

Exiting the European Union Committee

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

Wednesday 31 October 2018

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Members present: Hilary Benn (Chair); Sir Christopher Chope; Mr Jonathan Djanogly; Peter Grant; Wera Hobhouse; Jeremy Lefroy; Seema Malhotra; Mr Pat McFadden; Mr Jacob Rees-Mogg; Emma Reynolds; Stephen Timms; Mr John Whittingdale; Hywel Williams.

Questions 3089 - 3205

Witnesses

I: Sir David Natzler, Clerk of the House.

II: Dr Jack Simson Caird, Senior Research Fellow, Bingham Centre; Raphael Hogarth, Associate, Institute for Government; Dr Sara Hagemann, Associate Professor in European Politics, LSE; Dr Simon Usherwood, Reader in Politics, University of Surrey.

Examination of Witness

Witness: Sir David Natzler.

Q3089 **Chair:** On behalf of the Committee, Sir David, can I welcome you to our meeting this morning? Thank you very much for agreeing to come and give evidence. Can I begin by asking you this question: when the Government put their withdrawal agreement and the future partnership to a vote in the House, assuming there is one, if they were to be defeated, say in December, could the Government come back in March, procedurally, and have another go?

Sir David Natzler: That is a hypothetical question, and you will know there is a general rule against being asked to decide again on the same question in the same Session, but that rule is not designed to obstruct the will of the House. If it plainly was the will of the House, there are ways in which that could happen, yes. That is partly because the words might be the same but the underlying reality would, self-evidently, be different, not least because there might have been a change in either the negotiated withdrawal agreement or in the framework for the future relationship. If it was a different document, obviously there would be a different motion. I do not know; I would not want to speculate. If it was exactly the same document and they came back three months later for another bite, I do not think the procedures of the House are designed to obstruct the necessary business of Government in that way in such a crucial thing. I hope that is helpful.

Q3090 **Chair:** Would it require a business of the House motion to sort that out?

Sir David Natzler: I hope not. I think it could be done, notwithstanding the practice of the House against reconsideration of a motion in the same Session. That would not be necessary unless, as I say, not only was the motion the same but the underlying political reality was the same, so that nothing had changed in the intervening months in what was being put to the House, in substance.

Q3091 **Chair:** The thing that would have changed is we would be about to leave with no agreement in those circumstances, but I am not expecting you to comment on that. That would be a change in political circumstances, but it is helpful to know it would not be an absolute bar to bringing it back.

Sir David Natzler: I think it is unlikely, and I do not want to speculate on various things the chair might do, but the chair is there to facilitate the business of the House, not to operate a series of strange theological rules, with no disrespect to theology. They are there for a purpose, and it is the purpose that has to be looked at.

Chair: It will be a great comfort to all Members to know that.

Q3092 **Emma Reynolds:** Good morning, Sir David. The Government's memorandum to the Procedure Committee suggests that, instead of



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amendments to the Government motion on withdrawal being put first, the motion itself would be put first and amendments would come afterwards. Could you explain what would happen to amendments to the motion under that procedure if the motion were to go through?

Sir David Natzler: Again, that has to depend on what arrangements the Government propose to the House in the business of the House motion that would necessarily precede the introduction of that procedure. As I understand it, they would be quite unlikely to simply bring forward an exact copy of the procedures as happen on an Opposition day, which is where this idea apparently comes from, in other words that you put the proposed words standing part of the question. That is what it says in their memorandum. They have looked at the standing order on that and think that is a template; I think that was their phrase. I take it a template is not like a technical drawing template. It is not to be copied word for word. It is an indication of what you might do. Straightforwardly and normally, if a motion is passed then amendments to it fall, but, as I say, there is no reason why they cannot devise a procedure to get around that, or any number of procedures, which the House would have to agree to.

Q3093 **Emma Reynolds:** If that is what they wanted to do.

Sir David Natzler: If that is what they wanted to do, yes.

Q3094 **Emma Reynolds:** As I understand it, two MPs have made suggestions to the Procedure Committee that there should be votes on freestanding resolutions. Instead of having a vote on the motion and then a vote on different amendments, or the other way round, these votes would be on freestanding resolutions. I think this procedure has been used before. Maybe you could explain. How could this work in practice?

Sir David Natzler: Without over personalising it, let us call it the Grieve-Letwin thesis. As I understand it, the idea is that you would have a general debate on the whole subject, and then at the end you would vote on a series of freestanding resolutions. It is a matter for discussion as to how many, how you might control how many and who might control how many. It is a matter of question as to whether they themselves would be open to amendment or whether that would just cause such confusion, not only to you but, perhaps more importantly, if I may say, to the public. This is not some sort of private practice. This is a very, very public and big moment.

You would go through the resolutions and, as I understand it, at the end of it you would have a vote on what I would call the principal motion, the 13(1) motion.

Q3095 **Emma Reynolds:** The Government's motion.

Sir David Natzler: The Government's motion, yes.

Q3096 **Emma Reynolds:** It has been suggested to me that the innovation of



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having freestanding motions would be that, for example, if we were to vote on a freestanding motion that is not the Government's motion, but is an amendment brought by—

Sir David Natzler: Not an amendment, a motion.

Q3097 **Emma Reynolds:** Sorry, a motion. It is a motion brought by a Back-Bencher, for example, on either side. If that motion had a greater majority than the majority on the Government's motion, that would mean, somehow, the Government would have to take that motion rather than its own motion, but surely if the Government's motion had a majority they would decide to take that forward.

Sir David Natzler: Yes, the size of majorities has no procedural significance. You, plural, are better able than I am to judge its political significance. If, let us say, there was a resolution that expressed concerns at the lengthy continuation of a backstop procedure—and obviously I do not want to get into politics, but let us be realistic—where there might be a large majority expressing some concern at what that might mean, that might have a huge majority. That is indicative of the House's feelings or their opinions and nothing more than that. At the end of the day, the Government will want to put to the House their 13(1)(b) motion, and all they will want to do is get that passed.

Q3098 **Emma Reynolds:** That would be, really, the only vote that ultimately counts.

Sir David Natzler: I do not want to say yes to that. Say there was a majority for some other propositions expressed before you got to it. I am calling it the principal motion, because that is the vital one. It is the one that has some statutory effect. It opens up the gate to ratification. If some of the other motions were passed, they would have considerable political force.

Q3099 **Emma Reynolds:** But they would not have legal force.

Sir David Natzler: They would have no legal force.

Emma Reynolds: Thank you. That is really helpful.

Q3100 **Chair:** The House of Commons Library argues that, if the House were to vote in favour of an initial motion, the original words standing part of the question, in the procedure the Government is proposing, amendments that insert or add words to the end of the original motion could still be moved. Is that correct procedurally?

Sir David Natzler: Chair, I never like to open with the phrase, "The House of Commons library argues". It does not argue. It just says things, so I will argue.

Q3101 **Chair:** Oh, sorry, right. It is never argumentative. Is that it?

Sir David Natzler: I hope not.



Chair: No, fine, all right.

Sir David Natzler: And it is always right. It is like saying, "The Holy Father argues". If you believe the Ministers are proposing to transpose literally the standing order procedure about Opposition days, that only bites under certain circumstances. First, the amendment has to be moved by a Minister of the Crown, which is, I think, quite unlikely in these circumstances, in fact inconceivable, if you are having a literal transposition of those procedures. Secondly, it has to leave out all the effective words and insert other words. It is quite likely that some of the amendments that are conceived will not do that. They may be additive rather than suppressive and additive, or substitutive. There may be any number of a class of amendments, but the precise standing order only bites in those circumstances, and it has to be all the effective words.

In practical terms, it is not likely that, if Ministers pursue that course of action, they will literally read across from the standing order on Opposition days. They will create a special procedure that enables them to effectively move the motion first, and if it is defeated we will then go to amendments. They are not going to say it has to be moved by a Minister or that it has to leave out all the effective words and add other words, so, in that sense, that is quite true. Even on an Opposition day, if the Government amendment were defeated, you could, theoretically, move on to other amendments that were merely additive. In practice, the Speaker selects one amendment on Opposition days, if one is moved. That is, with respect to the library, as I said, a rather theological point, because that is not how anyone would conceivably operate it.

Q3102 **Mr Rees-Mogg:** Can I continue on the first resolution for a moment? If the Government put down no business of the House motion and just follow the usual proceedings, and the debate completes all its time available, only the one amendment would be taken, and that would be taken first, before the motion. Is that right?

Sir David Natzler: Broadly, yes, with the disadvantage it would last for 90 minutes.

Q3103 **Mr Rees-Mogg:** Yes. If the Government put down a business of the House motion, that is amendable in any way, theoretically. Business of the House motions are generally amendable, are they not?

Sir David Natzler: They are amendable. It is the phrase "in any way" that I am being cautious about saying yes to. No, they are not amendable in any way, but in any way within what the Speaker judges to be a reasonable footprint of the motion.

Q3104 **Mr Rees-Mogg:** If the only business of the House motion were to extend the time from 90 minutes to six hours, it might be unlikely that the Speaker would consider certain amendments to that, or can you not go that far?



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Sir David Natzler: I really do not want to speculate on what the Speaker might select, but it is a very fair question.

Q3105 **Mr Rees-Mogg:** What would the normal practice be?

Sir David Natzler: Normal practice is to look at any amendment tabled and decide, in the interests of the House, what should and should not be selected.

Q3106 **Mr Rees-Mogg:** The Government almost have to put down a business of the House motion, purely on the 90-minute timeframe.

Sir David Natzler: Effectively. They have not concealed that they are going to so, yes, we can say they do not want a 90-minute debate. They have also indicated that they have an idea as to the sort of way they would like to organise the vote. I do not want to stray too far, but I think they also would be under pressure to allow for more than one amendment to be taken if they did allow for amendments. That also requires a business of the House motion. Otherwise, as you know, the Speaker can only select an amendment that we then debate. The question is then proposed on the amendment and at the end it is put. Unless he is given the power, he does not have power to move on to then put in sequence other amendments.

Q3107 **Mr Rees-Mogg:** Is that true even if a closure motion is put before the end of the available time?

Sir David Natzler: It does not matter when the closure motion is put, but once the moment of interruption is reached or passed he cannot start going through processes of other amendments on the paper.

Q3108 **Mr Rees-Mogg:** I just want to clarify the answer to Ms Reynolds on the freestanding resolutions. In your view, as I understood it, the 13(1)(b) motion has legal effect, would therefore be justiciable in the courts and is not an exempt proceeding in Parliament.

Sir David Natzler: Sorry, what do you mean by "not exempt"?

Q3109 **Mr Rees-Mogg:** Normally the courts cannot examine proceedings in Parliament.

Sir David Natzler: Can I stop you there?

Mr Rees-Mogg: Yes, please.

Sir David Natzler: Again, without being hypothetical, the courts should not examine proceedings in Parliament, but they are perfectly at liberty to take notice of what Parliament has decided. They do so all the time when they look at an Act of Parliament, which means the two Houses and the monarch, obviously. As I understand it, and I am not a lawyer, they are perfectly at liberty, particularly if both parties agree, to say, "The votes and proceedings for X January shows beyond doubt that this is the resolution the House came to".



