge from the common rulebook in a way that causes serious friction in trade, the backstop solution might well come into play. There are various contingencies and assumptions that we are working on if the backstop is signed off by the Government, and you basically have to say on an indefinite basis that those contingencies will not materialise. I think that is a pretty big assumption. It is not necessarily an unrealistic one, but it is a major assumption.

Q2199 Sammy Wilson: That being the case, and since the Government have sold the Chequers agreement to different parts of the Conservative Party on different bases, where on one hand it says, "Yes, we will sign off the harmonisation of the rulebook, but Parliament will always have the option of diverging in the future", and it has also made it quite clear that it will not accept any break-up of the United Kingdom, that would mean that the backstop arrangements as currently being proposed by the EU could never be signed up to by the Government. There would always be lurking there in the background the possibility that any attempt to express independence by the Parliament of the UK would then lead to the break-up of the United Kingdom.

If that is the case, what is the likelihood of any agreement being reached on the basis of an anodyne or certainly extremely watered-down version of the backstop arrangement?

Allie Renison: That is the big question. There has been a lot of justifiable expression of disagreement and that this would not, under its current text, be agreed to. What we have not seen yet from the Government is exactly what the alternative is. I hate to go into indefinite articles, but there has been a lot of talk about "a" versus "the" backstop, and I think the Government do reference—I am probably overinterpreting it—"the backstop". Maybe it is putting forward a suitable alternative.

This also touches on the sequencing. This would have been infinitely easier to deal with, had the withdrawal agreement and negotiations on the future relationship been done in tandem, rather than putting the Irish border on the withdrawal agreement separation right away without talking about the future relationship first. There is a big question about whether this proposal is meant to countenance the current backstop, or is there still an alternative form of wording? That is a big question not only in its own right, but just to move the negotiations on to the future relationship, whether the Government are going to come up with an



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alternative form of wording. That is what they have been saying for the last two months and we have not seen anything yet.

Henry Newman: I will pick that up. This is one of the bizarre problems that we are now facing. As a result of agreeing to a phasing, where we would resolve questions around the Irish border first, but equally, trying to resolve that without being able to prefigure the future relationship, which of course the backstop explicitly must, we are in this ridiculous loop.

Equally, in your opening remarks you suggested that we had bought the Commission line on the Irish border. The problem is the Government have to a degree bought that line. Certainly the text in December agreed to things that I think at face value were clearly contradictory. The EU recognised in that agreement that the UK was leaving the single market and customs union, but equally was committing to a potential backstop scenario where there would be no border. How did the EU side think those were resolvable? I do not know. As we said previously, when I put this to the Commission, it accepted that its backstop was a risk and was an example of cherry picking.

The most frustrating thing of all of this is that rather than quickly, in the aftermath of December, deciding what we understood the backstop to have meant as a government and as a country and defining that, we have waited now until July, and we still do not have a vision of what the UK thinks the backstop means for goods.

Inevitably, the backstop has been defined by the Commission uniquely in various different ways, and we have lost the opportunity to say—we seem to be losing the argument—that what we initially agreed to as a backstop to prevent no hard border has now become a commitment to a completely frictionless border, obviously a category difference in terms and something that, as you say, already does not exist. This is a failure from the UK side to have taken the chance to define quickly after December what we had actually agreed.

Personally, I would not have agreed to the backstop in the form that it was agreed in December, but the Government did make that agreement. Even the agreement that was made committed to the free movement, broadly—it committed us only to elements of the single market pertaining to north-south co-operation, the Good Friday Agreement and the all-Ireland economy, and that clearly was not the whole customs union or the whole of the single market explicitly in that text. We could have quickly defined that on our terms and sought to frame the debate. Instead, we have waited.

Allie Renison: The Government have belatedly put something out three weeks ago, but it only deals with just customs, and says we will deal with regulation later. It is not clear whether this document that is coming out is meant to subsume that or whether there will still be a separate proposal on whether that customs union alignment, in terms of shared



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customs territory, is permanent under the backstop, extending UK-wide, but also what the regulatory dimension that it broadly references is.

Michael Dougan: The problems run back slightly in time from what Henry suggested. First of all, the first problem is that very few people thought about Northern Ireland during the whole run-up to the referendum.

The problem is that the UK defined—and it was the UK Prime Minister who made this definition—a hard border as any customs checks or formalities or related checks, and in a way it is that definition of a hard border that lies at the root of a lot of these problems. There is no abstract definition of a hard border. It was there to be defined. The Prime Minister gave a definition that, in a way, lies at the root of a lot of these problems. By not just saying the lack of physical checks at the frontier but also all related formalities, that was not necessary but it is there now and we have to live with it. That is the first historical problem, that the UK's definition of a hard border could have been different, and that could have seen this whole debate go along a very, very different direction.

Secondly, the joint report. I think I was before this Committee just after the publication of the joint report in December, and I said at the time that the joint report on Northern Ireland was a fudge, and it was an attempt to keep irreconcilable things together, and it would come apart at some stage. I think we are still living with the consequences of that.

I do not necessarily agree on the issue of sequencing but I am aware that time is very short. The question of Northern Ireland had to be dealt with in the separation issues precisely because there is no guarantee that the future relationship will be in place by the end of the transition period. Therefore, it is a separation issue and it did have to be dealt with relatively early in the negotiations.

Q2200 **Sammy Wilson:** Why do you say she has to live with the definition she has said already? She made other promises about coming out of the customs union totally and the single market totally. She has redefined what that means. Why can there not be a redefinition of what is meant by the border?

Michael Dougan: The problem is that the Prime Minister's definition of what a hard border is is now in the joint report.

Allie Renison: Yes, it is in the joint agreement.

Sammy Wilson: That has not yet been signed.

Michael Dougan: It is still in the joint report. It is not purely a unilateral decision now by the Prime Minister to change that definition. That is the definition that was suggested by the UK, and it has been subsumed into the joint report, and now we have to live with the consequences.



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Allie Renison: The Government reserve the right to effectively change what their putative red lines orientation is because it has not already been laid down in political declaration yet, but they have laid those down with the EU in tandem.

Chair: Can I say on behalf of the Committee—because you can tell from the fact that every single person here wanted to ask lots of questions—this has been an excellent session? We are very, very grateful to all of you for giving us the benefit of your expertise. If that is what we can do when we have not even read the White Paper yet, imagine what future sessions of the Committee are going to be like when we get our teeth into the detail. Thank you very much for coming today.