

Exiting the European Union Committee

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

Wednesday 19 December 2018

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Members present: Hilary Benn (Chair); Mr Peter Bone; Joanna Cherry; Sir Christopher Chope; Stephen Crabb; Mr Jonathan Djanogly; Peter Grant; Andrea Jenkyns; Stephen Kinnock; Jeremy Lefroy; Seema Malhotra; Mr Pat McFadden; Mr Jacob Rees-Mogg; Emma Reynolds; Stephen Timms; Mr John Whittingdale.

Questions 3477 - 3550

Witnesses

I: Dr Kirsty Hughes, Director of the Scottish Centre of European Relations; Professor Catherine Barnard, Professor of EU Law, Cambridge University; Sam Lowe, Research Fellow, Centre for European Reform; Henry Newman, Director, Open Europe.

Examination of witnesses

Witnesses: Dr Kirsty Hughes, Professor Catherine Barnard, Sam Lowe and Henry Newman.

Q3477 **Chair:** On behalf of the Committee, can I welcome our witnesses this morning? We are very grateful to you for giving up your time, some of you again and some of you for the first time, to enlighten our deliberations. I welcome Dr Kirsty Hughes, director of the Scottish Centre of European Relations; Professor Catherine Barnard, professor of EU law at the University of Cambridge; Sam Lowe, senior research fellow, Centre for European Reform; and Henry Newman, director of Open Europe. We have, not surprisingly and as always, a lot of ground to cover. Succinct questions, colleagues, and succinct answers would be really helpful, to enable us to get through everything. Please do not all feel under an obligation to answer every question. Some questions may be directed to you as individuals.

The first question I wanted to put was on the troublesome question of the backstop, and how and when it can be ended. The House of Lords EU Select Committee concluded earlier this month that, in the event of an intractable dispute, as I think they described it, between the UK and the EU over whether the backstop should be brought to an end, the UK could invoke arbitration. The Attorney-General subsequently indicated in his published advice that arbitration could indeed be used for this purpose, while the Government's legal paper said that going down this route would depend on there being a clear lack of good faith on the part of the EU.

The question is this. Do you think that arbitration would be available under the terms of the withdrawal agreement, to try to deal with a situation in which the UK and the EU had different views about whether the backstop should be ended? Professor Barnard, you were nodding, so I think I will come to you first.

Professor Barnard: We are looking at article 20 of the protocol.

Chair: Yes, we are.

Professor Barnard: We are looking at the fact that article 20 says nothing about any remedial provision. There is a problem because article 14 of the protocol does provide remedies, and you could make a *lex specialis* argument and say that, if those are the only remedies specified, those are the only remedies available and they apply only to limited provisions of the backstop. I do not find that argument compelling because, first, it is not very practical. Secondly, you could also make the point that article 14(4) deal with the specific issues, which are very technical issues; it does not deal with your broader point.



Then the question is whether the arbitration clause, i.e. title 3 of part 6, can be applied to article 20. There is an argument that it can, because the specialised committees can refer matters to the joint committee about issues of implementation and interpretation. I tend to take the view, as the House of Lords Committee does, that the general remedies provisions apply, but there is a problem. The problem is, first, legal. What happens if there is a breakdown and neither side can agree, not because of bad faith but because there is a very different perspective? There is good faith on both sides, but a very different perspective about whether the backstop is still necessary.

That point was not really dealt with by the Government. I think it would still have to go to arbitration, which brings us to the next political-cum-legal point: can arbitration essentially decide on something as deeply political as whether the backstop is still necessary? The fact is, as we know, that arbitrators and courts have to trespass on ultimately quasi-political issues, as we have seen with the Wightman case, so I think it should be able to go to arbitration. Then the question is whether arbitration embraces the substantive issue—if things have broken down to such an extent, what to do about it—or merely the procedural issue: how do we get to the next stage? That is not clear at all, so you might end up having to go to arbitration to work out the powers of the arbitrators. I bet that has really cheered you up, has it not?

Q3478 Chair: I want to pursue that last point. If the UK says, “We think that this dispute about whether the backstop should be ended does come within the provisions for arbitration in the agreement, and therefore the issue itself should go to the arbitrators”, and the EU side says, “No, we do not think it falls within the powers”, is there a provision for that question, whether it does or does not fall within, to then go to arbitration, to decide whether the substantive issue can then go to arbitration, if you see what I mean?

Professor Barnard: Yes, absolutely, and of course the answer is no, because we do not even know whether the arbitration provisions can apply at all to article 20. There is a further problem. If you look at the text of article 20, it also envisages a situation where the decision is that the backstop is needed only in part, not in whole. Then that creates further issues about who will decide that. It feels a political decision but, if the two sides cannot agree on that point, how do you get it resolved? Essentially, that is where arbitration must eventually kick in, but then the question is whether the arbitrators can come up with a process for how to deal with this, or whether they will actually decide the substantive issue.

Q3479 Chair: That is very helpful. Does anybody want to add to that or express a different view? If not, the second question I have is this. The Prime Minister went to the Council last weekend, seeking some kind of reassurance on this question I have just asked you. None was forthcoming, but she says that discussions are continuing. We know, however, that no special Council has been scheduled. The next ordinary



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Council is in March. Is there a mechanism available by which the EU could agree and sign off—I do not know: a write-round, a conference call, whatever it is—that does not involve the leaders meeting in one place? I am talking about the process. Is there a process by which the EU could sign off something, which could then be transmitted to the UK Government? Is there any precedent for them doing it, on a major issue like this, without having to call a special Council? This is a procedural question. Can anyone think of anything?

Dr Hughes: I will have a go. I am not sure; that is the answer. I am not aware of any precedent. If you think of when Ireland or Denmark had second referenda, for instance, to stop a stalemate over a treaty, where protocols, additional clauses or reassurances in various forms were given, there were European Councils. We have seen, in the last year and a half or longer ago, Presidents Juncker and Tusk make statements with a European Council, but I am not aware of a process that would allow you to do that.

Sam Lowe: I am not sure, but it is a political question. From the EU side, there was always the feeling that they were not going to do anything this year. To be honest, they do not feel that Parliament has actually read the text yet, so they want to give a bit more time for it to sink in and for the domestic argument to play out. If they want to do something in January, they will find a way. It is possible that, when we hit January, discussions start to happen about how tweaks could be made. I do not think anything substantive could be changed, but there could be clarifications and the like. Nothing will be announced yet.

Q3480 Chair: That is very helpful. One suggestion has been to try to approach the backstop problem from the other direction. It seems pretty clear that there is a reluctance to put an end date on the backstop, and the idea has been floated that you could seek to put a start date on the new trade relationship. As long as the start date for the new trade relationship is before the end of December 2022, you can argue that you can extend the transition to December 2022, and if the new relationship is going to come into effect before then, ergo, the backstop will never be used. There are clearly difficulties in trying to agree a legally binding start date, because it depends on how the negotiations go and what the UK wants. Do you think there is anything in that, or is it a vain hope?

Henry Newman: I do not particularly understand the difference between the two. Obviously, there is a difference. There is a danger from the UK side in setting a fixed date to end the backstop. That is what the Prime Minister tried to seek at the Council meeting last week, but that was broadly a mistake. First, it is something I think the Union would never give us, and secondly, if you do that, you create a new negotiation cliff edge, which you then rush towards and take actual power away from the UK negotiating team. I do not think they are going to give us that, and it is not a very sensible approach.



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There are things you can do, as Sam was saying, to offer greater clarity. There are also things that would not necessarily change the balance of how the backstop operates, but would make a substantive difference on the UK side, for example creating a role for the Stormont institutions. That could be done through the operation of the joint committee without changing, ultimately, anything in the balance between the UK and the EU side on that joint committee, but it would give reassurance that the commitments made in December last year by both sides in the joint report were being met. There are things you can do like that.

As a final point, to the earlier question on arbitration, good faith has become an element of some recent international disputes. The UK was taken to the International Court of Justice over whether we were negotiating in good faith under the non-proliferation treaty. There is some precedent for the use of these sorts of points in international dispute resolutions. We might be able to get some greater clarity on the operation of the exit mechanism through some sort of interpretive declaration. Policy Exchange has done a report on this recently, which was interesting and provides some thoughts. Equally, there are dangers in creating some sort of parliamentary lock on the operation of the backstop. If you went too far in that direction, you could end up with a situation where, if an amendment like that was passed, Parliament had not actually ratified the treaty that we would need to ratify.

Chair: That is very interesting.

Professor Barnard: On the point about some sort of comfort declaration, the most likely form would be a decision of Heads of State or Government. This is a particular jargon term; I accept it is very unappetising jargon, but it is what was used when Denmark voted against the Maastricht treaty, when Ireland voted against the Lisbon treaty, and it is what was used, essentially, for the Cameron 2016 renegotiations. That was going to be an international agreement; it was going to be registered as an internationally binding text, and it would at least stand separate and independent from the withdrawal agreement, which the EU has made very clear it is reluctant to open. It seems to me that that is the most likely way forward. It would be an intergovernmental agreement. The idea that they could do it on a quick email circular seems extremely unlikely. They would have to meet.

Dr Hughes: On the idea of the date, it is very hard, for obvious reasons, to have a legally binding date when you have not even begun the trade negotiations, when the UK is not yet a third country. It certainly could not include ratification. Having said all that, putting an intention, politically, as part of attempting to offer a political route through is perhaps possible. I am not sure if it damages the UK's bargaining power. I suspect it would maybe limit the EU's bargaining power. The EU is going to be in an extremely strong position from April, if we leave on time and if we leave. I am open as to which side politically would want that and benefit from it.



Q3481 **Sam Lowe:** To add to Catherine's point, one of the issues the UK has is this. On the EU side, I think they will be willing to help with further declarations and the like, on the condition that they are convinced it would allow the Prime Minister to pass the withdrawal agreement through Parliament. At the moment, it is not clear to them what would help her do that. Until she can clearly articulate a route through Parliament and what they can do to assist her, it seems very unlikely that they will do any of these things. I agree with Catherine that what was laid out is a likely route for how they would go about it.

Q3482 **Chair:** That is very helpful. We are going to explore this subject in more detail in the questioning, but I want each of you to give me a sentence, and I mean a sentence. When someone says to you "managed no deal", what is your reaction? What would you say about it?

Dr Hughes: My reaction is the same as the EU 27 reaction: there is no such thing as a managed no deal.

Professor Barnard: Agreed. A managed no deal requires bilateral agreements, and the EU has come out very clearly and said, "No bilateral agreements. We will do unilateral decision-making, which helps the EU 27". It said that in its communication last month.

Sam Lowe: It is a political slogan of no substantive worth.

Henry Newman: There are some substantive things the UK can do unilaterally to mitigate the effects of no deal in certain areas. That is indisputable, but overall, unless you can agree side agreements, there will be very significant disruption.

Chair: That is very helpful. Thank you very much indeed.

Q3483 **Emma Reynolds:** Good morning. We know from the recent EU Council meeting that the EU faces other issues and challenges. I wonder if you could comment on where Brexit ranks in the EU's priorities.

Dr Hughes: I was in Berlin two weeks ago and was told it certainly was not in the German Government's top five priorities. I think it was in the top 10. You are right that there are other major challenges, internally and externally: how to handle external migration, which carries on as a major issue; eurozone reform; the growth of populism. Every country also has its own internal challenges. Whether we look at Merkel or Macron, there are different issues going on. That impacts on the politics of Brexit. One way or another, they want this over. In Berlin, just before 11 December, they were expecting that vote to proceed; they were expecting it to fail; they were not very scared about that, if I can put it that way, because they thought it was very important that it moved on, as time is running out. Yes, there are many, many other issues. I have given the example of Germany, but it goes across the board.