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If the Government rely on that resolution as meeting the conditions of 13(1)(b) so they can ratify the withdrawal agreement, and someone wishes to say, "But it does not meet the conditions of 13(1)(b)", I cannot conceive that we would want to stop the courts saying, "There is no doubt what Parliament agreed, and we are not discussing how it agreed it or how it voted, or its own peculiar internal workings, but the fact of the motion is there", and that is sufficient for them to be able to deal with it.

Q3110 Mr Rees-Mogg: A specific 13(1)(b) motion can go to the courts to determine whether the Government are allowed to ratify.

Sir David Natzler: Yes.

Q3111 Mr Rees-Mogg: Can the courts consider, around that, any of the other freestanding resolutions, or, as they are not referred to in statute, would they, in the normal course of events, be protected by parliamentary privilege?

Sir David Natzler: Again, that is, to some extent, a legal question and I would rather not speculate. If you read, and I am sure you will have read, the Miller judgment, the Supreme Court did and does use other material to help and assist it in coming to a conclusion, sometimes including the views expressed by Parliament by resolution. We have an ongoing dialogue with the judiciary on where that is appropriate, and sometimes where we think it has not been appropriate. For example, the courts are properly cautious about using the conclusions of Select Committees as if they were fact.

Chair: That is a disappointment.

Sir David Natzler: Yes, or indeed the evidence given to them. For example, I would hope they would not look at my evidence this morning. It is not sworn. It is not evidence in a court sense. It is my testimony to you. There are areas of caution where courts should tread, and do tread, with great care. If they are trying to find something out, they are entitled to look at records, so long as they do not dabble in the proceedings, which means how we got there.

Q3112 Mr Rees-Mogg: Is there, to some extent, a hierarchy of parliamentary motions? That is to say, an Act of Parliament at the top of the tree, a motion provided for by an Act lower down, but very important, and then other motions passed by Parliament, which may be used to help interpretively, but cannot change the law. Is that a fair summary of the constitutional framework?

Sir David Natzler: I think that is a reasonable summary. I would add orders of the House of Commons, which I hope the courts will not generally concern themselves with. In the past they did when we used to order, as you will remember, the streets to be kept open.

Mr Rees-Mogg: It is a great pity we do not still do that.



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Sir David Natzler: That was a cue for you to say that. Thank you. I think the courts could pay attention to that when dealing with a case, a motoring offence for example, as we had about 100 years ago, when a Member who made an illegal right turn into Hyde Park claimed as a defence that the road should have been held open for him in order to be able to do that. The magistrate did pay passing attention to it before fining him.

Q3113 **Mr Rees-Mogg:** Could I move on very briefly to the motion in neutral terms? Do you think the motion, if an amendment were accepted, would then be the motion provided for by the Act?

Sir David Natzler: The Act says, as you will know, but just for the clarity of those listening, that a Minister of the Crown must make arrangements for a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in whichever the subsection is, to be moved in that House by a Minister of the Crown within seven sitting days. That is all that has to happen. He or she has to move it. The Act has no interest in what happens thereafter at all. They have done their duty under statute if they have ensured that such a motion has been moved, which, in their best judgment, is in neutral terms, to the effect that it has considered the matter.

Q3114 **Mr Rees-Mogg:** Even if our favourite procedural motion that the question be not now put were moved, and therefore the motion were never taken, the requirements of the Act would have been fulfilled.

Sir David Natzler: As long as it is moved, yes.

Q3115 **Mr Rees-Mogg:** It would have been moved, even if never voted on and therefore not entered into—

Sir David Natzler: Or adjourned. You would not have to try to test the patience of the chair by the previous question. You could just move to adjourn debate. Lots of things could happen. I am glad to say the statute does not go that far into our proceedings as insisting that the House should actually agree or pass.

Q3116 **Wera Hobhouse:** Forgive me if I have not quite understood everything, because the acoustics are not great, or if I have not quite understood the content, because it is complex. I have possibly a very simple question. If the no-deal motion was unamendable, what other procedures could the House use to express its opinion, including, even though it is controversial, to stay in the European Union? Is there actually any procedure at this point now for staying in the European Union?

Sir David Natzler: I will not take the last question. There is no House procedure that can overcome statute. You have passed the European Union (Withdrawal) Act, and you cannot overturn that by a resolution of either House, or even both Houses. Statute is overturned by statute, because we are a law-based society. The possibilities for expressing opinion in this place are not endless but quite numerous. The written



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ministerial statement made at the time when the current text of what is now section 13 was agreed pointed out that there are always opportunities for debates in the House. Particularly, the Opposition have a number of days each year, or each Session I should say, in which they can bring forward motions, which are motions of opinion. Of course, there is the Backbench Business Committee, where Back-Benchers can ask them to have time on the Floor of the House. That was referred to in that written ministerial statement, which I understood was produced partly to assist the House in deciding whether to accept this compromise form of words in what is now section 13. If the House passed a resolution that said, "We are going to stay in the European Union", would we stay in the European Union? No, not as a result of that resolution, any more than the House has passed a resolution by, I think, two hundred and eighty something to zero that we should recognise Palestine as a state. Well, we have not.

Q3117 Wera Hobhouse: But, if we pass a resolution that we leave the European Union with no deal, that would be statute.

Sir David Natzler: No. In respect of these famous motions in neutral terms, in the event of 21 January being reached with no deal having been agreed, the motions themselves have no statutory effect. As I was trying to explain, the statutory issue is simply that the Minister has to ensure there is a motion tabled and a debate. What happens to it does not really matter.

Q3118 Mr Rees-Mogg: What role, if any, could humble addresses have within this, for example, if a humble address were presented to require the Government to ask for an extension of Article 50, or if a humble address were put forward to ask the Government to introduce the necessary statutory instrument to change the withdrawal date?

Sir David Natzler: Humble addresses can only be orderly and therefore only be moved if they seek something within the House's accepted powers to do. That does not include directing Ministers to do anything, or not to do anything. I am afraid the phrase "starting with a humble address" is not a sort of Harry Potter spell by which suddenly the House's powers are extended by merely adding a few words at the beginning. You can get papers with a humble address, as this Committee knows very well, if those papers exist. You cannot order the Government to do stuff.

Q3119 Mr Rees-Mogg: What about the 19th century Post Office issue?

Sir David Natzler: I can happily produce a note on the 19th century Post Office issue, which, as I recall, was about Sunday deliveries. My memory is that in those days the Post Office was not a statutory organisation but was a prerogative organisation. There had already been resolutions, which they wished to overturn, because the House had, unusually, changed its mind on the subject of Sunday deliveries. Candidly, it is of antiquarian interest.

Q3120 Mr Rees-Mogg: The humble address can be used on the prerogative but



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not to direct Ministers.

Sir David Natzler: It is notionally the prerogative. I hope I have got this right, on the humble addresses. It is slightly different if it is a Department headed by the Secretary of State, as opposed to one not headed by the Secretary of State. The Queen directs the Ministers to produce the papers, but by standard constitutional law she cannot direct Ministers as to whether or not to seek an extension of Article 50.

Mr Whittingdale: You have already covered the answers to all my questions.

Sir David Natzler: I am so sorry.

Q3121 **Mr Whittingdale:** No, it is very helpful. To clarify in my own mind, I just wanted to come back and put it in more simple terms. The discussion about the use of Opposition day procedures is helpful, in that we have now become familiar, in the last couple of years, with Government not opposing Opposition day motions and allowing them to pass, but then paying absolutely no attention to them whatsoever. As I understand it, you are saying the Government are perfectly capable of doing that on any of these votes, other than the gate-opening initial vote under section 13.

Sir David Natzler: Are you asking me if it is conceivable that, for example, if we followed the Grieve-Letwin proposition and had a series of resolutions, the majority party, of which you are a part, could decide to sit on its hands and simply not bother to vote? I think your judgment on that is probably as good as mine, but it is perfectly orderly. No Member is obliged to vote. There is a standing order that says that.

Q3122 **Mr Whittingdale:** Indeed, but there is no compulsion on the Government to pay any attention to any of those votes.

Sir David Natzler: That is correct. There is no statutory obligation. Let us say there was a majority in favour of a different sort of future trading arrangement to that envisaged in the future framework. Let us say, indeed, there was a majority for a number of different trading arrangements in different resolutions, because the only precedents close to this are the House of Lords votes in 2003 and 2007, when the business of the House motion explicitly allowed for mutually contradictory resolutions to be passed. I cannot remember, but we voted for both, I think 80/20 and probably 50/50. There were majorities for things that were just simply contradictory. You will remember it. I cannot remember the outcome.

Q3123 **Chair:** I think the second time, in 2007, the House voted both in favour of 100% and 80% elected. On the previous occasion, in 2003, everything got voted down, as I recall.

Sir David Natzler: This was a way of testing the House's view and it never pretended to be more than that. Therefore, the House may come out in favour, I do not know, of Canada-plus-plus or Norway-minus and



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all sorts of things. Does the Government then have to go and renegotiate? No. They then try to get their principal motion through with whatever they are proposing to the House.

Q3124 Mr Whittingdale: The initial vote, which allows the Government to proceed with the introduction of the Withdrawal Agreement and Implementation Bill—

Sir David Natzler: Could I stop you?

Mr Whittingdale: Yes.

Sir David Natzler: I think there is a slight misconception. I am looking at *Speaker's counsel*[9.47.49], and if I am wrong he will tell me. 13(1)(b) says that one of the conditions precedent for ratifying is this motion being agreed. It is not a motion precedent for bringing in a Bill. They are quite separate. (1)(d) says an Act must have been passed. It does not say you have to get first the motion and then the Act. It may be politically inconceivable, but the Bill is not founded on the motion. It is not like a finance Bill that requires the motions to be passed before the Bill can be brought in. It is technically conceivable that you move straight to the Bill. I do not know if this is shocking, but, as I read it, that is quite straightforward.

If you cannot get the motion, are you going to get the Bill? Well, Second Reading of the Bill or Third Reading of the Bill might be seen as a similar vote in type to the motion they need under (1)(b). You just said, sorry, they have to get the motion before they get the Bill, and I think that is a misconception.

Q3125 Mr Whittingdale: That is helpful. Going back to Wera Hobhouse's question, when we come to the Bill presumably the one way in which the House of Commons could possibly even vote to stay in the European Union would be to table an amendment to the Bill to overturn the European withdrawal Act.

Sir David Natzler: I really do not want to speculate on what would be orderly amendments or new clauses to the Bill, for many good reasons. I am sorry; I am not being unhelpful. I really cannot. If we get to the Bill, it will be a matter of huge controversy. No one has seen the Bill. At least, I have not seen the Bill, and the Speaker has certainly not seen the Bill, or the Chairman of Ways and Means if we are talking about a committee of the whole House. I do not know what would be in scope of the Bill and what would not.

Q3126 Mr Whittingdale: That brings me back to where I started. In terms of votes on the Floor of the House of Commons, none of them are binding on the Government until you get to statute, and then anything that is passed as an amendment to statute is binding on the Government. Is that correct?



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Sir David Natzler: Yes. That must be correct. Obviously, it has to get through the House of Lords but, yes, that is right. That is sort of obvious. That is effectively the way that public law is passed in this country, not by resolutions as in the French revolutionary convention or what have you, no.

Chair: I have a number of colleagues who want to come in, stimulated by the testimony.

Sir David Natzler: I am sorry.

Chair: No, this is exactly what we were looking for.

Q3127 **Sir Christopher Chope:** When we are discussing section 13(1) and the resolution, would it be possible for the withdrawal agreement and the political declaration to be separated, because they are in separate parts? Would it be possible for the Government to bring forward two separate resolutions so that those could be potentially amended separately? Otherwise, would the statute not have said, "Put it all in one clause, in one subsection"?

Sir David Natzler: In one motion, you mean.

Q3128 **Sir Christopher Chope:** Yes, that there should just be one motion, but what they are saying is there could be two motions.

Sir David Natzler: Sorry, if I may say, your question got more confused towards the end, Sir Christopher. I understand what you are asking. You read 13(1)(b) and you are saying "Could it be two motions?" I am sorry, but my answer to that has to be that it is a matter of the interpretation of statute. If the Government put down two motions, I am sure that would not be disorderly. It would then be for lawyers to say if that meets the terms of 13(1)(b) where it says that A and B have been approved by a resolution. Does that mean A has been approved by a resolution and B has been approved by a resolution, or does it mean that A and B have been approved in a single resolution? That is a matter of interpretation of statute. The answer to me is obvious in common sense, but I would rather not share it with you, because it may be wrong in law. Because this is statute and not a standing order, I am not going to try to interpret it.

Q3129 **Sir Christopher Chope:** I understand that. If there is a debate in Parliament on section 13(1), there may or may not be amendments put down, which may or may not be voteable on before or after the main question. When we have the debate, all those amendments that are regarded as being in order will be able to be debated in the course of the several days for this debate, will they not?

Sir David Natzler: It is inconceivable to me that you would not have a general debate on, if it is in this form, a principal motion and all selected amendments. That is now the common way the House runs. It is not a question of what gets debated, if I may say. You are absolutely right. It is a question of what, how and when it is decided, and to what effect.



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Q3130 Sir Christopher Chope: There could then be this general debate, and during the course of that debate people will be expressing their views on various possible amendments. Without the need for the specific resolutions on any of those, or specific amendments being put, the information coming from that debate could then be used by the Government when they draw up their withdrawal legislation.

Sir David Natzler: There would be a debate, and no doubt Ministers will listen keenly to what colleagues say. Indeed, if something comes up in the debate they had not anticipated that they wish to, in some way, reflect in a Bill, I guess they could do it. I am not sure where this is leading; well, it does not matter where it is leading, sorry. There will be a debate, presumably a long debate, on all these matters, yes.

Q3131 Sir Christopher Chope: Presumably, every possibility will be able to be raised by Members there.

Sir David Natzler: I cannot see the chair stopping the Member in such a big debate, on the basis that they are outside the scope. I suppose there are some things that would be outside the scope of debate, but nothing that we are talking about, no. There would be, I assume, a wide debate.

Q3132 Sir Christopher Chope: My final question is on the linkage between the future relationship and the withdrawal agreement. Is it going to be possible to make sure the two are linked together in law, so that one is dependent upon the other?

Sir David Natzler: There are two questions there. If the Government wanted to do it, could they draft a Bill that linked some aspect or aspects of the future relationship in some way to the withdrawal agreement? I imagine yes, but I am not the expert on that. If you are asking, which I suspect you are, the Government having introduced a Bill that did not have such a linkage, whether it would be possible to try to link it by way of new clause or amendment, I come back to, I am afraid, the answer I am giving. That is about what sort of amendments or new clauses might be open to selection when the Bill comes.

Q3133 Mr Djanogly: Can I just confirm what I think you said, which is that, effectively, the Government can ignore their main resolution on the deal being lost and move on to the withdrawal Bill in any event?

Sir David Natzler: I would not say "ignore". I hope I did not.

Mr Djanogly: No.

Sir David Natzler: I think technically they could. They could move to the Bill, and if they thought they had a majority for the Bill I imagine they could import into the Bill—and this is pure speculation—a retrospective provision saying that the passage of the Act—that is to say, the Bill that will become the Act—shall be taken as meeting the necessary conditions set out in 13(1)(b).



Q3134 Mr Djanogly: It seems to me that the amendments, particularly if they were going to be taken earlier, in effect become a sign of what people would prefer in an ideal world, whether they are going to vote on the Government's amendment or not. I, for instance, might prefer the Norway deal, but I might have told my whips that I will vote for the Government's deal as well. In effect, I am saying, "If for any reason, Government, your Bill fails, I would like to see the House move towards the Norway option".

Sir David Natzler: Yes. Not avoiding the specifics, whether it is by way of amendment to a principal motion or precedent resolution before a principal motion, if there is an amendment or a resolution saying that Norway is a good option or the preferred option—and this is politics, so I am being candid—there may indeed be Members who want to express that view, but also might, when it comes to it, on the binary question, support the resolution. I assume that is the politics of it, but you know it much better than I.

Q3135 Seema Malhotra: Thank you very much, Sir David, for coming here today. I just wanted to come back, because I am not sure I fully understood what you were saying about the words "in neutral terms". I wanted to come back again to what using the words "in neutral terms" has actually done to change the effect of the outcome of any motion in neutral terms.

Sir David Natzler: I will try and be as open as possible about how I think we got to this, because I do not think it is a secret. I think the framing of these provisions about obliging Ministers to lay motions in neutral terms, to the effect that the House of Commons has considered the matter, was intended to engage the terms of standing order 24B, which is not a secret. That says where, in the opinion of the Speaker or the Chair, a motion of "this House has considered the matter" is expressed in neutral terms, no amendments to it may be tabled. What the framers have tried to do is to lay upon Ministers the duty to lay a motion that the Speaker will be more than likely to regard as falling within the terms of standing order 24B, and therefore no amendments may be tabled to it. That, I think, was the purpose behind that phraseology.

If it succeeds and the Minister lays such a motion, the Speaker looks at it, and he is not obliged to go along with this. He will look at it and say, "Does this motion I am now seeing fall within the terms of standing order 24B?" If he says yes, no amendments to it may be tabled. It was as close, I suspect, as in statute the framers could get to saying it was supposed to be an unamendable motion. My proposition is simply that, although this may matter politically, it does not matter statutorily because, having laid the motion and ensured that it has been moved, statute then loses interest. Even if you had an amendment, it would not have statutory effect. If it had not had all this motion in neutral terms, even a motion purporting to instruct the Government to go back to the negotiating table in January would not actually force the Government



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back to the negotiating table, other than if the House passed it. You might think "How could a Government survive without doing what the House wanted it to do?"

Q3136 **Seema Malhotra:** That is better. We will go around in circles on this. That is clear, but it is just the chain of something then having legal effect where I am not fully clear.

Sir David Natzler: The motion that the House has considered the matter, if the House passes it, has no legal effect. It is a House proceeding.

Seema Malhotra: Yes, that is right.

Sir David Natzler: If the motion that the House has considered the matter is defeated, that has no legal effect. In the event that, whatever the Secretary of State's advice that he has tried to meet the terms of the Act and laid a motion in neutral terms, for some reason the Speaker does not agree and allows amendments, there is an amendment to the motion and it is passed, and the motion is amended as passed, that has no statutory effect. These are merely House proceedings that we control, or that you control. None of them have any statutory effect. There is simply a duty to have a motion moved in the terms of the Act in the event of the defeat of the principal motion, or subsequently no deal being reached, or the Prime Minister telling us that no deal has been reached.

Q3137 **Chair:** Just to be clear on this—

Sir David Natzler: I hoped we were clear on this.

Q3138 **Chair:** You are being very helpful, but I am just trying to understand the position that the Speaker has been put in by section 13(6). The statute says the motion must be in neutral terms, and that then engages 24B of the standing orders of the House, which also refers to a motion in neutral terms, to which, if that is what the Speaker considers it to be, there can be no amendments. I think what we are trying to get clear is what discretion the Speaker might have.

Sir David Natzler: It is complete. The Speaker decides. He is obviously bound by statute, but he is bound by standing order. He does not have to lay the motion. A Minister of the Crown has to do that and has to try to obey the law, and I am sure they will take legal advice as to how to table such a motion that is in neutral terms to the effect that the House has considered the matter of the statement, and the Speaker is not going to argue with that. When he sees the motion, he will look at it, and then he will look at standing order 24B. That is for him to interpret, with what advice he seeks.

Q3139 **Chair:** Say the motion was expressed in the terms you have just put it—

Sir David Natzler: I have not. I am sorry; I have not said how the motion is going to be expressed.



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Q3140 **Chair:** No, but, if the motion was that the House has considered the Government's statement, that sounds pretty neutral to me.

Sir David Natzler: Does it? Right.

Q3141 **Chair:** Well, it does. Anyway, I am just trying to be clear. You said the Speaker has absolute discretion. That is pretty neutral. Does he actually have any discretion?

Sir David Natzler: Yes, he interprets the standing order.

Q3142 **Chair:** He does. Okay, that is helpful.

Sir David Natzler: With respect, it does not matter what it looks like to you.

Chair: Indeed. I am just a humble Back-Bencher.

Sir David Natzler: It does not matter, possibly, hugely what it looks like to me. It matters what it looks like to him, and the House has to put the trust in the Speaker to interpret the standing orders.

Chair: That is very reassuring. Thank you very much.

Q3143 **Wera Hobhouse:** Basically, what I understand is that any motion has no legal effect, so in order to express anything meaningfully the House would need to pass a different law, a new law.

Sir David Natzler: Some resolutions of the House have legal impact, for example 13(1)(b). You are being asked to vote yes or no, and it has legal effect because if you vote yes it opens one of the gates to eventual ratification of the withdrawal agreement. That has legal effect because the statute says it has legal effect. When you agree an affirmative instrument, that has legal effect. The affirmative instrument comes into play, and stuff happens. When you agree to an early General Election, as you did last year—I do not know if you did, but the House did—that has very considerable statutory effect all around the country.

I am not saying resolutions have no statutory effect, but they only have statutory effect if the statute has been passed that gives them effect. The House has powers over itself and over its own proceedings, so I can be told to do things by the House, as can you, but it cannot order public law. Public law is passed by public law. I am not a lawyer, and you are talking to lawyers later.

Chair: We are indeed, imminently.

Q3144 **Mr McFadden:** Thank you, Sir David. I want to take you back to this question of what we might call the Grieve-Letwin proposition of these freestanding motions. You have said to us this morning, if I have understood you correctly, that the only motion that really counts is the Government motion, because that stems from section 13(1)(b). The others, to go back to Mr Rees-Mogg's hierarchy, do not count as much, in



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layman's terms. Is that a reasonable interpretation of what you said?

Sir David Natzler: I do not think that is quite what I said, that they do not count. This is a political environment. Obviously you know that, but I think anyone else listening or reading should know that.

Q3145 **Mr McFadden:** What is a better phrase for not counting?