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Professor Barnard: I was in Brussels yesterday, not talking about this as such; I was talking about social policy. I was struck that nobody in the room was interested in Brexit at all.

Sam Lowe: We should differentiate between member states and the EU. In different member states, Brexit is a sideshow, because it is not just a case of having EU issues to think about; they also have domestic issues, which are the priority. At the EU level, there is a lot of talk about it not being that high up on the priorities, but in reality it is. It is fundamentally important and something they are definitely concerned about. As for whether it is the number 1 priority, probably not, but it is certainly in the top five.

Henry Newman: I agree exactly with what Sam says. I do not know exactly what the right expression is, but there is a desire to show how little they are paying attention to Brexit. You often see this in public pronouncements, at European Council meetings and so on. Clearly, this is a serious issue. Embassies here are very, very engaged in it, for obvious reasons. They spend a lot of time on it; they get very senior visitors, who are very interested in it. If I speak to people in the offices of Heads of Government in other European countries, they are very interested in what is happening here. It may be that they feel they have settled the deal, and they now understand that this is a political process in the UK as to whether the deal is ratified, but I would not say they are not interested.

Q3484 **Emma Reynolds:** Thank you. That is really useful. Given that it is in the EU's interest as well as our interest to avoid a no-deal scenario, how willing would the EU be if the UK were to ask to extend article 50, and in what circumstances?

Dr Hughes: I do not think the EU would be willing to extend article 50 just because the UK Government and Parliament had failed to decide whether they wanted Brexit and what sort of Brexit they wanted. The message has come from various quarters in the EU that an extension may be possible, for instance if for some reason there was going to be a general election and it could not be held within the time limit of the end of March, or if there was going to be a further referendum on the deal. But there is a serious reluctance to extend just to allow the inconclusive debate and stalemate that exists at the moment to go on.

A number of people—commentators and others—have been rather too optimistic about how simple it may be to get an extension of article 50. It requires unanimity. Again, as I heard when I was in Berlin, it is going to take time. You would expect member states to come with some demands. They may not get them, but you could imagine the flashpoints, whether it is fish, Gibraltar, money or something else. Take the example of there being a decision to have another vote, another referendum on the deal. Given that we have the Wightman judgment, if we were to have another vote and it was remain, the UK could unilaterally revoke. At the point of extension, the EU would know this was potentially its last



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bargaining power in that scenario. There is some debate about whether all 27 EU member states want to help, in the case of it being requested. It depends what it is being requested for. For a people's vote, they will want us back. It cannot be done just because the stalemate we are in at the moment continues.

Sam Lowe: I would agree with that. It can be extended if they determine that the reason for extension is in their interest. The only time, in my discussions with the Taskforce on Article 50 team on the other side or with member states, that I have had it acknowledged that article 50 could be extended was to allow for domestic ratification processes, on the UK side, but also on the EU side. That is not to say there are no other reasons for which it could be extended, but it gives an idea as to the sort of reason they would allow it for.

That makes sense, but it also brings home a point that I do not think has been fully appreciated in the British debate. There is actually only really one deadline. We have lots of other deadlines, and I realise there are domestic parliamentary deadlines to consider as well, in a way, but if an agreement is signed at one minute to 11—because it is not midnight, obviously—and it is one that both sides think they could pass, time will be made domestically to allow it to happen. Talk of earlier cliff edges leads people to miss this.

Henry Newman: My understanding from speaking to people in the Commission and elsewhere was that there are two broad circumstances where article 50 extension would be considered, although, exactly as was just said, it would probably require unanimity, unless QMV was extended there as well, which has its own problems. If that was the case, it would only be for a general election or referendum. I have been listening to Labour frontbenchers talking about extending article 50 and going back to renegotiate more. That is simply not on offer. It is magical thinking.

Emma Reynolds: That is helpful.

Professor Barnard: It has to be unanimity, because article 50(3) clearly says “unanimously”. There are just two other points. First, there is quite a lot of discussion about whether you can pause article 50. Article 50 does not envisage any possibility of pausing. The only thing it envisages is that it could be possible to delay the implementation date of the withdrawal agreement, which is one rather overlooked dimension of the article 50 provision. Pausing is unlikely, and it is even more unlikely in the light of Wightman. Wightman says, albeit in the context of revocation, I agree, that it has to be an unequivocal and unconditional decision. A pause does not seem to be unequivocal or unconditional, because by definition a pause is just that.

Henry Newman: We come up against a structural problem quite quickly, with the European elections in May. That is a concern on the Commission side as well.



Q3485 Emma Reynolds: I wanted to ask you very quickly about that. To what extent is that a constraint? I know it is a difficulty. If, for example, we got close to the end of February or March, and the Prime Minister and Parliament said we wanted a general election, or there was a decision to go ahead with a second referendum, how far beyond the 29 March deadline could we extend? Could there be some temporary solutions to the European Parliament elections problem? For example, we used to send MPs to Brussels as MEPs in the past. Could that be a temporary solution while a referendum or general election was taking place?

Dr Hughes: A general election does not need so long that you need to extend it long enough to cause a problem in terms of European Parliament elections. You are going to be asking for that extension, presumably, hopefully, by the start of March, not on 28 March. For a second referendum, that is more difficult. There are different views on how long it takes. The Constitution Unit at UCL said 22 weeks. Catherine may have clearer legal views than I of what you can do, in terms of whether you would have to hold European Parliament elections in the UK, whether you could nominate existing MEPs to carry on. That could potentially be open to legal challenge, in terms of whether it allows people fully to exercise their democratic rights. As you say, it is a difficulty. It is not a complete veto-like block, but it does not make the EU's decision any easier. They find it very difficult to factor that in, because already those European Parliament elections are looking pretty difficult for the EU, in terms of combatting some of the right-wing parties.

Q3486 Chair: That is very helpful. Can I pursue the point you just made, Professor Barnard? Section 3 of article 50 says, "The treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification". What if one side wants the date of entry to be 29 March and the other side says, "We would now like it to be September or December next year"? What happens then? It seems to me that article 50 is silent on that question, because the need for unanimity would appear to apply to the two years, but not to the date of entry into force of the withdrawal agreement.

Professor Barnard: I agree with you entirely on that. That is a problem. It is likely that the EU side would decide it by qualified majority voting, because it would be part and parcel of the article 50 withdrawal agreement. It would require agreement on both sides; you are absolutely right.

Q3487 Chair: It would, to pick another date for the date of entry.

Professor Barnard: Yes, and you are already up against the problem of tampering with the text of the withdrawal agreement, which is acquiring the status of being written in stone. It is a possibility built into the extremely skeletal text of article 50 as a potential other way of buying some time.



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Q3488 **Andrea Jenkyns:** The Chair has covered some of these, but I want to delve a little deeper. What will the immediate response be from the EU 27 if the House of Commons votes down the deal?

Professor Barnard: They will say virtually nothing publicly. They will say it is a domestic constitutional matter to be resolved internally.

Q3489 **Andrea Jenkyns:** Internally, what do you think might be said within the EU. What do you think their reaction would be internally? Will it put panic into them, thinking we are heading towards WTO?

Professor Barnard: No, because they have already factored in to a large extent that there is a good chance of a no-deal Brexit. They have been planning for it for some time. The technical notices have been around for the best part of a year. Now they have also published the communication on how they are going to deal with them taking unilateral decisions.

Andrea Jenkyns: They are more prepared than we are, really.

Professor Barnard: Of course, it is going to affect them more disparately. For us, it will be a concentrated effect.

Sam Lowe: Catherine is right that some of this is priced in. One thing that is priced in is that Parliament rejects it first time round, so it would not necessarily be a surprise. We were expecting a vote some weeks back, and the large expectation was that that was going to be voted down. In terms of the immediate reaction, it could go two ways. One is to wait, because time has always been the EU's ally, in all this. There is a feeling that, the closer we get to March and the more tangible the effects of no deal are—some of them will be felt before we leave, because decisions will be made and things will start to be priced in—the more likely it is that Parliament could change its mind.

There is also the chance that, if they think it has been rejected for reason X, Y and Z and these are things that they could help the Prime Minister with clarifications on, that will come into play the closer we get to March, but that would not happen immediately. There would be a breath.

Henry Newman: It depends on the size of the defeat. There have been several different stages. When the deal was first closed, the expectation was that this would be passed, and there was surprise among certain member state capitals when I explained the extent of the feeling against elements of the deal. Perhaps that was not initially very well factored in. As Sam was saying, the extent of opposition is now very priced in. It would depend on the scale of the defeat, and I think they would expect the deal to be put back to the Commons several times, potentially. If there were discrete areas, I am sure they would be happy to look at those, as long as it did not cut across something fundamental in the text.

Dr Hughes: I do not entirely agree with that. Going back to being in Berlin a few days before the 11 December vote, at the point when that



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was expected to be held and probably to be lost, my interlocutors there were expecting the process to move on. They, quite interestingly, were not expecting to step in at European Council a day or two later and try to rescue the deal. From their reading of British politics at the time, which they are following to see what is possible and what is in their interests, they thought, as of two weeks ago—we know that is a long time at the moment in politics—that it would probably move on to being a choice between Norway-plus, so called, and another referendum. Whether even today, two weeks later, this is still how they would read it, I do not know. If it was a close defeat, they might see the best possible route as having another vote.

Q3490 Andrea Jenkyns: Are you saying the EU 27 do not take no deal seriously? They think we are going to go with either Norway or a second referendum.

Dr Hughes: They are making serious unilateral preparations. I think they are amazed and appalled at the state, to be frank, of UK politics. While they think it is unlikely, they certainly would not rule it out. Therefore, they have to prepare for it.

Sam Lowe: To come back on that slightly, there was never any intention to offer anything in the European Council following the deal being voted down. I agree with that. There would have always been a pause and a break. On the question of Norway, no deal and the like, Norway is a second-order question. That is to do with the future relationship. The first-order question is how or whether we leave. There are three options: no deal, a deal that looks substantially like the one on the table, potentially tweaked—let us not rule it out—and then remain. Those are the three options. The second-order question is what the future relationship looks like. There is probably scope to tweak the political declaration, if it was deemed to help the Prime Minister to do so, because it does not bind either side. If potentially clarifying that a Norway-type solution was the ambition was deemed by the Prime Minister to be helpful in Parliament, would they consider that? Perhaps, but you could argue that the other way, or with a Canada-style solution, because the withdrawal agreement as it stands leaves open nearly all future relationships, with the caveat that if you want a Canada-style relationship it can only be for Great Britain, because Northern Ireland will have to have supplementary provisions.

Q3491 Andrea Jenkyns: You mentioned in an earlier question that the UK has not stated what further changes it would want to the withdrawal agreement to make it palatable to Parliament. In your expert opinions, if you were the UK, what would you be asking for?

Sam Lowe: It is a very political question. I do not know what would help with Parliament. I know what might help with individual groups within Parliament, but if the aim is to build consensus I am not sure. This will not please everyone, but I think it is still possible, if you wanted, to tweak the withdrawal agreement to remove the whole-UK element of the



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backstop and revert to the Northern Ireland-specific backstop. I think the EU would countenance that, because the UK-wide customs union element was a concession on the EU side. It was something asked for by the UK that the EU did not want. That is possible, but does it help in Parliament? I am not sure.

Henry Newman: I have a few specific points. First, a role for Stormont institutions is definitely something the UK could achieve, and that could be done through a combination of domestic legislation and some degree of international agreement. Secondly, I would seek greater clarity over the circumstances in which the EU would be able to impose customs tariffs on the UK under the protocol, and whether those could ever apply to customs traffic between Northern Ireland and Great Britain, because that is clearly unacceptable. The third area would be some degree of interpretive declaration or otherwise on the exit mechanism from the backstop. As I referred to, the Policy Exchange paper on this was excellent.