Sir David Natzler: They do not have statutory effect. If the House were to agree that there should be a referendum before X or after X, that would have no statutory effect. No referendum follows as a result. However, if a majority of Members of the House of Commons have voted for it, I think you would be very unwise to say that had no effect. It would have, I assume, a considerable political effect.

Q3146 **Mr McFadden:** Let me pursue that example, if it was done another way. If instead of this freestanding smorgasbord, as Mr Letwin put it, we had such a proposition passed as an amendment to the Government's main motion arising from section 13(1)(b), either in a way that the Secretary of State has set out with the main motion being taken first, then voted down in favour of such an amendment, or—

Sir David Natzler: Sorry, no, I have to stop you there. When you said "voted down in favour of such an amendment", that is not how the House works. If you are voting on it first, you are voting yes or no. If you are voting yes, there would have to be a special procedure to subsequently allow amendments to a motion when the motion itself had been passed, and then it would be up to the Government, which will bring forward a business of the House proposition. You do not know what the results of any one of a number of amendments may be.

Say the Government have lost the main motion. Again, I am moving into politics. If the Government want to go first, the House has to agree to the business of the House motion. It has to do that before any of this happens. If the Government go first and say to the House, "Would you please agree the negotiated withdrawal agreement and the framework for the future relationship?", and the House says no, there is continuing political significance in what there is a majority for, but you might find the Government have, to some extent, lost interest because they have lost. They have lost the main battle. Do you see what I mean?

Q3147 **Mr McFadden:** Yes, I do, but what I am trying to get at is the hierarchy of these House decisions. Let me put it another way. Let us say the House decides these things in the way that normal business is decided, where amendments are voted on before we get to the principal resolution, and there is an amendment, such as the example you used, that says, "This House agrees this package subject to a further referendum". What is the legal effect of that?

Sir David Natzler: That is the expensive question, meaning I am not a lawyer. That is the big statutory question. The Government's memorandum to the Procedure Committee, which you will have read,



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expresses their concern that if the resolution is spoiled, which is my shorthand, and others are using it, by anything other than the pure milk of agreeing to what it says in 13(1)(b), it casts doubt as to whether that gate has opened for them to be able, eventually, to ratify. They think it casts doubt on it. It obviously casts doubt on it if you have a future conditional amendment that they are not able to meet, but that is a question for their lawyers if such an amendment were passed, and then, incidentally, the motion as amended were agreed. It would then be for lawyers to determine whether the 13(1)(b) condition had been met. It is not a procedural question.

Q3148 Mr McFadden: Is there a difference in the weight attached to such an amendment relative to the same text being passed in a standalone motion of the kind that Dominic Grieve and Oliver Letwin put to the Procedure Committee?

Sir David Natzler: There is only political weight attachable to either. The difference is that, in the Grieve-Letwin proposition, the resolution does not spoil what I would call the principal question, which is coming along at the end, the yes/no, the binary question on the 13(1)(b) resolution. If you have standalone resolutions, that is obviously designed as a means of avoiding any risk of, either deliberately or possibly unintentionally, spoiling the principal resolution. That is the difference.

Q3149 Mr McFadden: Why is an amendment to the principal resolution regarded as spoiling when this is what Parliament does week in and week out?

Sir David Natzler: Sorry, perhaps you have either misunderstood me or you are being mischievous.

Mr McFadden: No, I am not being mischievous.

Sir David Natzler: When I use the word "spoiling", it is a perfectly entitled thing to do, but the Government are saying they will then have legal doubts in the case of some amendments, and absolute certainty in the case of others, that they have not got the 13(1)(b) resolution they seek. You are perfectly entitled to do that. I say "spoiling" meaning from their point of view they have a resolution and they wish to have a yes/no. If you have a chance to amend it, you are perfectly entitled to, but it has spoilt it from the perspective of whether it has statutory effect any longer. If you read their memorandum, they are expressing concerns, legal concerns, as to the effect. Perhaps "spoiling" is a bad word, but it is vitiating its effect.

Q3150 Mr McFadden: With the Chair's indulgence, could I ask you one more thing? If the binary resolution, as you call it, is passed, what is the impact if the withdrawal Bill, which gives effect to it, is either not passed or is itself amended in a material way?

Sir David Natzler: The resolution under 13(1)(b) is just a statutory gateway that has to be opened at some point, or dealt with, before they



can ratify. Having been passed, if it is passed, it is sort of dead, is it not? We then move on to the next stage, which is the Bill. If in the Bill the House either changes its mind or is able to find a different centre of gravity around some proposition, we do not go backwards and revisit the gate we have opened to get into that field, because we are now in that field and moving forward to the next gateway, which is getting the Act. If you see what I mean, you do not have to go backwards and re-pass a resolution or something. That would be pointless. It is a necessary precondition in statute for them to ratify the withdrawal agreement.

Q3151 **Mr McFadden:** There are other gateways in the Bill. There are other options in the Bill, in the sense that it can be amended.

Sir David Natzler: Absolutely. We have discussed that. The Bill is the thing. The Bill is the next thing and it will be open to amendment, although, as we have discussed, I cannot speculate as to what depth or breadth of amendment, because we never do. Yes, of course it will be open to amendment.

Q3152 **Chair:** Just to pursue this a little further, we heard earlier that, even if the Government's clean motion—not a term I like—is defeated, the Government can bring in the withdrawal Bill, in part to try and correct that problem and say, "Actually Parliament has decided it is okay". Therefore, if, in the hypothetical amendment we have been discussing, the House approves the Government's withdrawal agreement and the future partnership, subject, say, to a referendum, there would be nothing to stop the Government then bringing in the Withdrawal Agreement and Implementation Bill, presumably. They could put that on the statute book, saying, "That means when we have a referendum we are ready to go if it gets approval". Am I correct in thinking the thing it could not do is actually to ratify the agreement under the CRAG procedure? It could do the Bill, but it could not ratify under CRAG, because the House would have said ratification is subject to the outcome of a referendum.

Sir David Natzler: I would rather leave CRAG aside, because it is a further, possibly minor, complexity that I suspect the Government may find other ways to deal with if they have a majority, rather than opening themselves up to yet further pre-ratification tests. Could they proceed to the Bill? Yes, and if they can get the Act through, which contains provision for the implementation of the withdrawal agreement, what are they going to do about their uncertainty, if there is uncertainty. If there is said to be legal uncertainty—this is, again, a legal issue—about the 13(1)(b) motion, as to whether it has been achieved, they would, as I and others have suggested, quite conceivably wrap that up in the Bill.

Q3153 **Chair:** It would be a political question, as to whether the Government paid any attention to the House's requirement that there should be a referendum, for instance.

Sir David Natzler: It would be a political decision, just so, but obviously they might be faced, if it were possible, with a similar proposition, if it



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was selectable, in the Bill. If it turns out there is a majority in the House for that, it is unlikely that there will not be at least an attempt made to do the same on the Bill.

Chair: Indeed. That is very helpful.

Q3154 **Mr Whittingdale:** I have one last question, because I was asked this by somebody in the City yesterday, for whom it is hugely important, apparently. What is the fastest that the Government could get this Bill on to the statute book? Can they get it on by Christmas if they initiate the procedure, say, at the beginning of December?

Sir David Natzler: Whether in the City or anywhere else, I am sure lots of people would like to know that. We have Acts of Parliament that were introduced as Bills in one House, were passed by both Houses and got Royal Assent within, from memory, 24 hours, but that is where you have a consensus that we proceed in this way. Also, we have another Chamber. If the House has a majority to get a programme motion or possibly an allocation of time motion through the House on this Bill, they can do it as quickly as they can get away with, if speed is of the essence. They do not have the same freedom in the House of Lords.

Chair: That is a whole other matter.

Q3155 **Stephen Timms:** I have a tiny question. Could ratification of the withdrawal agreement happen before the Withdrawal Agreement and Implementation Bill becomes an Act?

Q3156 **Sir David Natzler:** No. 13(1)(d) says the withdrawal agreement may be ratified only if an Act of Parliament has been passed that contains provision for the implementation of the withdrawal agreement.

Chair: Sir David, we are very grateful. That has been a terrific session. We hope we have not been too taxing.

Sir David Natzler: I hope I have not been too helpful. I think I may have been.

Chair: Thank you very much.

Examination of Witnesses

Witnesses: Dr Jack Simson Caird, Raphael Hogarth, Dr Sara Hagemann and Dr Simon Usherwood.

Q3157 **Chair:** We will move on to our second session. I am very grateful to all of you for coming today and for your patience. As you will have heard from the previous session, we have a lot of ground to cover and questions to ask. Welcome to Dr Jack Simson Caird, senior research fellow at the Bingham Centre, Dr Sara Hagemann, associate professor in European



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politics at the London School of Economics and Political Science, Raphael Hogarth, associate, Institute for Government, and Dr Simon Usherwood, reader in politics, University of Surrey.

We have a lot of ground, so as succinct as possible answers would be really helpful. I might start with you, Mr Simson Caird. The Government have prayed in aid in the memorandum that the Secretary of State sent to the Procedure Committee their deep concern that there might be legal cases brought if their “clean” motion is not passed in an unsullied form. It would be very helpful to us if you could set out what kind of amendments might engage that fear that there was a reasonable case that could be argued in the court that the terms of section 13 had not been met, and what kind of amendments would not, in other words would have a lower or a nil risk. Well, nothing has a nil risk, but I think you get the point. It would be helpful for us to understand. Since I am looking at you and you are looking at me, Mr Simson Caird, I am going to ask you.

Dr Simson Caird: It is a nice, easy one to begin with. The main test with any amendment made to the motion is whether it changes the fact of approval. The statutory test is that the motion must approve both the withdrawal agreement and the future relationship. Any amendment made to the motion that indicates in substance that there is disapproval to either agreement would not pass the test. That is the clearest possible example. Then you enter into a grey area when you start talking about any conditions you attach. Then the question is whether the condition could prevent the withdrawal agreement or the future framework being agreed. If a condition was added for an amendment that would potentially stop them being agreed, that would not amount to approval. If it was a potential block to approval, like a referendum, to my mind, that would not be approval.

The clearest category of amendments that would allow the motion to still amount to approval would be things that would happen after exit day. If there was an amendment to say, “The agreements are approved subject to the House of Commons approving the Government’s negotiating objectives on the future relationship after exit day”, that, in a sense, does not change the fact of the Commons approving both the agreements. That would be the way I would make a distinction.

Q3158 **Chair:** I am just going to follow that up. Approval subject to a referendum has been a theme of discussion. I do not quite understand why that is fatal, because, in effect, Parliament will be saying. “Yes, fine by us, but we just want to check with the people who started this whole process off and see whether it is fine by them”. It is conditional approval subject to a bit of process, or a rather important bit of process in those circumstances, but I do not see why someone would be able to go to court and challenge that in some way. I struggle, but I am not a lawyer.