There are various other things that I would love to have seen. For example, on the arbitration panel, there is a referral to the European court, for obvious reasons, on EU law matters. Why did we not seek a referral to the UK Supreme Court on matters of UK law? But it is better to focus on a few discrete things that are potentially achievable. A Stormont lock, assurances on internal customs matters within the UK and clarification on the exit provisions would be my top three.

Dr Hughes: As Sam said, it is a political question. Does Parliament want Brexit and can it agree what sort of Brexit it wants? You could change the political declaration quite substantively. People talk about tweaks, but you could have a Canada-plus or a Turkey-plus, as I have called it. The EU certainly thinks you could have a Norway-plus there, although you might take out the sentence about the UK having free movement. If, in doing that, there are one or two sentences you want to change in the withdrawal agreement, it can happen that way. As it stands, the backstop and the basic customs union exclude fisheries products from the customs union. We all know how sensitive fish is; there are interests on both sides and it is a very tough one, so I certainly do not think there will be any acceptance of avoiding customs tariffs in that area.

Q3492 **Andrea Jenkyns:** As a final question, Emma has already touched on no deal but, if we go to no deal, how will it affect the EU 27 countries? We have heard a lot of rhetoric coming through about Britain, but what about the EU 27?

Henry Newman: Negatively, but it would affect both sides very negatively. There is a very big difference between trying to go for a no-deal scenario now, when a deal is on the table, and the status quo before a deal had been agreed. If we had been in the position, say, of a month ago where we had simply been unable to reach agreement on the backstop applying in customs terms beyond Northern Ireland, and therefore we were faced with a scenario where we had to accept a



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withdrawal agreement that would have created a customs border down the Irish Sea, it would have been much easier in that scenario to have pulled out, as the UK, and said, "We cannot agree this. Therefore, we need side agreements to mitigate some of that damage".

Q3493 **Andrea Jenkyns:** With respect, what I mean, Henry, is this. Say we get to 29 March; it is no deal; nothing else has been agreed. I just want to understand what it looks like from the EU. How will it affect them if we go to no deal?

Henry Newman: I am sure it will be very problematic.

Q3494 **Andrea Jenkyns:** In what respect, then? This is what I am trying to understand.

Henry Newman: It will affect their budget and their trade.

Q3495 **Andrea Jenkyns:** It will be quite significant, will it?

Henry Newman: Security and foreign policy relations will also be affected. I expect that we will see greater EU 27 solidarity in those circumstances and emergency measures coming into effect that will mean the prospects of getting any sort of UK agreement any time soon with our biggest trading partners will be far harder.

Q3496 **Andrea Jenkyns:** Okay, so will no deal be worse for the EU 27 than it will be for Britain?

Henry Newman: No. It would be very bad for certain countries within the 27, but the effect on the UK of the disruption would be more concentrated. The UK and the 27, in the medium term, could survive a no-deal scenario, could survive trading with tariffs, but the problem is not the tariff element of this. The problem is much wider.

Q3497 **Andrea Jenkyns:** Again, I do not want to look at the British element; there is so much out there. I just want to look at the EU element, please.

Sam Lowe: If you look at the exposure from a GDP perspective for the other member states, Ireland of course is quite exposed—not as much as the UK, but it is close. Looking at other countries, the ones you would expect—the Netherlands, Germany, the ones where we have supply chains running into the UK and back out again—have some problems. From a financial stability point of view, some potential issues have been identified. We can already see the EU taking unilateral actions on those issues. For example, on derivatives clearing houses, they have said, "Okay, we have acknowledged that there is a financial stability risk to the EU here. In the event of no deal, we would grant equivalence, unilaterally, for a year or so". This is something that is underappreciated. The EU can take unilateral measures in a lot of these areas. Is it enough to avoid all the negative impacts? Of course not, but, as Henry and Catherine articulated earlier, the impact is much more acute in the UK, while in the EU it is spread quite widely.



Dr Hughes: Obviously this hits Ireland extremely hard, economically, but it is very important to remember the Irish border. What will happen in a no-deal situation if the Irish border becomes the external border of the EU, with no political agreement between the UK and the EU 27? Will there then be disagreement between Ireland and other members of the EU 27 over what to do about that? I have heard some German commentators warning of that, for instance. I do not know what the solution is. I gather that the document the Commission is publishing this morning does not refer to that, but amidst all the huge potential chaos and damage of no deal it is terribly important not to only focus on—it is not only economic, obviously—health, medicines, transport and so on, and not to forget the Irish peace process.

Q3498 **Stephen Crabb:** I would like to ask the panel about the Irish backstop and specifically how the EU sees the backstop. Perhaps I could start by asking Mr Lowe and then open it up to the rest of the panel. How real or significant a concession was it on the EU side to move to a UK-wide backstop, as opposed to Northern Ireland? When we hear repeatedly from EU Ministers and ambassadors that the backstop is not a comfortable outcome long term for the EU, how real are those statements? On the other end of the argument, and particularly what is fuelling a lot of the opposition on my side of British politics towards the backstop, is the idea that it is somehow a trap that we are being lured into, which will remove influence and leverage from the UK position in negotiating a longer-term future trade relationship. How does the EU actually see the backstop?

Sam Lowe: My opinion on this is an informed opinion, and I have discussed it with lots of people in different member states and in the Commission, but it is an opinion nonetheless. It is perceived by them as quite a significant concession, in that they did not, for a very long period of time, want to address whole-UK issues as part of a withdrawal agreement. The backstop was initially viewed as an aberration, in that it was such a significant issue with Northern Ireland that it had to be pulled into the withdrawal agreement and an insurance policy had to be put in place, but they did not want that to be extended to the whole UK. In the end, that was done on the UK's request, so as to attempt to get the withdrawal agreement over the line.

One of the reasons they are unsure about it is fish. That has not been resolved yet, and that is quite a big issue for some countries. There are also the level playing field provisions. While on state aid countries are generally happy, if you look at the environment and labour rights, where it is largely just non-regression with little means of enforcement—or at least the enforcement mechanisms are envisioned from the environmental perspective to be a domestic measure, so we will create our own body—there is a worry there that it could allow the UK to gain competitive advantage in some fields.



This talk of it being a trap I do not really understand, because it is still possible, under the existing withdrawal agreement and the backstop within it, to remove the UK-wide element and revert to the Northern Ireland-specific element. This is ultimately why the Commission was okay with this, and the EU was okay with allowing the UK-wide element. If that falls away, the Northern Ireland-specific element remains, which is what they see as the ultimate backstop. The backstop to the backstop still lives, but it requires two-party consent at this point. The UK would have to choose to remove the whole-UK element. That is what we have always known.

There is a sense among commentators on the outside that, within Parliament at the moment, there is a slight Brexit comprehension lag. I am not sure if it is just for political reasons, but it seems that MPs—not on this Committee but elsewhere—are just finding out about things we have known for a very long time, like the Irish backstop not being unilaterally revocable. Part of me wonders if we are now just going through a process of realisation or if these are hard opinions that are not going to shift, which would then lead us towards no deal.

Professor Barnard: It is uncomfortable from the EU's side because it is about goods. It is about certainly Northern Ireland staying in the customs union and the single market for goods, at least in part. That, of course, goes against their much-repeated red line about the indivisibility of the four freedoms. It is uncomfortable. It is also uncomfortable because, as we discussed right at the outset, the dispute resolution provisions are unclear. Of course, the EU have insisted on no unilateral withdrawal from the backstop, which is probably right, because we are talking about an insurance policy, and you would not want your insurer to unilaterally pull out of your house insurance once your house had caught fire.

Stephen Crabb: They do, though.

Dr Hughes: I do not particularly accept the word "trap" either, not so much in the sense that it does not exist, but I do not see the backstop in such negative terms, because it is there to ensure an open border, to ensure the peace process and Good Friday agreement continue to work. Having said that, in the protocol, it talks about coming out of the backstop if and when the future relationship supersedes it, in whole or in part. What the backstop is doing has to be done by the future relationship, and therefore the backstop is always, in a sense, going to have an influence on how that future relationship is negotiated. It has to be jointly agreed, in coming out of the backstop, whether in whole or in part it has been superseded.

If there was agreement, which clearly there is not at the moment, for instance, that the future relationship should be a customs union, you can see already in the political declaration a clear commitment to building a much deeper customs union. That would probably be preferable for the EU and the UK, if you were going down that route. Sam can talk more authoritatively than I on this. Depending on how far you go down that



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route, whether you might still need differentiation on the standards and regulation side, but not on the customs side, is an open question. It was to some extent a compromise for the EU, but it was well formulated to make it pretty uncomfortable for the UK too. It would be in their interests to move beyond it, as long as all the conditions in the backstop are effectively still covered.

Henry Newman: My conversation with EU officials and member states was that it was a substantial compromise to extend the customs union UK-wide. The one country that did not particularly care about that was Ireland, which wanted a solution that was workable. I have heard many EU state diplomats raise very, very strong concerns about fish and level playing field issues. The level playing field provisions in the backstop are very positive for the UK. They are not subject to arbitration. They are subject to non-regression, but we can achieve those certain principles in our own way. Overall, there has been a lack of focus on positives around the backstop from the UK's point of view.

I accept the fears of many that we could be "trapped" there. Part of the problem has been the way the Government have approached the backstop, by suggesting they will do everything possible to avoid going into the backstop. That, of course, creates a negotiation cliff edge at roughly June 2020, when we have to take a decision as to whether we seek to extend the backstop. Inverting that, you could say, "Look, the backstop is not ideal. It is not where we want to be long term. However, we are willing to go there, to slice the elephant in chunks, to get out of the EU, to form a stable relationship in various different areas. We need successor regimes on aviation. We need to work out what we are doing on services already in the backstop. Then, while we are there, we will work out the solutions that will allow us to develop a different policy overall". I would invert the way the Government have presented this. If you go around saying you will do everything possible to avoid using the backstop, you are setting yourself up for a very weak negotiating position the other side of article 50.

Q3499 **Stephen Crabb:** That is a very good point. Are you surprised by how many, particularly on the left of British politics, have set their face against the withdrawal agreement, when it so explicitly puts preserving the gains of the Northern Irish peace process at its heart?

Henry Newman: To go back to something that Sam said a minute ago, there are basically two ways to leave the European Union: with the deal that is currently on the table, whether or not it is tweaked—those tweaks could be substantive, but they are going to be tweaks—or without a deal. Everything else is not on the table and is not possible. When you heard people say they are going to develop all kinds of other options, it is not a serious policy. That worries me a great deal. There is a lot of confusion and, frankly, dishonesty in the public debate about the options actually available to the UK at this point.



Professor Barnard: There has been so much criticism of this agreement, but it must be said, from a legal point of view, it is an impressive document. I know that this might not be music to non-lawyers' ears, but the fact is that they have drafted the best part of 600 pages of highly technical stuff, which hangs together very well. The more difficult question is whether politically the backstop is sustainable, if it ever came into force, because of the issues of especially trade between Great Britain and Northern Ireland. My colleagues here can talk more fluently about that than I can, but it is a really impressive legal document, something lawyers can be proud of. That might not commend it to this Committee.

Henry Newman: There is a concern on the EU 27 side, as well, as to the long-term political sustainability of this. It could be subject to challenge from the European side, potentially from the ECHR side. The provisions for the UK to push back on new areas of legislation are arguably stronger than those in the EEA agreement. I have certainly heard Commission and member state officials raise real concerns as to what would happen if we were in the backstop and we started saying no on various different areas. How would that be sustainable? Those concerns are real.

Q3500 **Mr Whittingdale:** Can I follow up, Professor Barnard, what you were saying? It may be a very beautiful document but, in its present form, it is not going to pass the House of Commons. You suggested, I think in answer to the Chairman, a little earlier that you might see a potential solution around an international agreement with some legal force. Could you just expand on particularly the legal force that might be contained in an international agreement, and whether that would supersede or complement the withdrawal agreement? How would the two interact?

Professor Barnard: What I was talking about is called in the jargon a decision of Heads of State or Government. That is Heads of State acting as independent Heads of State, not acting through the vehicle of the European Council. That decision of Heads of State or Government would be essentially a very simple treaty, and it would be binding under international law. The fact it is binding under international law means that the UK or the other side could ultimately renege on it, and it would be a breach of international law, which is much more difficult to enforce than a breach of EU law. The UK does not have a tradition or a history of reneging on international commitments, and neither does the EU. It would be legally binding under international law, not under EU law, but it would be a freestanding text. Therefore, you do not tamper with the content of the withdrawal agreement.

Q3501 **Mr Whittingdale:** In the absence of my colleague Sammy Wilson, can I put this on his behalf? He and his party say there must be a change in the text of the withdrawal agreement, because that ultimately is the only thing that will give legal certainty. Are you saying he is wrong and that this might address that, or in EU law terms would it still require a change to the text?



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Professor Barnard: It would be a way of trying to square the circle of not tampering with the text of the withdrawal agreement, which the EU itself is also reluctant to reopen because it is worried that that would allow the member states to start reopening issues that, at least temporarily, have been put into a box, like fisheries and Gibraltar. It would be a freestanding text. It is the way the EU has dealt with problems, not on that scale, in the past, particularly over Denmark and Ireland's refusal to accept the Maastricht and Lisbon treaties, respectively, at the time. It would be a way forward.

Q3502 **Mr Whittingdale:** It would, you would be able to argue, provide the absolute legal certainty that is demanded by those who are critical of the present withdrawal agreement.

Professor Barnard: If you could drop the word "absolute", I would say it would provide legal certainty.

Mr Whittingdale: It is quite an important word.

Professor Barnard: If it could be agreed, it would provide legal certainty, yes.

Q3503 **Mr Whittingdale:** Can I turn to Andrea Jenkyns's questions about the consequences of no deal and what might then immediately happen? If we move to 30 March and Britain is now a third country without a formal comprehensive agreement, a lot of the suggestions of difficulties that might follow are based on the fact that, suddenly, lorries that passed through Calais in a minute on 29 March are going to take 10 or 15 minutes on the 30th. To what extent is that a matter of choice for the EU, or is it required to impose checks on third countries as a matter of EU law?

Sam Lowe: It is required to impose checks on third countries as a matter of EU law and under international commitments. It is possible for emergency provisions to be brought into force so as to alleviate some of the pressures, at least in the immediate aftermath. We are starting to see what the EU is prepared to do on that front, because it is publishing its no-deal preparation notices, which give the different areas where it might do this.

On sanitary and phytosanitary issues, we have not seen the specific text yet, but we know from the briefing note sent from the Commission to the Council and the European Parliament that there is no intention to do very much here. What does this mean in practice? It means that all products of animal origin exiting the UK and entering the EU will need to enter by a veterinary border inspection post, where they will be subject to 100% document and identity checks, and then about 50% at the upper rate for physical inspections, for, say, milk for human consumption. The problem the UK has there is that Calais and the Eurotunnel are not veterinary border inspection points under EU law.



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There is some suggestion in the EU's no-deal planning notices that it could authorise some other areas for a brief period of time, so as to facilitate the continued movement of trade, but you will still get friction. In the EU's notice, it also makes the point that the UK cannot be accepted as a third country licensed to sell products of animal origin to the EU until after 29 March, but that could be fast-tracked. My point here, using that specific example, is that there are things that the EU can and will do to alleviate some of the pressures, but will there be more friction than now? The answer is absolutely yes.

Q3504 Mr Whittingdale: A lot of people would accept there may be more friction than there is now, but to what extent do emergency provisions essentially give the EU the ability to set the rules as it would choose? Are there any absolute requirements under the law that they would feel, even though it would cause considerable disruption on both sides of the Channel, they have to impose, or do these emergency provisions essentially give them powers to implement or not implement what they like?

Sam Lowe: Their line is that they are using emergency powers to alleviate issues of extreme detriment that they feel could be systemic to the EU, but they are not going to act in areas where businesses could have taken contingency measures and maybe did not choose to. These will only ever be short term; they have put a time limit on them, but it is possible for them to do these things, and we have an increasingly clear idea of where they will do this. The example I used earlier was on clearing houses and an equivalence ruling to allow that.

Q3505 Mr Whittingdale: If it required, say, the installation of technology at the ports or the establishment of a veterinary check centre, the EU could say, "Until those things are in place, we will exercise emergency powers and allow trade to continue".

Sam Lowe: They could do, but we know, for example, on the veterinary issue they are not going to, because they have now said that. That could only ever, as I said, be short term. People sometimes point to WTO rules as preventing emergency provisions. Of course they do not. We could say, on both the UK and the EU side, "This is an emergency and we need six months to create the infrastructure and processes in which to enforce our border with the UK on terms similar to what we do with the rest of the world". That is fine, but this is only going to happen to a degree, because of EU choices in different areas, and it can only ever last for a short period of time, because after a while they will be obliged to treat the UK as they do any other third country with which they do not have a preferential arrangement.

Dr Hughes: The message I have picked up in the EU is, as we see with this document that we know is coming out this morning from the Commission on its no-deal preparation, that they are ready to take unilateral measures. They expect there to be some chaos; that is a phrase I have heard. They expect there to be quite a big gap between the



situation as it is now and the situation there will be between the EU and the UK in the event of no deal. As far as I am aware, some of the measures that are going to be proposed this morning cover things like aviation and road transport. I do not think the EU is trying to be as difficult as possible; it seems that it will give hauliers, for a limited period of time, permission to take lorries across. It is trying to put time limits on customs checks. On the other hand, there is nothing there yet, according to reports, on medications, data or fisheries, so this probably is not the last word on it, I would think, for the next three months anyway.

Q3506 Seema Malhotra: I want to turn to the political declaration and take your views on a couple of issues in relation to that. You have already intimated that you could see the political declaration being amended, and it does not have legal force, so there is less challenge in amending it, as it can be changed later. In our most recent report on the withdrawal agreement and political declaration, we noted that the Secretary of State told us that the political declaration keeps options for the future relationship open. There would therefore be a range of possible options that could be considered as the basis of future negotiations, if Parliament were to approve the deal. What is your view on the political declaration as it stands? Does it suggest to you a direction of travel you could identify, or would you say that it lays out a canvas and leaves all options on the table?

Professor Barnard: By definition, because it is a political declaration, it is not legally binding on either side, so it could be torn up tomorrow. Therefore, whatever it says will not be legally binding in the future. Secondly, if you take it as a global document, it looks more like Canada than it does Norway-plus. If you read only the first page and paragraph 4, it clearly says there is going to be an independent trade policy and the ending of free movement. An independent trade policy would suggest that we would be leaving the customs union. However, it is contradictory internally because, at paragraph 23, it talks about a single customs territory, which is the language in the protocol, where it looks like the UK will be staying in a customs union.

If you look at other matters, because we have spent a lot of time talking about goods but of course services are more important to our economy—that is not to deny the importance of manufacturing—there is quite little on services. Sam is the expert in that field, but it is striking just how little there is on services. As far as mobility is concerned, all we know is there is going to be a future mobility framework, but this falls very far short of free movement as we know it. We are told it is coming to an end, so again it looks much more like CETA than anything we are familiar with under EU law.

Q3507 Seema Malhotra: Sam, could you follow up that point about services?

Sam Lowe: The Government have been clearer about what they want to achieve from services, with the caveat that the political declaration does not bind anyone to follow it through. This goes back to the White Paper.



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In acknowledging that freedom of movement is something the UK no longer wants, they have acknowledged that services access will be less than it is now. That bit of Chequers was underexplored, because everyone was focusing on the facilitated customs arrangement. This acknowledgement that, because we do not want freedom of movement we are not going to get the same access on services, made that bit of the paper far more interesting. It was actually something against which the EU could substantially negotiate, because it accepts trade-offs.

The political declaration does not add much more clarity on this, but my interpretation of what the UK is saying is that we accept that it will become much more difficult for services industries based in the UK to export directly to the European Union. We know, from the EU side, that they are willing to make it much easier to establish entities there. They are willing to go further on the temporary movement of people to supply services, but that is in the UK's gift. What sort of labour mobility regime do we want? That is a constraint. As it is laid out, the political declaration largely suggests, at least on services, that we will not have much different from what you would get under, say, Canada. The provisions on services within Canada are not much different from what you get at the WTO GATT level. I know it is popular in the UK to say that the single market for services does not exist, but that is just not true. We are going from quite a high level of integration, specifically in some highly regulated areas including financial services and legal services, to going as far away as possible. Of course that will have an impact.

As to whether the political declaration binds us to this outcome, it does not. It presents the Government's intended approach. It is self-contradictory. If you were to pursue the approach outlined in the first few paragraphs, you would not be able to obviate the need for a backstop, so it is self-contradictory in that sense. That is the direction of travel as it stands, but I would argue that the political declaration itself leaves open all possibilities from Norway-plus-plus, whatever that looks like, to Canada, with the caveat I made earlier that Canada can only apply to Great Britain.

Dr Hughes: I agree with most of what has been said. In answer to your initial question, there are basically two main directions of travel; one sounds like Canada or possibly Canada-plus. As Sam has just said, there is not that much plus on services there. We are getting used to seeing triple pluses on Canada. The defence, security and criminal co-operation is there, but it is not clear there is much of a plus on services nor that there ever has been. If you were to go down that track, you would then have to keep Northern Ireland in a separate backstop.

There is quite a strong nod, because of the single customs territory point, towards Turkey or even Turkey-plus, perhaps with more regulatory alignment. Obviously Turkey has to meet EU regulations to export to the EU. There is quite a strong nod in that direction. It is extraordinary, as my fellow panellists have said, that so much of the Brexit discussion has



almost ignored services, essentially, when they are such a big part of our economy. The political declaration talks about equivalence in financial services, which is much less than we have now. That is the direction of travel but, as Sam says, Norway could be in there too.

Q3508 Seema Malhotra: I will ask you this then. What is your understanding of the implications of us having access to the EU free trade agreements that currently exist? Would an interpretation of this give access to those in the future or are we now excluding ourselves from them? There are 40-plus trade agreements that cover around 70 countries outside the EU.

Sam Lowe: Legally speaking, from the end of March next year, we are no longer party to any of these trade agreements. The transition provisions outline a process by which the EU will notify third countries that they can continue to treat the EU as a member state, for the purpose of these agreements, for the duration of the transition.

Seema Malhotra: There is no guarantee.

Sam Lowe: It requires third-country consent. My feeling is that most will go along with it. They might ask for concessions from the UK vis-à-vis something else or the future replaced agreement to get it, but most will go along with that. There is no mechanism at all by which the UK automatically remains party to all of these agreements. They all need to be replaced, and of course replacing them could be difficult. Some countries might be happy to use the existing agreement as a template, and just cross out or change some words, but others will ask for concessions. We recently had the declaration that the Swiss are happy to replicate the existing arrangement, no matter what, so even if we had no deal. It is interesting to note from my intelligence on this that they have only agreed to replicate three of the bilaterals, so the initial free trade agreement, it being extended into agriculture and some mutual recognition of conformity assessment. For the rest, they are waiting to know what the future relationship with the EU looks like, and that will be the same for all of these third countries.

Q3509 Seema Malhotra: Could I ask you a final question? Perhaps Henry can come in on this. How long is it going to take to negotiate the future framework? The areas it needs to cover are very broad.