Dr Simson Caird: “Approval” means it is approved, not approved subject to something that could result in it not being approved. That is the problem. The withdrawal agreement needs to take effect on 29 March



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2019. If the thing that you are inserting into the motion could result in that not happening, that is—

Q3159 **Chair:** To pursue that point, the Withdrawal Agreement and Implementation Bill might not be passed. Why is somebody not arguing that having a Withdrawal Agreement and Implementation Bill is a potential roadblock to approval? If it does not get through, you cannot go on to ratify, because you are not going to be able to implement the thing anyway. I do not see what the difference is between the Bill, say, and a referendum, in this hypothetical case.

Dr Simson Caird: It is a different question in relation to the Bill. The words of the statute, section 13(1)(b), say that the House must pass a resolution that approves, so the question is what “approves” means in that context. “Approves” means approves, and it could include adding words that do not interfere with approval, but if the words could interfere with approval that would raise doubts as to whether it is approval.

Chair: That is really helpful.

Raphael Hogarth: Could I say a couple of words about that?

Chair: Of course.

Raphael Hogarth: Suppose we get an amendment of the kind that you described, saying, “We approve conditional on a referendum”. There are two ways that could go. One is that the Government say, “We are ignoring that. We do not want to have a referendum. We are going to proceed and ratify anyway, because, as far as we are concerned, that does not have legal effect. It is still a motion to approve”. In that eventuality, your litigation risk is probably high, for the reasons that Jack suggests.

The other way it could go is that people could say, “Parliament has amended to require a referendum. We need to have a referendum”. Then the legal question probably fades from view. The reason for that is that the only reason the legal question would arise is if we were still talking about ratification of the withdrawal agreement under section 13 if somebody wanted to bring a challenge in the courts over the interpretation of section 13. There is going to be loads more legislation if there is a referendum. There is going to be legislation to set the terms of the referendum for one, in which Parliament can clear this business up. It can say in that legislation, “The Government may ratify if X, Y and Z, notwithstanding the provisions of the European Union (Withdrawal) Act”. Probably, in that scenario, we would not need to be too worried about the legal question surrounding section 13, provided that Parliament was pretty clear in its subsequent legislation.

Q3160 **Chair:** Let us take another example. Parliament says, “We are happy to approve the agreement, subject to the Government giving a commitment that in the WAIB they will legislate to ensure that Parliament has a vote



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on the terms of any treaty or treaties that come out of the future partnership negotiations". Would that constitute approval or not?

Raphael Hogarth: That is a difficult legal question, on which the House would probably want to seek legal advice. The Attorney-General would probably be sent to give the Government's legal opinion to the House on whether that would hold up the ratification of the agreement. Potentially, a more natural place for that kind of move by parliamentarians might just be amendments to the withdrawal agreement Bill anyway.

Q3161 **Chair:** To the WAIB, yes.

Raphael Hogarth: There, you are probably not so worried. You are probably not going to be as worried that it is going to sully the section 13 effect in that event.

Q3162 **Chair:** Are any of you aware that this concern about potential legal challenge was raised during the course of the consideration of the withdrawal agreement Bill? Does it spring to mind?

Raphael Hogarth: I do not remember it, but I have not read through Hansard.

Chair: You do not remember it, okay. No, I am not expecting you to remember every word. That is fine. That is very helpful indeed.

Q3163 **Mr McFadden:** Good morning. Could I begin with you, Mr Simson Caird, and ask you your view on this debate that is taking place as to whether the right way to do this is—I am going to use the word "normal" in a subjective way—the normal way that Parliament would do these things? That is to consider amendments to a main resolution first and vote on them, and only if they fall you then proceed to a vote on the main resolution. Then there is the way the Government have suggested to the Procedure Committee, which is more like how Opposition day business is conducted, where the main resolution is considered first and any alternative proposition is only considered if the main resolution falls. What is your view of these two ways of doing this?

Dr Simson Caird: The principal advantage with amendments first is that you get the House to make a series of decisions on a series of propositions. I think that is what some people assumed the meaningful vote would involve, and that it would not just be a straight yes or no decision. It would involve a sort of negotiation, if you like, between the Commons and the Government on a series of different options. If you have the amendments first, that negotiation is perhaps more likely to happen than if you have the amendments afterwards. There, you raise the stakes of that first vote, because you can only get to the amendments if the Government's motion is rejected.

For the sorts of things that we were talking about, potential amendments that could be compatible with approval, you are less likely, if you are in favour of approval, to risk voting down the Government's motion first.



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You do not know what might happen afterwards. You do not know. There might not be a majority for any of the amendments moved after the original Government motion is rejected. It is a riskier procedure, perhaps, to have the amendments afterwards, from the point of view of someone who may or may not want there to be amendments considered and decisions being taken by the House on those amendments.

Q3164 **Mr McFadden:** The view has been put that by taking the main motion first it is riskier, because the only way any MP can get to talk about anything else or any alteration on that is by voting it down.

Dr Simson Caird: I do not know about “talking about”. My assumption would be that the amendments would be debated and then the Division would take place.

Q3165 **Mr McFadden:** Okay, say “deciding on” rather than “talking about”. In other words, the view has been put that the Government’s proposition actually maximises opposition to the main motion. The only way a Member can vote on anything else is by voting that first proposition down. Do you think that is a risk the Government is running?

Dr Simson Caird: That is a political question to an extent, but I can see your general point. You would have a coalition of people who want different amendments, potentially, people from different perspectives, saying, “We want a chance to give our view on these particular amendments, so we are going to have to take this decision first”. Also, there is the point that rejection of the Government’s motion first does not necessarily mean that you would not get approval resulting in the end. The amendments considered after the original motion is rejected could, in theory, have approval but in a different form of words. Alternative amendments considered after the main motion could say, “The House approves the withdrawal agreement and the future framework, subject to” something else. You could still get approval, perhaps, in that circumstance.

Q3166 **Mr McFadden:** Going back to the session we just had with Sir David Natzler, where we talked about the motion and the Bill, do you think there is a danger that politicians have been focused too much on the resolution and not enough on the Bill, given that the Bill itself can be amended in any number of ways?

Dr Simson Caird: That is a very good point. Constitutionally, from a domestic point of view, the legislation is much more significant because the legislation is what grants transition. It is what grants citizens’ rights. We know from the withdrawal agreement text that has already been agreed there is some constitutionally significant content in that agreement that is going to have to be translated into domestic legislation, potentially the protocol on Ireland and things of that nature. As you say, the political attention is on the vote because that precedes the legislation, but in constitutional terms the legislation is, arguably, more significant.



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Q3167 **Mr McFadden:** Would anybody else like to come in on this, first on the question of amendments first or amendments later?

Raphael Hogarth: I would say one thing about that, which is about the rationale for the Opposition day procedure. In the context of Opposition motions, hearing your main motion first and then going to amendment is the best way to hear the variety of opinions in the House, simply because most of the time the Government have a majority. If you let the Government do their amendment first, it is just going to supplant the Opposition day motion. You are never going to hear the Opposition day motion. The Opposition is not going to have a chance to put its case. Here, that logic does not necessarily apply. The rationale behind the Opposition day procedure, in terms of parliamentary principles, is not necessarily applicable to this case.

Q3168 **Mr McFadden:** You would never get to the amendments, potentially.

Raphael Hogarth: You may not, so you would not be giving minorities in the House, or indeed potentially majorities in the House, the opportunity to air their views. At the same time, that procedure lowers your legal risk. That is a political question, whether you are more concerned about reducing your legal risk or hearing what the House has to say.

On that question about the withdrawal agreement Bill, that is incredibly important. I completely agree with Jack that it is going to be a Bill of serious constitutional significance that requires careful scrutiny by the House.

I worry that it is going to be a bit of a political nightmare, partly because I am not sure everybody has fully digested yet how politically unpalatable some bits of that Bill are going to be when they turn up; things like essentially keeping the European Communities Act in force for a while, giving Ministers powers to make payments to the EU.

When you are considering the motion you are looking at a whole package. The Government can say, "I know you do not like this bit, but there is all this other stuff that you do like, including an orderly transition, a really ambitious future framework and the rest of it, so can you please just vote it through?"

It is much more difficult when you come to considering the withdrawal agreement Bill, because you might just be voting that the bit on the protocol on Ireland stands part. We potentially have very serious problems if the Government can get the motion through but cannot get the Bill through. The Bill is what gives effect to the agreement in UK law and a condition precedent of ratification.

Q3169 **Mr McFadden:** That is a very important point and I imagine one focusing the minds of the Government whips, but I do not know.

Dr Usherwood: It is mainly just underlining that last point that, as far as the EU is concerned, the last decision that it has had from the UK was



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notification on 29 March 2017. The default outcome is a no-deal exit for the UK. The Bill is essential as part of that ratification process. If there are questions of amendments or changes, that will be the way that would be communicated back through to the EU. In terms of the European level of this process, that will be the much more consequential part. A motion is not going to have any material impact on that process of Article 50.

Q3170 **Mr McFadden:** An amendment to the Bill might.

Dr Usherwood: Potentially, depending on what the amendment to the Bill is.

Q3171 **Peter Grant:** Can I follow up on that point you just made, Dr Usherwood? Something the 2015-16 Parliament was completely in charge of was that we had the option of whether to approve the referendum Bill, whether to amend it and whatnot. We are now in a situation where you have described it as the default position that, if something else does not happen, we have a no-deal Brexit on 29 March, which few, if any, Members of Parliament have said they think is a good idea. At what point since the autumn of 2015 did we pass almost a point of no return, where we moved from Parliament having the power to decide what happened to Parliament trying to find a way to stop it from happening? Was it when we agreed to the Article 50 Bill? Was it when we agreed to the withdrawal Bill? Was there some point where Parliament effectively stopped having a chance to be in full control of the Brexit process?

Dr Usherwood: As far as the EU would see it, the point at which that changed was 29 March 2017, when the UK submitted its letter of notification under Article 50(2). Article 50(1) says a state can choose, under its domestic procedures, to withdraw. Then it notifies and that will start that two-year window, at the end of which, unless there is a deal, that member state will leave with no deal. That is the point at which decisions were made that have a material impact on this.

Q3172 **Peter Grant:** Can I move on to a very specific question for any or all of the panel who want to answer it? When we come to the EU withdrawal agreement Bill, what does that need to say about the protocol on Ireland and Northern Ireland? Does it need to say anything? Does it need to explicitly give approval to it, or can it ignore it completely and hope that it will be fixed at some other point? I have never managed to stump an expert panel prior to this.

Dr Usherwood: From the European side of the debate and the negotiations, they have been very clear that they require a backstop that is in operation. We are now getting into what amendments there might be. The withdrawal agreement, including the protocols, would need to be approved in the form that has been signed prior to the moving of motions and Bills here in the UK for ratification purposes. If Parliament decided that it was doing something different with that, it would depend rather what that different thing was and whether there was any indication from the EU about whether it considered that acceptable. We have to



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remember that, as well as UK ratification, there will also be ratification by the European Parliament and the sign-off from the Council, which will come after the UK has done its part, largely for that reason. If the UK does not like this deal or does not want to leave on those terms, that is the UK's prerogative. The EU has negotiated in good faith, as has the UK. If that deal is not acceptable to Parliament, it will depend how it is not acceptable.