Henry Newman: I will just come back to the first question and come on to that in a second. The most interesting things about the political declaration is that it does not point to a Chequers-style relationship. That has been absent from a lot of the responses that we have seen, particularly from the Conservative side that is very opposed to a Chequers-style relationship. You could reach a facilitated customs arrangement, but nothing in the text points to that directly. It points to a default of Canada, but with a broad spectrum of options where everything is possible, if you can resolve the backstop. That is a very big conditional but, nonetheless, it leaves it wide open.



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On how long it would take to develop a successor regime, it depends what you want that successor regime to look like. Even to come up with a Norway-plus model, which is presented by some of its proponents as an off-the-shelf option, is far from simple. To answer that question depends on what sort of relationship you want.

Sam Lowe: A lot of it is knowing what you want. Look back over the past two months; we managed to negotiate a customs union in about two weeks. You can negotiate things quickly if you have a shared objective. The problem the UK has is that we do not know what we want in the future relationship, and it is becoming increasingly clear that the argument being used by the Government is, "We will get you out", and then it is up to someone else to decide what the future relationship looks like. That requires a domestic discussion and some decisions to be made, which is going to take a while. This also exists on the EU side. We have the European Parliament elections coming up and then the Commission reshuffle. There will be a lot of time that is not going to be used for anything substantive on the negotiation front. It might be useful domestically to come to a decision. Could you do it in two years? Theoretically you could.

Q3510 **Seema Malhotra:** Is that realistic based on the experience we have had so far?

Sam Lowe: No, absolutely not.

Q3511 **Seema Malhotra:** Do you think it will be a one-year or two-year extension?

Sam Lowe: I think we will use the whole lot.

Professor Barnard: On average, it takes 42 months to negotiate a trade agreement. It is also worth bearing in mind that the future agreement will not be under article 50. It will be under article 207 or, more likely, article 217. That will require ratification of not just the EU but all the member states, including the regional parliaments in Belgium, which had issues with CETA, the Canadian free trade agreement.

It is also worth bearing in mind that never before has a trade agreement been negotiated that lowers integration, rather than improves integration. That will also prove difficult, and it will present communication and presentational challenges to both sides, because it will be harder to say, "Look, we have a win on this", if the tariffs have been reduced from 10% to 5%, because the baseline is 0% at the moment.

Q3512 **Chair:** To clarify one point on the 40 or so trade deals, Mr Lowe, you referred to what happens under the withdrawal agreement. If we leave with no deal they all fall. Do you think there would be an appetite on the part of those countries to roll them over?



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Sam Lowe: I have always been a bit critical of the term “roll over”, in that I do not think they can be rolled over. Our agreement as it stands, as a member of the EU, will cease to apply from day 1, if there is no deal. Will those countries want to replicate the arrangements? I think lots will. Being honest, it is still in their interest to have preferential access to the UK market and vice versa. However, they might not want it on exactly the same terms as now, because the UK is a smaller market and it will potentially make, and has made in some areas, concessions to the EU that they would not want to make to the UK.

Q3513 **Chair:** It would be a negotiation.

Sam Lowe: All of these are negotiations.

Chair: Trade negotiations take time. That is really helpful.

Q3514 **Mr Djanogly:** I will move on to the possibility of a second referendum. Parking for one moment what the question would be and also the EU’s attitude towards this, we can just look at it domestically to start with. How could a second referendum be triggered in legislative terms, Professor Barnard?

Professor Barnard: It will require legislation, as did the first referendum. That legislation could be an amendment to an existing Bill going through Parliament. The question is relevant, because there will be a delay in the legislative process, because the Electoral Commission needs to look at the terms of the question and road-test it. A three-pronged question will require more work than a two-pronged question.

There are also issues about whether you just replicate the franchise that there was before. The franchise before was the same franchise as for a general election, which produced the oddity that UK nationals who have lived abroad for more than 15 years could not vote, nor could Polish and Lithuanian citizens living in the UK, whereas Commonwealth citizens who might only have been here for a short period of time could have voted. There is an argument, particularly on the remain side, that the franchise needs to be looked at. The leave side, were they even to countenance a second referendum, would say you have to keep the franchise the same.

Q3515 **Mr Djanogly:** Is there a legal argument that the franchise should be kept the same as it was last time, or are they different pieces of legislation providing for different referenda? There are also 16 year olds, and the issue of whether Commonwealth or European citizens should be able to vote.

Professor Barnard: Exactly, so you can see, if there is a huge pressure of time, it is easier to keep the franchise as it was for 2016 than to come up with a new franchise. There is nothing to stop a franchise being changed, but all of these are big questions that will require debate. It will take a minimum of six months to have the referendum. If you argue about that, it will extend the period.



Q3516 Mr Djanogly: The Constitution Unit estimated the minimum period as 22 weeks. Does the panel agree with that?

Henry Newman: I would also say that, if the executive introduces legislation on this, it may end up looking very different once it has gone through Parliament. It could introduce legislation requiring a particular franchise and question, but Parliament could amend that to take off options or extend the franchise in all kinds of ways.

Q3517 Mr Djanogly: What would need to be included in the question, Kirsty Hughes?

Dr Hughes: As we said earlier in today's session, in the end we are facing two simple outcomes, at one level. Do we leave the EU or not? There should certainly be a "not leave the EU" or remain option. The question of what to put as the "leave the EU" option is much more difficult. It depends where we are at the time when Parliament agrees to have a referendum. We are mostly agreed that any deal in the next few months would require something that looks like the current withdrawal agreement to be part of the deal. If the deal is rejected, say in the week of 14 January, and it does not come back to Parliament, and if you put that deal on the ballot paper, who will campaign for it? Which politicians will say they are ready to campaign for that? Would it be responsible for Parliament to put no deal on the ballot paper? Would it be responsible to put Canada on the ballot paper without a Northern Ireland backstop, which surely sounds like May's deal? It is politically contingent, but where we are now, remain versus the current deal on offer would be the sensible choice.

Henry Newman: I disagree. The question of whether we are leaving the European Union or not was answered in 2016, but that is a political point. The fundamental difficulty, which was just alluded to, is that if you create a second referendum you will end up with campaigns chasing different unicorns again. You will have a remain campaign essentially saying it is going to spend all the money it would have spent on no deal on all kinds of fancy tax cuts and so on. You will have a no-deal campaign making all kinds of promises about how the money or so-called Brexit bill would be spent on domestic objectives, and so on. We saw a Labour frontbencher suggesting that, if there was a second referendum, they would campaign for the Labour Brexit deal, which does not exist. It is profoundly problematic in all kinds of directions.

Sam Lowe: I do not know what the question would say. That is your decision as Parliament.

Chair: You are putting it back to us.

Q3518 Mr Djanogly: People have also been commenting on the role of the Electoral Commission here and the extent to which it should have a say on whether it should be a binary question or three questions. Can someone explain what the role of the Electoral Commission would be in



this context?

Professor Barnard: All I would add is that it is a requirement under the legislation that the Electoral Commission looks at the questions. Then there is a further issue, if you go for a three-pronged question, of whether you ask the three questions at the same time or have various permutations. Do you vote on one permutation one week and then on the second in the second week? We do not have much experience of referenda, but we have not gone down that route so far. The real practical concern is that, if you have a three-pronged question that says, "Leave, leave under Theresa May's deal or remain", you end up with 30/30/30 or a very narrow permutation thereof, which does not take us any further forward.

Q3519 **Mr Djanogly:** Is the decision made by the Electoral Commission challengeable? Can you judicially review the decision of the Electoral Commission?

Professor Barnard: I think the answer to that must be yes, but I would like to check.

Q3520 **Mr Djanogly:** How does the panel think the European Union might respond to a second referendum request? If it took 22 weeks, we would be heading beyond the European elections, for instance.

Dr Hughes: As I said earlier, they probably would extend article 50 fairly reluctantly, given the European Parliament question. That cannot be guaranteed, because it is at unanimity. Some people say that the European Commission does not really want us back, or at least some significant people in it do not, but it does not have a vote. Others mention France. I do not know what the rest of the panel have picked up but, on the whole, I have picked up that the EU thinks it will probably get there, but not without quite a bit of horse trading first. Of course that horse trading could then impact on politics here. If there is a decision to have a second referendum, you will want some support from the EU. It is not going to be great, at least on the remainer side, if the EU sounds very lukewarm or makes lots of demands about more money, more fish, less fish or whatever the argument is.

Q3521 **Mr Djanogly:** Do you think that, if there were no remain option on the ballot, it would impact their view?

Dr Hughes: They would be surprised and I would be surprised, but I wonder more what their view would be of having a no-deal option on the ballot paper and whether they would be prepared to extend in that case.

Sam Lowe: I think, but cannot guarantee, that they would probably be okay with extending to allow for a referendum if it was a referendum that led to a certain outcome. It could not be a referendum that would then be followed by more negotiations. The option of remain is a certain outcome. If it had no deal on there, that would be a certain outcome. If it had Mrs May's withdrawal agreement on it, that would be a certain outcome. They



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would extend up to the date of the results coming in, and the next day that is what would happen. They would still be slightly wary about it, because the preparations for no deal are different from the preparations for a managed withdrawal or remain, but I think they would allow that. I do not think there is any circumstance under this—and I am not sure if there could be from a referendum perspective—in which they would extend in the knowledge that they would have to extend again, because you would have to get into loads of discussions. They just want an answer at this point.

Henry Newman: I think I am correct in saying that, if we vote to remain and therefore to revoke article 50, we would be remaining under pre-2016-renegotiation terms. Cameron's renegotiation would essentially fall away.

Q3522 **Mr McFadden:** I fear I am going to continue Jonathan Djanogly's idea of asking you perhaps more political questions than factual ones, but I want to return to the issue of no deal or extending article 50. We have announcements in the newspapers today that the armed forces are being prepared. I expect more of this in coming days, perhaps with implications for food supplies, medical supplies, jobs, industry and all this kind of thing. If we get to a point where the Prime Minister's negotiated deal is not approved by Parliament in January, how realistic is it that any UK Government would march forward to that proposition rather than seeking to extend article 50? Can I start with you, Dr Hughes?

Dr Hughes: Could you clarify the last bit?

Mr McFadden: If the deal is voted down by Parliament, do you think any UK Government will blithely march towards no deal? Is it your judgment that the more likely outcome is some sort of extension to article 50?

Dr Hughes: UK politics is in an extraordinary state, but I do not find it credible that a UK Government would go forward to no deal. The problem at the moment with where Brexit goes is that there does not seem to be a majority for anything in Parliament. There seems to be a majority against going ahead with no deal. There might be a majority in Parliament today—well, maybe not as of today, but maybe after a rejection of a deal—for extending article 50 but, as we said earlier, the EU is not going to accept a request to extend article 50 if it is not for something specific. If it is just because Parliament has rejected May's deal and there is no expectation the deal is going to come back again, the EU will want to know, as it wants to know today and now, what the UK Government and Parliament want. Do they want an election? Do they want another vote? Do they want a change in the political declaration to point it more in one direction than another? What do they want? Is it something that the Government want, whoever the Government are, which can be got through Parliament?

I say "whoever the Government are", because it depends where this goes in the next few months. We have just been talking about a second



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referendum but, if it has remain on the ballot paper, would it be credible for the current Government to drive such a referendum through. There has been some discussion of national unity Governments or temporary caretaker Governments. There are a lot of process scenarios for where this might go, but there are only two substantive choices—Brexit or no Brexit.