Dr Hagemann: A question was asked earlier about how here, domestically, there would be a close connection between the withdrawal agreement and the Bill, and any future arrangements. I would just like to point out that the sequence on the EU side is quite important to keep in mind in this respect. The approval process requiring the majority in the European Council and the consent of the European Parliament, as Simon just mentioned, at this point in time it is very clear, with the points that have been made, that the EU's demands for a withdrawal agreement would be fairly straightforward if those conditions were met. The backstop is an absolute red line in that respect.

For any future relations to be negotiated subsequently, the European Parliament has a different role. It has to adopt it differently to just giving its consent. The European Parliament and the approval process on the EU side is perhaps fairly quick, if we are to think that the withdrawal agreement would be what has been made clear from the EU side and if the UK were to agree to that at the end. It is unknown what the dynamics would be for future relations going forward.

Dr Simson Caird: On the question of the protocol, the key question would be what the text of the protocol actually says. If you look at other examples in the draft withdrawal agreement, there are things that clearly require domestic legislation. For example, in relation to citizens' rights there is a clear statement that the UK courts must be able to disapply legislation that is incompatible with relevant citizens' rights. If the text of the protocol makes clear that there must be domestic legislative effect, in order for the UK to ratify, one is presuming that the relevant legislation must correspond to whatever the withdrawal agreement says it must do.

There is one important point to make there. So that you can assess the legislative effect of the withdrawal agreement, arguably there is a case that the Government should publish the withdrawal agreement legislation at the same time as the withdrawal agreement. They can then be read alongside, so you can appreciate the domestic legislative implications of approving the withdrawal agreement, precisely because of the danger that you approve one and then only establish the legislative consequences when the legislation is presented.

Raphael Hogarth: You probably have to do the protocol in the withdrawal agreement Bill. If you think about it from an EU perspective, the whole point of the backstop is that it is an all-weather insurance policy. If you imagine a scenario in which the UK has undertaken that as



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an obligation in international law, but has not actually got the implementing legislation through Parliament to make it happen, or to make it happen if it needs to happen, from an EU perspective, people are probably going to be thinking, "What if there is not a majority for this in Parliament at the time we need it?" All you are relying on at that point is EU parliamentarians' belief that the UK is a good international citizen that upholds its obligations in international law, whether we like those obligations or not. It may be the case that the EU is generously prepared to take that view of the UK at the moment. My instinct would be that it probably is not. If it is not, I expect it is going to want to see provisions for the protocol in the withdrawal agreement Bill.

Q3173 Peter Grant: Could I just get clarification on that? You seem to be saying that it would certainly be tactically politically helpful as a way of persuading the Europeans to agree to it. Is there any legal or constitutional requirement within the domestic set-up of the United Kingdom for it to be included within the withdrawal Bill?

Raphael Hogarth: I do not think there is.

Q3174 Chair: Can I just pursue this point? We will have the approval of the deal here if it goes through. We will have had it approved at some point in this process by QMV and the Council, and then the European Parliament has to approve it. Are you saying the European Parliament might say, "Show us you have put this all into legislation before we are going to give the go ahead"? Are you saying that is a possibility?

Dr Hagemann: Hypothetically, it could be a possibility, but at the same time I would think it unlikely. It is a possibility. The consent that the European Parliament has to give is a simple majority. The British MEPs have a vote on it. The European Parliament has had the right to complete access to information throughout this process, and they have been kept informed. They are very involved and they give their views, especially on the issue of their citizens' rights. They have also voiced their strong opinion and support for the Irish backstop issue. The European Parliament should be seen as of the very same opinion as the Governments in the European Council. Of course, either of those two institutions could ask for that sort of evidence, but I would not expect the European Parliament to take a different position from the Council.

Q3175 Chair: It is a bit like David Cameron's renegotiated deal. People in the European Parliament were not terribly happy, but the view from the Council was: "We have agreed it. For crying out loud, agree it too".

Dr Hagemann: But the European Parliament has had a chance, and continues to have a chance, to give its opinion and input to the negotiations. They have been heard and have certainly played a role throughout this process. It is not that they have been given a "take it or leave it" vote at the end of the process. They have highlighted, especially with regards to citizens' rights, their strong opinions on these matters as well.



Chair: That has been very clear in all the conversations we have had, for example, with Guy Verhofstadt, as a Committee.

Q3176 **Stephen Timms:** I want to ask you about the discussions around the future framework. We have been kept reasonably well informed about what is happening with the withdrawal agreement. We have seen draft texts. We have been told it is 80% complete and 95% complete, and so on. But we have heard nothing at all about progress on the discussions around the future framework. Why do you think that is?

Dr Hagemann: Everything depends on the withdrawal agreement and the kind of relationship the UK itself is proposing and willing to get into. From the very beginning, from the rest of the EU there has been a whole range of options available, from the Norway model to the Canada model and others. At this point in time, there are still many options available but the conditions of any of these arrangements are also very clear. With the UK's Government's position that the UK is to leave the single market and to leave a customs union, we are going in a direction that looks less and less like a Norway model. The politics changes from day to day at the moment, so it could be that this comes back on to the table.

The priority being the withdrawal agreement and the conditions that it lays out, it is unlikely that a Norway model, or something of that kind, can be a temporary solution, simply because that comes with the same sort of conditions as EU membership regarding the four freedoms et cetera. Unless the UK accepts those, we cannot imagine that it would be a Norwegian model.

Also, these other alternative options take time to negotiate. They have implications for the existing members. Norway, Liechtenstein and Switzerland will have to accept a UK membership, and their concern at this point in time is that it does not open up questions about their relationship with the EU. Whatever the outcome, existing EU members are hoping that the UK will be as close to membership as possible, given the conditions that are very clear for EEA membership et cetera, but these things take time to negotiate. It is not easily conceivable that that can happen from this point in time until a withdrawal agreement can exist.

Q3177 **Stephen Timms:** Can I ask any of you what sort of document you think the political declaration about the future framework is going to be? Will it be a lengthy, detailed document? Will it be rather a short document?

Raphael Hogarth: I would expect it to be short-ish. I have heard talk of a 15-pager; that number is floating around. Who knows? It could be more or it could be less, but with very positive mood music and not a lot of detail. That is ultimately the answer to your question about why we have not heard very much about it. It is the bit that you can fudge, because it is not a legally binding text. It is a political declaration so, in a sense, there is less pressure on it.

Q3178 **Stephen Timms:** Is it the expectation of all of you that we are talking



about perhaps a 15-page document, so quite a short document?

Dr Simson Caird: I do not have any comments on how long it might be. For the meaningful vote, the framework on the future relationship is the most difficult element of the process because it is an unprecedented thing to ask Parliament to approve a political statement or something without legal weight, which is the foundation for a negotiation that has not yet taken place and is only going to take place after we have left the EU.

When we are thinking about procedure and how the meaningful vote should work, one of the biggest challenges is the idea that there will be this document that we are, first, a bit unfamiliar with as a document and, secondly, we are not quite sure how we should adjust the procedure in order to deal with what approval of this document will actually mean. It is a very different parliamentary question.

Q3179 **Stephen Timms:** If what we are going to be presented with, potentially in the next month or so, is a 15-page document, is it your understanding that there is a draft of such a document somewhere between here and Brussels? You do not know. Mr Verhofstadt suggested to us that this document could be given legal force by making it an annexe to the withdrawal agreement, and the Committee commended that idea to the Government. Is there merit in that idea?

Dr Hagemann: There would be a lot of caution on the EU side regarding this, because we need to keep in mind what repercussions this could have for other EU member states. It would be in the EU's interests to get a good agreement with the UK and to keep relations strong, but at the same time current Governments are also under pressure domestically from various sides regarding their own membership. EU membership has become much more popular on the continent. Even the very sceptical EU countries that have often looked to the UK continue to watch what is going on here with the negotiations.

It is not to suggest that the UK is being treated in any punitive way, but there is an interest from the EU side to stay united and to give a deal to the UK that is not more favourable than membership itself. That is an important point, because the negotiations, as they are right now, are taking place in a political climate in Europe that is very difficult for the sitting Governments. It would also be in the interests of the European side to keep it short and without much detail regarding a future relationship, making clear that it is not akin to EU membership itself.

Q3180 **Stephen Timms:** Can I make a final point? We know the political declaration itself will not be legally binding. Jack, you have made the point that it will have legal implications. Can you tell us something about what those might be?

Dr Simson Caird: What I meant was that there would be indirect legal implications because already Parliament has enacted Brexit legislation with delegated powers that are designed to deal with multiple outcomes, so namely the EU (Withdrawal) Agreement 2018 and the correcting



power, which is section 8 of that Act, I believe. We know that that power will be used to get rid of some EU legislation that we do not need. When it was originally introduced, it was designed to prepare for exit day March 2019. The latest White Paper on implementing the withdrawal agreement said that it will also be used to prepare for the second exit day, the end of transition, at the end of December 2020.

What I meant when I made that statement was that, if the future framework says certain things—rules certain things in or rules certain things out, like freedom of movement for example—that could affect the legislative preparations that occur between now and the end of transition, even before we get to the treaty on the future relationship.

I was trying to make a point analogous to the debate we had about implementing the withdrawal agreement when we had the EU (Withdrawal) Bill before the House. There was a question: will we start implementing the withdrawal agreement before we get the final version of the withdrawal agreement? There is an analogous point to be made: will we start implementing the future relationship before we get the finalised version of the treaty? That will depend on how much detail and how much certainty there is with the framework.

Q3181 Stephen Timms: I wonder whether Sara and Simon can say anything about the legal implications from the EU side arising from the political declaration.

Dr Usherwood: Again, the EU's concern will be one of uncertainty about where the process is heading, where the UK's settled position will be, and whether that will be clear at the point of signing of this declaration and in the period of negotiation following withdrawal next March.

We have to remember there is going to be uncertainty on the EU's part, in that it is also going through continual changes of Government on national electoral cycles. The European Parliament's election will produce a new Parliament and a new Commission during next year, which will produce a necessary hiatus in those negotiations anyway. While the mandate on negotiations will nominally continue through that period, it will be evident that member states would want to revisit that once withdrawal has taken place and once they know what the Parliament and the composition of the Commission look like. Managing that uncertainty will lead to a degree of caution about how to approach this.

Thinking about the future relationship, we talk about a treaty. It may well be that there are a number of treaties. You might have a framework document that provides the basic parameters and a subsequent series of parallel negotiations on specific areas of policy, which come in at different points. The process is likely to be complex and coloured strongly by political preferences on both sides of the table, which are going to change.



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Member states have more varied preferences around what the future relationship might look like than they have in relation to the withdrawal process under Article 50, where the strength of unity behind the Commission and its programme has been very strong. You are not going to see quite the same level of coherence of political preferences on that future relationship. All of this points towards uncertainty and a degree of unwillingness to get pinned down on things that might cause more trouble later on, given already the considerable amount of difficulty that is associated with this.

Raphael Hogarth: On the legal effect of the future framework, I would say two things. First of all, to this idea of having it as an annexe to the withdrawal agreement, which I have not heard before. Probably more important than the structure of the document is looking at whether it contains clear, enforceable rights and obligations. If it is an annexe to the withdrawal agreement that says things like, "The UK and the EU recall their commitment to enter into a highly ambitious free trade agreement", that does not sound to me like a binding and enforceable obligation. If it says specific things that either or both parties will do, and explains the consequences and the sanctions available if they do not do those things, it is starting to look like a legally binding document. I do not think that is the direction in which we are heading.

The other thing on legal effect is this. If you wanted to give it a bit of legal bite, but not necessarily the kind that I just described, you could have a legal obligation to negotiate on the basis of it, which you would put in the main withdrawal agreement. But a legal obligation to negotiate is obviously not the same thing as a legal obligation to conclude an agreement.

Dr Simson Caird: Can I say one thing about linkage on that point? There is a danger, with the idea that the withdrawal agreement contains some kind of binding provision in relation to the framework, that it creates more confusion than is desirable. At the moment, we know that we have a withdrawal agreement that is legally binding and we have a political declaration that is not. Anything that muddies those waters, where you have different lawyers saying different things about whether the declaration is binding, is a bad thing.

Q3182 **Wera Hobhouse:** Guy Verhofstadt came here and said quite clear things to us. You have been saying the European Parliament has quite a lot of power in this. He said that the framework does not have to be detailed but it has to be specific. He was very clear about it, whereas you have just said that it will probably not be specific. How do we square that circle? It is all speculation but from what has been said to us here, about four months ago, it very clearly had to be specific.

Raphael Hogarth: It could be both specific and, in some respects, non-specific, in that it could say, "We anticipate that we will negotiate towards outcome X", be it a free trade agreement, Norway or whatever. In the same way that the Council guidelines in the past have said, "If the



UK's red lines change, the EU will revisit its offer", you might expect the same kinds of provisions in the future framework, to ensure that the negotiation is able to reflect political changes on either side.

Dr Usherwood: You can be very specific about the areas that you might want to cover without being specific about what the final agreement comes out as. It is worth underlining that the EU's negotiators will be bound by the other treaty provisions on relations with third parties, under 207 and 217. This is an Article 50 document because it is associated with the withdrawal agreement, but that cannot be the basis for long-term standing relations with third countries. That has to be done on a different legal basis, which would involve different approval mechanisms by the European Parliament member states and all those things. You can have a detailed intention, but you cannot have a detailed obligation on the EU through that path because that would infringe the EU's own legal basis for concluding that agreement.

Q3183 **Emma Reynolds:** Very briefly on this, given that the political declaration is not legally binding, even if it did include specific things in it, there is nothing stopping a new European Commission and a new European Parliament, which could look very different politically to what we have now, and indeed a new Government here from throwing this thing up in the air and starting again, or having something entirely different. Is that the case?

Dr Usherwood: That would be my understanding of it. We have to remember that after 29 March, after withdrawal, the UK is no longer a member state so the situation changes. We are in a discrete part of the process. Statements made in the political declaration are statements made, but whether they are obligations on how to act and how to pursue negotiation subsequently is necessarily constrained by the situation, as you say, that any of the other parties can change what they might wish to achieve and wish to do.

I do not see any party being willing or able to tie its hands with an obligation to reach an agreement either on the specifics of the political declaration or even in general to reach a conclusion. It is a bit like the Clerk earlier talking about the motion, in that you can make the statement but then you cannot oblige everyone to follow that in the manner of international negotiations in general.

Raphael Hogarth: I completely agree with that. This is the only caveat I would add. You have the shadows of both the backstop and the transition looming over the future framework. There may be legally binding provisions within the withdrawal agreement about the circumstances in which the backstop would come into effect and/or the transition would cease to be in effect. Those are things with a great degree of relevance to your future relationship. It would not be true to say that there will be nothing in the withdrawal agreement that will create any legally binding obligations with respect to the UK's future relationship with the EU. It



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would be true to say that the political declaration on the future relationship itself would not contain such obligations.

Dr Simson Caird: One of the things, from a domestic constitutional perspective, we would be looking for in the political declaration is how on earth you are going to get it done in time by the end of December 2020. One of the things we will be looking at is what Parliament's role will be in the transition in terms of delivering that treaty, because it is such a tight timeline. When will the treaty be presented? There are all those sorts of questions, and that is one of the main things.

Q3184 **Sir Christopher Chope:** When David Davis was the Secretary of State responsible for this, he envisaged that we would have these two documents side by side, that we would have the withdrawal agreement ratified by 29 March, and that early in April we would have more or less the document setting out the future relationship, which would be more or less completed but would then be subject to ratification under those EU rules.

That vision has, in a sense, been complemented by the repeated assurances we have had from the Prime Minister that nothing is agreed until everything is agreed. In light of what you have been saying, how is the Prime Minister's assurance to the people going to be delivered if there is no binding legal nexus between the withdrawal agreement and the declaration of the future arrangements?

Dr Simson Caird: That is why the UK Government want the legal linkage, in order to make that precise point. The legal linkage is what the whole thing will hinge upon. To say that, because we have this legally binding commitment in the withdrawal agreement, the content of the framework will be delivered is how you explain that position.

Raphael Hogarth: There are two ways of interpreting the phrase, "Nothing is agreed until everything is agreed". It might be that nothing in the withdrawal agreement is agreed until everything in the political declaration is agreed. That can perfectly well be true. Or it might be that nothing in the withdrawal agreement is agreed until everything in the future relationship itself is agreed. That is not true.

Q3185 **Mr Whittingdale:** I wanted to explore that a little and to come back to something Mr Hogarth said earlier in the session, which was to talk about the unpalatability of certain measures within the Bill, particularly around the flexibility to allow Ministers to make payments. I wondered if you could say a bit more about that. When it comes to the linkage, and the difficulty of establishing linkage, the Secretary of State had previously suggested, some time ago, that the Bill could include some conditionality on payments to link to outcomes. However, given the difficulty of specifying outcomes and, indeed, the possibility that the declaration could be torn up completely by the European Commission or Parliament, how practical is it to try to include amendments to the Bill that would make future payments and the financial settlement somehow conditional on an



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outcome being achieved?

Raphael Hogarth: The short answer is that I do not know. The slightly longer answer is that there are two things you have to think about. First, is what we do in the withdrawal agreement Bill taking us sufficiently far away from the obligations that we have agreed in the withdrawal agreement that the EU is going to say, "Hang on a minute; I am not sure we are happy to conclude this deal with you by March 2019 after all"?

Secondly, is what we do in the withdrawal agreement Bill taking us far enough away from the treaty that, even if we do agree the treaty by March 2019, it could subsequently be found that the UK is in breach of its international obligations under that treaty? This also goes to the question that the Chairman was asking earlier about what the repercussions might be of, in some way, getting it wrong in the Bill, for instance by not including Ireland.

I do not know the extent to which the EU at negotiating level is going to be looking at what you are doing in the withdrawal agreement Bill, whether we are trying to make payments conditional or anything like that. Inevitably, in enforcing that agreement, subsequent to its signature and ratification, whether the UK has legislated to give effect to those obligations is going to be the material question. One would want evidence from the EU side and, potentially, from lawyers about whether that kind of conditionality being introduced in the withdrawal agreement Bill would render the UK in breach of its international obligations.

Q3186 **Mr Whittingdale:** You are suggesting Parliament could impose conditionality.

Raphael Hogarth: A sovereign Parliament can do whatever it likes.

Q3187 **Mr Whittingdale:** The EU might come back and say, "Hold on; this is not what we agreed. This is not the deal and, therefore, we will not proceed on the basis if that conditionality is included".

Raphael Hogarth: There could conceivably be domestic arguments about whether the Bill, if sufficiently amended, still satisfies the section 13 requirement. I think it probably would. Again, that is a legal issue on which you would have to get an opinion from a lawyer, but basically the analysis that you just presented is right.

Q3188 **Mr Whittingdale:** Can you just get back to the question about unpalatability?

Raphael Hogarth: The withdrawal agreement Bill is going to do a few things. It is going to provide for transition. It is going to provide for citizens' rights. It is going to provide for the financial settlement, provide for other separation provisions and, potentially, although the White Paper does not make this clear, provide for the protocol. In all of those, there are going to be some quite politically difficult provisions. Jack mentioned earlier the provision on Article 4 of the draft withdrawal agreement,



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basically saying that the UK will ensure in future, if any Parliament legislates against the citizens' rights provisions, that new legislation will be disapplied. That is trying to preserve the supremacy of EU law with respect to citizens' rights. The EU also wants to preserve the supremacy of EU law with respect to other things. That could be politically difficult. The power to make payments, as I mentioned, could be politically difficult. Keeping the European Communities Act in force until the end of transition or saving for its effect, which is I think the Government's phrase, which will mean putting on hold the first clause of the EU (Withdrawal) Act, could also be politically difficult. I am anticipating some potentially quite challenging days for the Government in Parliament as they are getting this Bill through, which is a worry given that it is a condition precedent of ratification.

Mr Whittingdale: You are probably sensible to anticipate that.

Chair: Can I pursue this point of unpalatability, as I am describing it? We know that the Northern Ireland-only backstop is the outstanding issue for the conclusion of a withdrawal agreement. We read that there appear to have been some discussions about whether something could be put in the withdrawal agreement about a commitment to negotiate another arrangement along the lines that the United Kingdom Government prefers. But presumably the Government could say to the EU, "We did not legislate for the Northern Ireland backstop in the WAIB because, first, we do not think it is ever going to be used and, secondly, if it ever did come to be used that is yonks away, because it is at least 21 months, and it could be longer if we have to extend the transition period. It cannot be for you, oh EU, to tell us by what date we have to legislate for the different commitments that we have entered into in the withdrawal agreement". Would that not be a reasonable argument to make? I am judging the facial expressions, but you will need to turn those into words.

Raphael Hogarth: I defer to EU colleagues on how the EU would react.

Dr Hagemann: That would not be seen as acceptable on the EU side. The backstop question has been given prominence lately but it has been a criterion on the EU side all along. It is not a new issue. The commitment to ensure that the backstop is in the withdrawal agreement, from the European side, will not be seen as sufficient if it is a matter of domestic legislative process to delay such an agreement.

Dr Usherwood: It is worth adding that the EU has had enough concerns about the status of the backstop up until now that it will not want to go down a promissory route. The agreement on the joint report, the publication of the draft withdrawal agreement, and statements from Ministers and others in the UK about whether this was as binding as the text suggested it was have made both the EU and certain member states, notably Ireland itself, very concerned to make sure that it has a watertight legal basis, that it is a genuine all-weather backstop.



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While there are always going to be issues about how things change in the future, that will always be a concern. The issue was already mentioned. Yes, you could make a promise that you would put it into effect at the relevant time, but that would be dependent on local political conditions over which you cannot be sure.

Q3189 Chair: The Government might put the Northern Ireland backstop in the legislation today, and then another Government might take it out of our legislation tomorrow. It comes back to Mr Hogarth's point, which is that you enter into an international treaty, you are regarded as someone who does what they promise internationally and the expectation is that you will, at the appropriate time. The point I am trying to explore is whether the EU can say, "It is not in your version. We are looking at your current version and your amendments to the EU Withdrawal and Implementation Bill, and it is not in there. If it is not in there, all bets are off".