Professor Barnard: Legally, we are not ready yet. We have the EU (Withdrawal) Act 2018, which provides the framework for us leaving, which you know far better than I. There are about 700 pieces of secondary legislation that need to be adopted under the delegated powers in that Act. The Institute for Government is saying that only a third of them have been introduced so far, so the attempt to try to smooth this process of no deal is far short. The National Audit Office's report on key Government Departments has looked particularly at Defra. The introduction of computer and IT systems is at red in some of the key Departments. In trying to go for an orderly no-deal Brexit, we are a long way short at the moment. It may be all the extra money will be applied, in trying to get things through, but there is a capacity issue.

Q3523 **Mr McFadden:** I will come to you in a second, but when you say that "legally, we are not ready yet", what are we not ready for?

Professor Barnard: We are not ready for continuity of recognition of goods coming in from abroad and for managing what is going to happen with financial services, for example. All of that is what the EU (Withdrawal) Act is about. It empowers Parliament to adopt all of the secondary legislation to make sure that there is a smooth process.

Q3524 **Mr McFadden:** What does that imply for your judgment of the realism of the deal-or-no-deal position the Prime Minister has taken? Will that still look realistic at the end of January, if Parliament has voted down the deal?

Professor Barnard: It depends on how far the Prime Minister is prepared to go to take such a serious decision with the very difficult legal consequences and deep uncertainty that will follow as a result. It may be she decides that this is the only way forward politically to arm-twist the EU into getting what she wants out of them, but we are not legally ready.

Sam Lowe: On the political point, it is not in the Government's or the EU's interest to countenance the extension of article 50 at this point. The threat of no deal is deemed to be the only thing that could focus minds in Parliament and allow the withdrawal agreement, which has been agreed by the EU and the UK. The EU likes this withdrawal agreement and they want to see it pass. I do not think they will countenance the extension of article 50 until very late in the day because, until then, it can be used as a means of browbeating Parliament into accepting what is on the table.

Q3525 **Mr McFadden:** That is clearly how it is being used. I expect we will have a grid of announcements over Christmas on this. My question is really



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whether a UK Government would do this. Every time they make an announcement saying there is this terrible consequence of it here or this terrible consequence of it there, it begs a boomerang question: are you really going to say there is no alternative but this?

Sam Lowe: It is the default option. If you do nothing else, this is what happens. If the question is whether a UK Government could do this, the answer is yes. Would it? That gets intensely political.

Dr Hughes: It also depends on Parliament. If Parliament cannot get a majority for something, as Sam says, it is the default option. There has to be a majority for something.

Henry Newman: Parliament legislated after the Miller case to trigger article 50. Therefore, Parliament set the time horizon that the Government are heading towards. I call into question the value judgment you place on the Government's blitheness. I do not think the Government are being blithe on this, but the default position is that we will leave on 29 March. Therefore, the Government are obligated to take preparations very seriously. There is an easy solution to this, which is that Parliament chooses to vote for the deal, in which case we do not need to worry about no-deal preparations.

Mr McFadden: That is the Prime Minister's position.

Henry Newman: It is the correct position. There are three choices: deal, no deal or remain.

Q3526 **Mr McFadden:** That is the Prime Minister's position, which you have set out admirably. I understand this is the default position. I understand it could happen, but my question to you, which I appreciate is a political question, is about any UK Prime Minister—and I not picking on this one particularly—saying that now Parliament has not voted for the deal, this is what is going to happen and what we are going to do. Do you think she will do that?

Henry Newman: It is quite possible, yes. I do not think you could possibly say that any UK Prime Minister would be willing to do. The Prime Minister, rightly or wrongly, takes very seriously that the country voted to leave the European Union and wants to see that delivered.

Dr Hughes: I disagree. I find it absolutely extraordinary and incredible that any Prime Minister would allow that sort of damage to be done to this country.

Mr McFadden: That is why I am asking the question.

Q3527 **Joanna Cherry:** I would like to ask about Norway-plus, as it is now referred to, and start with you, Kirsty. You think the European Union is open to a Norway-plus outcome, but they "would want to make sure the UK could not be disruptive in any new structures, that there were strong level-playing field conditions, and that there were deals around



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agriculture and fisheries. This would take time to negotiate". Can you elaborate on that?

Dr Hughes: The EU is open to Norway-plus. A number of them find it fairly surprising that it might be considered by the UK, just as they find the fact that the UK has agreed a customs union in the backstop surprising. It is inconceivable that countries such as France and Germany would put themselves in that sort of rule-taker position. They are also aware that there are different political drives behind those who suggested Norway for now or Norway-plus. Norway for now seems to have morphed into Norway-plus, but the EU listens to the British debates very carefully.

There is the idea that, somehow, Norway might be used as a way to circumvent the backstop, so you go into it and then later say, "Okay, now we can have a fantastical customs arrangement, which is not a customs union but still allows no rules of origin", or "Now we can put in 12 months' notice to leave the EEA again, should we be allowed into the EEA". They are aware of all that. That is quite problematic. Given that, as we were discussing earlier, you need a joint agreement to exit the backstop or to have a future relationship, it is quite possible that they might try to put in some backstop conditions that kick in if there was a Norway-plus and the UK decided to pull out after 12 months.

Some people talk about Norway or Norway-plus—and it has to be plus the customs union, because you do not get frictionless trade or solve the Irish border otherwise—as the least worst option. I disagree with that. It may be the least worst option economically, but clearly not democratically. Even if it was the least worst option economically, it would still be problematic. You do not have to look for very long at the EU structures to make laws and policies, through the Commission, the Parliament and the Council of Ministers, with the whole system of voting and the UK being at the table and so on and so forth, to think that matters. I worked in the Commission for two years. How countries influence laws and outcomes that are in their interest depends on being at the table. From my two years at the Commission, I cannot remember hearing Norway's views being brought up by somebody in any meeting that I was at.

I have one quote from a study Norway did in 2012, of 20 years of being in the European Economic Area. The report's author said that it had created a great democratic deficit and also said, "There are few areas of Norwegian democracy today where so many know so little about so much as is the case with Norwegian European policy".

I have a couple more comments. People also seem often to suggest that it is straightforward to join EFTA and then join the European Economic Area. First, you need to get the agreement of the EFTA countries. If you want to be in a customs union, you need to get those countries to agree to derogate from article 56(3) of the EFTA Convention on not trying to sign up to EFTA trade policies. At the moment, no country is both in the EEA and in a customs union with the EU, so that would be a bigger



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democratic deficit than this Norwegian study found for Norway. Also, what I pick up in the EU, and I suspect my fellow panellists may have heard the same, is that the EEA and also the Swiss arrangements were made for smaller and perhaps less troublesome countries. If you maybe gave the UK a parallel structure, so as not to overshadow the smaller countries in the EEA, and exactly the same abilities to veto things in certain extreme circumstances, it would be much more likely to use it than Norway has.

It would take time to negotiate. Issues like fisheries and the level playing field conditions would come back up, but you could get there. I find it very hard to imagine it would be politically sustainable in the UK. We may see this yet in an extended transition period. As soon as the EU takes decisions in some areas that are sensitive here or not in our interests, it will be highly neuralgic. Instead of people like me saying, "No, that is a scare story in a tabloid", it will be true. People have morphed or moved to this as a compromise, but I am not sure it is a good compromise. Polls suggest that more remainers prefer it than leavers, so it is not clear if it is really a compromise. If you were going to vote for that, why would you not vote to stay in the European Union?

Q3528 Joanna Cherry: Picking up on the point about fisheries, some people have suggested that the Norway-plus option is attractive because we could leave the common fisheries policy and also the common agricultural policy. As you have commented in one of your articles, all EEA members are required to agree to the UK joining the European Economic Area. How likely is it that fisheries would come into that debate? How likely is it there will be a trade-off between access to UK waters and the UK's access to the market?

Dr Hughes: It is very likely. This is a phrase I first picked up in Brussels at least a year and a half ago, around no access to markets without access to waters. It comes back to what is a compromise in the withdrawal agreement. There are a couple of rather important sentences in there about aiming to agree access and quotas by mid-2020, before the end of the first transition period. We also see on the backstop and article 6(2) of the protocol that Northern Ireland is intended to be within the customs union for fisheries, in some sense, but with the rest of the UK outside. For west-coast Scottish fishermen it will be problematic if you have queues at borders and tariffs, so we have to take account of subsectors within the fishing sector as well. The fact that Norway has an EEA agreement does not mean it is automatically available and on the same terms, including on fisheries, as Norway has it. It needs all 27 EU members of the EEA, as well as the three EFTA members, to agree, so it is a huge political process.

Sam Lowe: On process, we need to be far more articulate in the UK debate about how you get there. The first process is withdrawal. If you go via a withdrawal agreement it comes with a backstop. That backstop still exists. Then you could get to a Norway-type arrangement, and this is



where the British debate may have been too literal. We talk about Canada and Norway, but the EU has always used them as examples of the type of balance of access and obligation. It would not literally look like Canada and it might not literally look like Norway. There is still the possibility that you could enter the EEA via EFTA agreement. Actually, what the EU and EEA countries would prefer, and it is probably more in the UK's interests to take this route, is a bespoke arrangement that is built on similar terms to the EEA agreement.

If we were to enter into such an agreement, with the purpose of obviating the need to ever use the Northern Irish backstop, so a whole-UK approach that means you do not need separate provisions on Northern Ireland, it would have not only to cover fish and agriculture, but you would probably need to be in a customs union. Even deeper than a customs union, you would probably need to be within the Union customs code, as Northern Ireland is under the backstop, and you would also need provisions on VAT and excise. You are going quite a long way further than the existing EEA agreement. That is not to say that we could not then share some of the same infrastructure as the EEA EFTA countries, so the EFTA Court and the EFTA surveillance mechanism. Maybe that could be adapted. That is certainly possible.

On the EU defensive side there are already concerns within the EU about not non-implementation but delayed implementation. With the UK, they would want to address that. There would also be an issue on the level playing field. There is also talk that we could trigger article 112 and do something on freedom of movement. We cannot pretend the EU has not noticed this and would not put in something in a bespoke arrangement to prevent that from happening.

So Norway-plus-plus-plus, or whatever you want to call it, or a deep UK-EU association agreement, is certainly possible as an outcome, but we should be clear about how we get there and some of the difficulties along the way.

Q3529 Joanna Cherry: Just on process, Sam, earlier you made a comment about the Labour frontbench being a bit unrealistic about what could be achieved by an extension of article 50.

Sam Lowe: I think that was Henry.

Henry Newman: That was me.

Joanna Cherry: It was Henry, okay. I am sorry. Could you elaborate on that?

Henry Newman: Elaborate in what terms?

Q3530 Joanna Cherry: You made a comment about the Labour frontbench being a bit unrealistic about what could be achieved by an extension of article 50. By that I understood you to mean that we cannot just extend article 50 to negotiate some arrangement, and the Labour frontbench are



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unclear as to what it is they want to negotiate, but they seem to think they could get something better. What is your view on that?

Henry Newman: We have set out the terms under which you could extend article 50 with EU agreement. That would probably be a referendum or a general election. I do not think you can extend it to change aspects of the withdrawal agreement and suggesting that is problematic.

To pick up Sam's point, if you want to go for a Norway-plus option, my understanding is that the proponents of that are saying that we should accept the withdrawal agreement and then have, either in the political declaration or elsewhere a commitment to head towards a permanent customs union and then negotiate a protocol to the EEA agreement and, potentially, a protocol to the EFTA agreement. This gets very messy. What happens then when you are in the transition and you are trying to turn those things from a protocol into an actual treaty? You come up against all kinds of negotiating cliff edges: where the price is going to be, fish, level playing field, Gibraltar, tighter regulations on our services and divergence. The Commission would be happy to look at, as I understand it, a closer relationship, but it is not going to be simply Norway's closer relationship.