Similarly, does that mean the British Government could say to the 27 member states, "We are looking at your legislation and we do not yet see provision for clarifying how British citizens are going to get their rights permanently under the citizens bit of the agreement"? This could end in quite some difficulty, if we are checking each other's method of implementing what are clear international agreements that we are signing up to.

Raphael Hogarth: Parties are always checking on each other. That is what the European Commission does to us now. It checks whether we are complying with our obligations under EU law, as, indeed, private parties and citizens before our own courts. In any event, it would be perfectly legitimate for either side to raise the kinds of concerns that you are discussing.

Q3190 Chair: Then the dispute resolution body will decide.

Raphael Hogarth: Exactly. Once we have an agreement, you say, "I want to enforce this agreement. You are not complying with your obligations under the agreement because you have not legislated to do so properly". Like I say, it is a much more difficult question as to whether that could get in the way of agreement before March 2019.

Chair: That is very helpful.

Q3191 Seema Malhotra: Thank you very much. It has been an absolutely fascinating evidence session. I want to pick up on the point about the extent to which there is going to be any real weight coming from the political declaration at this point. I want to think through a scenario here. Assuming we leave in the way that is planned, we will leave the European Union on 29 March next year. Subsequent to that, we will be entering negotiations on the future framework, for which the forerunner is the political declaration. That could be one treaty in the end, or it could be a series of treaties. Those treaties could perhaps be independent of each other. There could possibly be treaties signed through the period of transition if there is agreement reached on different areas. We have had



some evidence to that effect before.

Say we are in a situation where there is a delay, with the changes to the European Parliament, Council and Commission. We will probably not be into active negotiations until this time next year. Then there may be a year with new teams in place. We do not know what the political reality will be over here either. If there is a scenario in which there are not any treaties signed or agreement reached on the future framework, what happens, come December 2020, assuming that there is not an extension of the transition period?

Raphael Hogarth: There is another cliff edge.

Q3192 **Seema Malhotra:** There is another cliff edge and we are back to where we could be without a deal on 29 March, so a possible default to WTO.

Dr Hagemann: That is not even a given. From the EU side, it is seen as very regrettable that we are in this situation, first, because of the UK being the UK and the EU regretting that the UK is leaving in the first place. Also, at this point in the negotiations, there is no certainty about the withdrawal agreement, but there is also no certainty about what the UK would want the future relationship to look like. From the European side, that is seen as adding to that uncertainty in the negotiations over the withdrawal agreement. They are linked.

The Article 50 text says that the withdrawal agreement is to be completed with a view to the future relationship. It is not giving any guideline that there needs to be something specific agreed. It is just "with a view". There is a hope that there will be some clarity regarding what that future relationship will look like.

At this point in time, as far as the EU 27 are concerned, we have no idea. Therefore, what you say on the timeline is correct. The withdrawal agreement has to come through, and only at that point will there be real negotiations over what the future relationship will entail. That could still be any of the options that have been on the table from the very beginning. The expectation is that we are nowhere near a Norway model. It is much more like a free trade agreement. That is the expectation at the moment, simply because of the way that negotiations have unfolded and the red lines that have been made early on from the UK Government regarding leaving the single market, leaving the customs union, jurisdiction of the ECJ, et cetera.

That will take time, whatever agreement has to be negotiated. You are right that even that transition period will be a very, very short period of time to get anything through. Mind you, the ratification for that agreement is also quite different from the withdrawal agreement. In fact, depending on the kind of agreement and whether it is an extensive agreement, which would mean that there is an extension of the EU territory in relation to the UK in some way—ECJ jurisdiction, et cetera—for some countries that might even require parliamentary ratification. It is important that the withdrawal agreement now, preferably, has a steer



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as to which direction this goes and, on day one after the withdrawal agreement comes into place, that there are serious negotiations about taking this forward.

Q3193 Mr Djanogly: I am going to drag us back towards Peter Grant's question. Could I confirm that the panel agree with what Sara Hagemann said, that in effect it is very unlikely that the European Parliament is going to vote against a withdrawal agreement? I think you said that on the basis that they are looking at it on an ongoing basis and, therefore, they know what is coming. Was that it?

Dr Hagemann: They know what is coming under the current proposal and, if that is the basis, there is an expectation that the majority in the European Parliament would approve it.

Q3194 Mr Djanogly: Right. Would everyone else agree with that?

Dr Usherwood: Yes

Raphael Hogarth: Yes, broadly.

Dr Simson Caird: Yes.

Q3195 Mr Djanogly: Great. On that basis, if there was a shock and if they did vote against it for whatever reason, what would actually happen?

Dr Usherwood: If you have non-ratification by one of the parties, the agreement is not ratified. If you have not found an alternative arrangement, you get to 29 March and the UK will leave without a deal. I presume that in the scenario where one party, not just the European Parliament but any party, specified that they were not happy to approve, they would be suggesting what would be necessary to make them be in that position. Then there would be a discussion about whether it was a matter of renegotiation or something else.

Q3196 Mr Djanogly: Could an Article 50 extension request come from the EU?

Dr Usherwood: It could, yes. All sides can ask for it, but the European Parliament can only ask the EU to consider asking for it, because the European Parliament itself cannot ask for an extension.

Dr Hagemann: An extension, by the way, of the Article 50 negotiations would require unanimity in the Council and there would have to be a clear reason for why that extension should be granted, especially as we are looking at European Parliament elections, European Commission, budget negotiations and what have you.

Q3197 Mr Djanogly: It is quite a tough call, you are saying.

Dr Hagemann: Yes, absolutely.

Q3198 Mr Djanogly: The other thing I was looking at was this. It seems, post-Brexit, that there is going to be a disparity in the scrutiny provisions that exist between the UK and the EU. In fact, there is a disparity today.



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Post-leaving, I suppose European Standing Committee B will presumably be dissolved. There are promises from Dr Fox that some kind of new regime is going to be brought in to review future trade agreements. This does not really stand up when you look at the processes that exist within the EU. I would be interested to hear the panel's views on whether you think what we have is adequate, what it is said we are going to have will be adequate, and how it compares with the EU.

Dr Simson Caird: That is an interesting question. The presentation of the framework is an opportunity. It is an invitation for Parliament to think about what its role is going to be in turning this framework into a treaty. Having had the experience of Article 50 and learned the lessons, whatever those may be, from the Article 50 process, what does Parliament want its role to be in the negotiations on the future relationship? At the end of those negotiations, what does it want its role to be in relation to approving that agreement? Does it want to replicate for the future relationship the conditions in section 13 for the withdrawal agreement? Does it want to guarantee itself a veto at a particular moment in time, perhaps, before the European Parliament gets a chance to give its consent to the future relationship?

You are right. This is the moment of maximum leverage for the House of Commons to say, "When we have left, we want to make sure we have at least a similar level of responsibility as the European Parliament has".

Dr Usherwood: During transition, the UK under the terms of transition would still be applying and transposing EU legislation, so where that is a matter of statutory instruments there would be a role.

Q3199 **Mr Djanogly:** How is that reviewed?

Dr Usherwood: Even though the UK will not have the legislative input into decision-making during that time, there will be certain issues where the UK might be able to advance its opinions about potential legislation. Again, Parliament would still have a role in place in that process.

Dr Hagemann: EEA members have the right to give early positions equal to EU members on legislation. There is a lot to take note of in their parliamentary set-up, especially in Norway. It is not only about influencing but also, in trading with the EU and any relations with the EU going forward, legislation here will be affected, most likely. There are other countries to look to for some best practice. Even where, in some cases, it is not working so well, there are conclusions to be drawn.

Q3200 **Chair:** Do any of you think that it is realistic that the negotiations on the future partnership will be concluded by December 2020?

Raphael Hogarth: It depends on two things: what you mean by "concluded" and what is in the future relationship. If the future relationship is, to a great extent, off the shelf, and by "concluded" you mean agreed between negotiators but not necessarily ratified or implemented domestically, yes.



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Q3201 **Chair:** Let me then qualify the question: concluded to the extent that we then would not fall off a cliff on 1 January 2021. You just said “not implemented”. If it is concluded but not implemented, do we not fall off a cliff?

Raphael Hogarth: You probably have to make some provision not to fall off a cliff.

Q3202 **Chair:** That sounds like an extension.

Raphael Hogarth: It might be extension-ish.

Chair: Extension-ish is a new concept.

Raphael Hogarth: After you have completed your negotiation, you need what is actually an implementation period. What we have now is not an implementation period, because there is nothing to implement. During your implementation period, you might get what the Prime Minister has at some points discussed, which is a phased implementation period, in which different parts of your future relationship are brought forward as and when the domestic structures, administrative structures and enforcement structures are ready for them. On 1 January 2021, are we going to have everything ready to go? No.

Dr Usherwood: You can have a provisional implementation of a future relationship. Even if you are in the middle or at the start of ratification with all the parties, in the way that you had, for example, with the CETA deal, you can have that provisional application of parts of the agreement, so you can have a partial implementation of the future relationship. Again, if we are talking about the framework document with some subsequent or parallel negotiations on specific areas, you might be able to get that in. It depends very much on what you want and which cliffs you do not want to fall off.

Dr Hagemann: I would like to stress that, from the EU side, there is a wish to get moving with things very quickly. All of this creates uncertainty. This has been the case during these negotiations up until the point of the withdrawal agreement. The continued uncertainty about what the future arrangement will look like is also something that the EU would like to settle very quickly, especially in areas such as security and trading between different markets. There is a lot happening on the continent at the moment where the UK has an interest in participating, but also where EU Governments would very much welcome it becoming clearer what kind of role the UK could play alongside the EU member states.

Q3203 **Chair:** Dr Simson Caird, Sir David Natzler earlier appeared to suggest that there might be some way the Government could get round the CRAG process or find another way of ratifying the withdrawal agreement. Could you think how that would be done?

Dr Simson Caird: You have to comply with the CRAG. I do not think he was suggesting that. I do not know. Ask the question again.



Q3204 **Chair:** Maybe we will have to check the record, but I seem to recall that he said the Government might have a different approach to securing the final stage of ratification. It was in the context of conditional approval subject to a referendum. I argued, "So you could get the legislation on the statute book, but the thing you could not do is ratify under CRAG". That was the context.

Dr Simson Caird: You cannot ratify under CRAG until you have fulfilled the conditions, which are to lay the final version of the treaty 21 days before ratification. That is the critical point. I think the Government have said that, when they lay the treaty for the purpose of section 13, that is not laying it for the purposes of CRAG. Only after the final version is approved, which may be after it has been approved by the EU side, I imagine it will be laid under CRAG, and then there will have to be 21 days before it can be ratified. That is my understanding.

Q3205 **Chair:** Lastly, on this question of a neutral motion, do you think that the way in which section 13 is framed, in practice, if it is a motion in neutral terms, gives the Speaker any discretion?

Dr Simson Caird: I would like to stick to Sir David's line on that.

Chair: That is probably a very, very sound and good point on which to end. Can I, on behalf of the whole Committee, thank you very much indeed for coming today? It has been a really useful and informative session.