I have also heard from key member states a concern that they simply do not believe that this relationship would be sustainable in the long term for the UK. Either we would push back against elements of the agreement, perhaps on migration or other areas of rule-taking, and therefore either create a huge problem within the agreement and blow it up or fall out of it and have to spend the whole time renegotiating a successor regime. They are very sceptical that this would be a realistic option for the UK in anything other than the short term. As a short-term option, it does not work.

Q3531 **Joanna Cherry:** Very quickly, on the revocation of article 50, Catherine, you will be aware that the Scottish case will again be before the Inner House of the Court of Session tomorrow, and they may wish to be addressed on what is the appropriate mechanism for revoking article 50. There is a debate about whether you would have to have an Act of Parliament to facilitate that or whether it could be done by a simple vote of the House. What is your view?

Professor Barnard: The Court of Justice does not specify that. All it requires is that it respects our constitutional requirements and that the intention to withdraw is unequivocal and unconditional. There is some hope that the Scottish court might give us an indication of what our constitutional requirements might be. The choice is either it can be done by an Executive Act or it needs an Act of Parliament. I think it would need to be an Act of Parliament, not just because of Miller but because we know from earlier case law that the prerogative cannot be used to frustrate the will of Parliament as expressed in statute.



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Statute has actually spoken twice. It spoke first in the notification Act. That is less problematic, because of the rather general way it is drafted. It allows the Prime Minister discretion. She may notify her intention to withdraw. The more problematic one is actually the European Union (Withdrawal) Act 2018, which is much more detailed about us leaving the EU, in particular section 1, which is the termination of the European Communities Act. It probably needs to be done by an Act of Parliament.

Chair: That is very clear. Thank you.

Q3532 **Stephen Timms:** Catherine, can I start by putting a question to you? I have heard you say previously that you were aware of the existence of a longer draft of the political declaration than the one that was finally published. Can you tell us anything about that? Is it your impression that the document had a similar sort of direction of travel in it to the one we have been talking about with the current political declaration? Do we know why they went for a much shorter declaration in the end?

Professor Barnard: I have been reliably told that there was a much longer version of about 100 pages doing the rounds. I have not seen it. I do not think anyone, outside a very small circle, has seen it. My suspicion is that it was hard enough to get the shorter version agreed and sometimes less is more to try to get it through. Of course, the more detail and the more information there is, the more people have time to pick over it. As it is, we have 25 pages. My sense is that a sort of Canada-type document is what we are heading towards. But, as you have also heard, there is enough wiggle room in it that it could be read to have some sort of Norway-style agreement too.

Q3533 **Stephen Timms:** Was it your impression that the longer version was probably a Canada-style direction as well?

Professor Barnard: That is my understanding, but I do not know.

Henry Newman: I also got the impression, from speaking to people inside Government, that there was a longer version that perhaps more explicitly set out a choice, a menu of different options for the future relationship. Things moved around quite a bit towards the end.

Clearly, we saw two published versions of the political declaration. We saw the very short version that was published when the Cabinet first agreed it and then a more substantive version after the Council meeting. We know from what the former Brexit Secretary has said publically that changes were made to the text in the immediate period before it was published, and he felt those changes were substantive enough to encourage him to resign. He has pointed to areas in terms of the language around building on the customs territory aspects and the level playing field aspects. Those then evolved a bit further in the period between the short political declaration being published and the final political declaration being published.

Q3534 **Stephen Timms:** Does someone else have a view?



Dr Hughes: I just hesitate a bit on this Canada emphasis. The reason the backstop is so problematic for some is that there is no deal that meets all the UK Government's and Theresa May's red lines. If you go down the Canada route, you are only going to get joint agreement to go down the Canada route by having a border in the Irish Sea.

If you do not want to go down that route, you then go for a much deeper customs union model. That obviously cuts across other red lines, but there is certainly quite a strong current of opinion that this is the way to go if Brexit goes ahead. Therefore, that is why, in my view, the political declaration very much points in both those directions, and that is an argument to be had again in the future, but I have no idea what the 100-page version was like.

Q3535 Stephen Timms: On the existence of this longer draft of the political declaration—I appreciate that no one has seen it and that there is a limit to what one can say about it—is it your impression that this was something that the negotiating teams were reasonably happy with and then, I suppose, when the politicians looked at it they decided not to go that far? What was the status of the 100-page document?

Henry Newman: I do not know much about the 100 pages, but at the negotiating level there were clearly things that were being looked at. I do not know how much of that was locked down or how much of that was in the different versions that have been used. I would not want to speculate more.

Dr Hughes: Perhaps it may have been the case that the very last late stage—the last two weeks or so—was spent putting the all-UK customs union into the withdrawal agreement. That may have then impacted on going for the shorter political declaration.

Q3536 Stephen Timms: Can I raise something completely different? This goes back to something you said earlier, Kirsty. You said that the Commission issued a document this morning, which I have not seen, about what they would do in the event of no deal. You made the point in passing that, amongst other things, it does not say anything about data and the arrangements for data exchange if we were to leave with no deal. From that, can we take it that the Commission is saying that, if the UK leaves with no deal, it will, from 30 March, be illegal to send personal data from anywhere in the EU to the UK? Is that the case?

Dr Hughes: What I said was only from some detailed media reports I read this morning. I do not know whether they have been well briefed or leaked a copy of the document. If they do not take any further steps, I suppose, yes, that is what it means. I do not know what they will say today. It is probably due out now, or maybe the Commission is just meeting now on a Wednesday. But it will be very interesting not just on that issue, vital though it is, to see what they say about whether this is it or whether they are going to come out with other documents. I understand why they are not saying anything about the Irish border,



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because it is extremely problematic politically, but I would expect them to return to data in some form. Maybe this is their opening pitch, and then they are going to wait to see how the UK responds.

Sam Lowe: Just on that, it is not that it does not mention data. It does mention data. I am going off the November paper that was sent from the Commission to the Parliament and Council that was a precursor to the legislation that is being proposed today. It does mention data. It says that existing provisions within different rules and the like are adequate. What it specifically says is that they are not considering a data adequacy arrangement at this time. That is what I am led to believe we will see from the legislation. It is not that data is not mentioned; it is just on that specific point.

Q3537 **Stephen Timms:** But that would mean, would it not, that it would become illegal on 30 March to send personal data from the EU to the UK?

Sam Lowe: Not necessarily, no, because it depends on the different provisions in other areas to do with the transfer within businesses and the like, but it is also still the case that the Commission could decide on 1 April to bring in place an adequacy arrangement. It just says they are not considering it at this time. But, yes, it is another potential cliff edge.

Q3538 **Jeremy Lefroy:** I just wanted to get your views on the difference, if any, there would be in the ease or otherwise of negotiating future relationships, particularly around trade, in the case of a no deal as against the withdrawal agreement, political declaration and hence the transition period.

Henry Newman: Unquestionably, it would be easier if we agree to leave through a deal. There are some suggestions in the papers today that if we left without a deal we could withhold the financial settlement with the European Union. If we did that, it would open dispute on all kinds of matters. It would be very hard to see the EU engaging seriously with us on trade. It is pretty obvious.

Dr Hughes: This is what the EU side mean by saying there is no managed no deal. Not only are they taking unilateral measures and not agreeing bilateral measures for no deal, but there is this idea that you might pay some of the money or you might, from the UK side, cherry-pick the withdrawal agreement. Why would the EU accept that? The EU is presumably, at that point, going to say, "We will negotiate with you when you accept the withdrawal agreement", and then we would negotiate free trade. If there is no withdrawal agreement, there are no trade negotiations, or not for quite some time.

Sam Lowe: Yes, it is a question of timing. If we had a 10, 15 or 20-year time horizon, I would not rule out that after five, six, seven or eight years of there being no deal that we would not start patching some things together. Of course that is possible, but in terms of the immediate aftermath, I have heard this argument that we should just leave with no



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deal and then immediately go to the table and start negotiating Canada. It just seems ludicrous. The first thing the EU will say is, "Okay, you have come back to the table because you cannot cope with no deal. That will be £40 billion and a backstop for Northern Ireland. Those are our conditions for continued negotiations".

It would be slightly more difficult than that because of the entire procedure on the EU side, but substantively that is what would happen. That is what they think would happen in the event of no deal. They think the UK will not be able to hack it for very long and will come back, but in a much worse position than we are in now.

Q3539 **Jeremy Lefroy:** Thank you. That is very clear. It pretty much accords with my view. I wanted to ask a second question. If there is no deal, can you be realistic about what the UK's trading position will be globally compared with all other countries around the world? Where will we sit in terms of our global trading relationships compared not just with other EU countries but with any other country, for example Australia, New Zealand, Indonesia or China? Where will we be in terms of relationships?

Henry Newman: Catherine has her report open in front of her.

Professor Barnard: You have given me a chance to mention a very fine report published by UK in a Changing Europe on what trading under WTO rules would mean. I will be brief and then I will let Sam conclude, but what becomes very clear from this report, which I am very happy to provide you with copies of—they are easily available on the UK in a Changing Europe website—is that very few countries indeed trade purely on just WTO terms. Most countries have a whole range of bilateral agreements that facilitate the trade that occurs. There are a handful of countries that are not in the WTO with which the UK does do some trade: Azerbaijan and Serbia. In reality, in terms of the main countries we trade with, 45% of our trade in goods goes to the EU. To be trading with them on purely WTO terms without any facilitation agreements of any sort would be very problematic.

Sam Lowe: Just to conclude that, can you think of any other country in the world that does not have a preferential trading agreement with the regional economic superpower? The answer is no, because of course you do. You are asking us to rank countries against each other in terms of openness to trade or in terms of trading position, but in the event of no deal we would be in a hugely detrimental position. Not only do we lose on day 1 our relationship with the EU; we also technically lose our trade agreements with all other countries. To go back to a point made earlier, yes, you could replace some of them, but it is not necessarily possible for all of them. For example, if we are not in a customs union with the EU, I cannot see how we replicate our trade agreement or customs union with Turkey.

Dr Hughes: Can I add something very briefly? Inevitably we talk a lot in this discussion about trade and the economy, but if the UK leaves with no



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deal we have to think about what damage that does to our international reputation as a state. To some extent, that has already been damaged by the political stalemate here. To leave without a deal, reneging on many obligations and commitments, as it would be seen, in terms of our foreign policy, our security, our influence around the world and our ability to be trusted in other crucial negotiations at a time of great global challenge and uncertainty also needs to be factored in to that rather extraordinary no-deal picture.

Q3540 Jeremy Lefroy: I have one final question on this. At the moment we have to keep just one or two balls up in the air with the European Union. In the case of no deal, we would be dealing with around 190 countries, or at least the trading blocs to which those 190 countries belong. Do the Government have, or are they likely to have, the capacity to deal with all that? At the moment we are just dealing largely with the European Union and, filtered through the European Union, a number of other countries. If we leave without a deal, we have to deal bilaterally with all those countries. Do Government now or even in the future, with this extra money allocated yesterday, have that capacity or that expertise?

Henry Newman: No, not to do all of those simultaneously. Sam was talking about replacing the EU's existing deals. Some of those are, in terms of Canada and Switzerland, pretty much ready to be replaced. It is not ready yet, but my understanding is that it is pretty advanced. Obviously, you would not prioritise all countries equally. However, leaving without a deal would leave you with no deal at all with your biggest trading partner in goods, which is a very problematic position. Whatever else you did with any other trading partner in goods would be less helpful than having a trading arrangement with your biggest trading partner.

Sam Lowe: I would add that the answer is no. It is not really a criticism of the Department for International Trade, or whoever is leading this, because some of these negotiations are being led by different bits of Government. The Foreign Office leads on the association agreements; DExEU leads on Turkey or EEA-type negotiations. It is just a question of whether you can have that much capacity if you were to do them all at once. The answer is probably not. It goes to Henry's point.

If we were to leave with no deal, you would have to prioritise. DIT and the like are already doing that to an extent. There are some agreements that matter more than others, but some are difficult in that they are not just trade. The association agreements with North Africa have other elements; the association agreement with Israel has research co-operation built into it. It would be incredibly difficult.

One point I would make, because this sometimes comes up in the debate, is that one area where there is no issue is when it comes to our position at the WTO. This sometimes comes up as an issue. People say, "We will not have our schedules ratified by the time we leave, and that could be a big problem in the WTO". In practice, that is not a problem.



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We would just apply at the border what we said we would and continue the discussion.

Henry Newman: I think there is a domestic law problem in terms of getting the legislation through to be able to set tariffs, both in terms of the primary legislation and the secondary legislation.

Sam Lowe: Yes, absolutely. I am talking with regard to our relationship with the rest of the world, not necessarily domestic issues.

Q3541 **Mr Bone:** When people voted in the referendum, of course they did not just vote about our trading relationship. In fact, that was probably not the most important issue. The Prime Minister is right in saying that people voted to control laws, money and borders.

Chair, the panel has told us that there may be no majority in Parliament for any deal, but surely that is not true. We have already had the article 50 vote. There was a huge majority in favour of that. We have had the European Union (Withdrawal) Act with a huge majority. Clause 1 is very clear in that Act, saying that we are coming out of the European Union on 29 March next year. Parliament has already spoken. There is legislation and two huge votes. Surely, coming out of the European Union on 29 March with no deal gives a number of things. It gives control over our laws, money and borders. The Prime Minister says that is essential to honour the referendum, and I agree with that. It gives what business wants, which is absolute certainty. The political declaration gives no certainty whatsoever. It gives a menu of different conflicting options.

Can I go back to the original comments from panellists to say there is no majority for no deal? Is it not a fact that there is a majority for no deal because it has been voted for? Is that exactly what the Government should do to keep trust with the British people?

Dr Hughes: I made various statements about majorities. Obviously there have been majorities that have brought us to this point. The question is about what there is a majority for, which we need urgently in the coming weeks, I would say, rather than months. Theresa May decided not to hold the vote on 11 December. It was really unfortunate to wait another month when we are so near 29 March end date. That was a bad decision. As we said earlier on this panel, if there is no majority, as a result of those earlier majorities the default will be a no-deal exit. That is clearly not what business wants.

Q3542 **Mr Bone:** I am sorry. On that, since when did we abolish the business vote? Was it not 100-odd years ago. Surely we should be listening to the people, not just business.

Dr Hughes: I was responding to you saying that business wants certainty and that no deal would be certainty. My response to that was to say that five business organisations today have come out saying they are very concerned about the preparations for no deal and therefore would prefer Theresa May's deal. I also think no deal does not give you clarity



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and control over borders; it will give you borders chaos. At the moment, a number of observers suggest that if there is an active vote in Parliament there would not be a majority for no deal, but you are certainly right. I am right and you are right. There was a majority for Brexit, but, if Parliament cannot come together with a majority for either no Brexit or a deal Brexit, that will be the outcome.

Q3543 Sir Christopher Chope: There is a duty on the European Union for sincere co-operation. That is an obligation that the EU has towards the United Kingdom as long as it remains a member of the European Union. Can you help us as to how that duty applies in these circumstances between now and 29 March when we are preparing to leave on WTO terms? We have an absolute right under article 50 to leave the European Union either with a deal or without a deal. The default position, as we discussed, is to leave without a deal. What obligation is there on the EU to try to make that easier for everybody under their duty of sincere co-operation?

Dr Hughes: It is more a legal question. Politically, there is little obligation. Frankly, at the moment politically the UK is essentially seen as already a third country. Therefore, the sort of co-operation and support you see in the way the EU works across a whole range of areas to support its member states and get things to a consensus is probably no longer there. But that is a political comment, and I think you are asking more about the legal side.

Professor Barnard: You are absolutely right. Article 4(3) of the TEU does contain the duty of loyal cooperation. In article 5 of the withdrawal agreement you have a similar obligation to act in good faith to assist each other. The question is about how legally enforceable that is. What can we do if we think the EU is not actually complying with that in some way? It would be at least theoretically possible for the UK Government to start proceedings against the Commission before the Court of Justice, but it will take some time. The ECJ may well say that it is not a justiciable concept; it is not a concept that can actually be legally enforced. The duty of loyal co-operation is used to try to facilitate other activities.

It may be that what you are thinking of is article 8, which is about the neighbourhood policy. I have certainly heard it argued that the EU is under an obligation to facilitate a future trade deal because of the neighbourhood policy in article 8. If that is perhaps what is underpinning the question, you are still up against the same legal problems. The neighbourhood policy provisions were drafted particularly against the backdrop of the Arab Spring and trying to facilitate relationships with countries in North Africa. Of course, that does not apply directly to us. It is also thought not to be a legally enforceable provision, but it creates a context for co-operative discussions, but probably not a lot more.

Sam Lowe: The EU could probably argue in that context that it has been trying to do that. It has agreed a withdrawal agreement at the technical level and, if the withdrawal agreement goes through, it will then try to



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negotiate a future relationship. It can legitimately say that it is down to UK intransigence, from their perspective, that this has not happened.

Henry Newman: We are getting to the very last minute to do legal challenges. Overall, the most important element of this was article 50, which places an EU law duty on the EU to negotiate and conclude an agreement with the UK. They have done that, as they see it. I do not particularly see this as a very helpful route for us at this point.

Q3544 **Sir Christopher Chope:** It may not be a helpful route for you, but surely it is incumbent upon the EU to demonstrate that it is to be trusted. That is one of the big issues here. A lot of people in the United Kingdom do not trust the good intentions of the EU. This is an example of it, is it not? They have this obligation, but you have just said that it may not be enforceable in law. If it is not enforceable in law, surely there is still a moral obligation on them to do it, but you do not seem to be fussed about that.

Can I ask you something slightly different? We keep talking about no deal, but what we heard in this Committee when we first went over to Brussels was that they envisaged the withdrawal agreement and the terms of the divorce would be agreed, and the terms of the future relationship will be more than just the sketch we have here—an ambiguous self-conflicting sketch map. What we would have would be the hard bones of a future trading relationship, which, as the former Secretary of State said, could be signed off within days of the withdrawal having taken effect. What we now have instead of that is a deal in relation to the divorce, but we do not have not any deal at all in relation to the future relationship. In a sense, it is a misnomer to suggest that this is a difference between no deal and the deal, because the deal has no deal in it about the future. Both options are unsatisfactory because they leave the future unknown. It would be wrong to suggest that one of those options leaves the future known when the other one does not.

Sam Lowe: I obviously cannot speak to what you were told in your meetings in Brussels, but from the moment article 50 was triggered, it has been my interpretation that we were negotiating the withdrawal, there would be a declaration of sorts on the future relationship but that would be substantively negotiated after we have left. You can even point to statements from Cecilia Malmström, the European Commissioner for Trade at the time, which point to that. When the former Secretary of State did make statements to that effect, I personally criticised him for it. I said, “You are not conveying accurate information”. I feel that what I have just outlined is an opinion, or at least an informed opinion, that is shared, I would imagine, by most of the panel, though I would not want to speak for them.

Dr Hughes: From very early on we heard that you could not do a trade deal until the UK becomes a third country. You appear to be saying that somehow the EU has done something wrong. If the UK had come up with a clear demand for a specific trade policy early on that it wanted, the



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Cabinet wanted and that its backbenchers were behind, maybe we would have got to the 100 pages. It might not have had firm bones, because, again, legally that is probably not possible.

I would make a similar point on sincere co-operation. If the UK chooses to leave with no deal, as opposed to the deal that is on the table, is that sincere co-operation? I do not think it would be seen as such from the EU side.

Sir Christopher Chope: It is entitled to do that under article 50.

Henry Newman: Ultimately, you could have mounted an argument that under the terms of article 50 the EU was required to agree a framework—I think that is the language that is used—and the political declaration did not quite meet that. We could have mounted that challenge. The former Secretary of State for the Department for Exiting the EU suggested that there would be a huge fight over the phasing of the talks in the summer of 2017, and we capitulated on that. These passes were sold long ago. It might have been possible to get something more substantive on a lot of these areas, but we are now in the last-chance saloon.

Q3545 **Sir Christopher Chope:** Can I take you back quickly to the Prime Minister's Lancaster House speech? That was immediately after Parliament had agreed to trigger article 50. In that speech, she envisaged the possibility that the European Union would only give us what was described as a punishment deal. She said in that speech that, as a result, no deal would be better than a bad deal. She spelt out some of the advantages of no deal as including our ability to be able to introduce fiscal and tax incentives for inward investment, which we might not otherwise be able to do. She even talked about the establishment of an alternative economic model as a way of showing that no deal would be better than a bad deal. What did the Prime Minister have in mind when she was talking about an alternative economic model as one of the virtues or benefits that could come out of no deal?

Henry Newman: The Chancellor also used similar language, as I remember, in an interview where he was suggesting the idea of a Singapore-on-Thames but then rolled back from it. Of course the UK could shift quite a lot of its economic model, but it is worth pointing out that we could do a lot of that even in the backstop as well. We would be able to substantially change our tax regime, for example, or our rules on foreign direct investment.

There is a lot of mythologisation about what Lancaster House said. For example, on the customs union, although it says we will be leaving elements of the customs union, it also explicitly talks about association agreements on customs and not leaving all of the customs union and an openness to a range of creative models. On no deal, obviously the Lancaster House position and the position in the 2017 Conservative manifesto was that no deal was better than a bad deal. If you had a



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member of the Cabinet here, they would argue that they do not think this is a bad deal and that is why they approved the deal.

Q3546 Sir Christopher Chope: It is for Parliament. If Parliament decides it is a bad deal, is the logic not for the Prime Minister to accept that the word of Parliament is that it is a bad deal and then go back to her position, which is that no deal is better than a bad deal?

Henry Newman: The default is that we leave without a deal unless we have a deal.

Dr Hughes: There is no deal that has been discussed that is as bad as no deal. The result of proposing or hinting at a Singapore-style deregulated model has resulted in the negotiations with the EU being much tougher at various points on the level playing field conditions and similar conditions.

Q3547 Sir Christopher Chope: They are frightened of competition from us. That is what they are really frightened about.

Dr Hughes: The level playing field, from their point of view, would be about fair competition. The political declaration talks about free and fair competition. That is the sort of phrase you will find a lot in the EU documents that the UK has agreed.

Q3548 Sir Christopher Chope: Can I just ask one other question? When we leave on 29 March, as I hope we do, without a deal, on WTO terms, what will be the position physically on the Irish border? There will not be any physical barriers put up by the United Kingdom Government, because we said we will not do that, nor will they be put up by the Irish Government, because they said they will not do that. Are we expecting EU army tanks to be placed across the border? What are we expecting, if anything?

Sam Lowe: It is a fair question. The answer is that we do not know exactly. I imagine that on day 1 not so much would change. There are no WTO inspectors who are going to march down and start staking out a border. This falls into the emergency provisions and that type of scenario.

Q3549 Sir Christopher Chope: It could come under article 21 on security as well, could it not? There is an exception relating to security.

Sam Lowe: That is moving to an area that is outside of my expertise, but on the trade side could you have emergency provisions that allow this to remain open for a period of time? Yes. Is that sustainable in the long run? The answer is no. You then have a situation whereby goods exiting the UK and entering the EU from any other destination face all of these controls but do not there. It is not a sustainable long-term solution to say, "We will not do anything". After a while either side, either the UK or the EU side, will have to start putting in controls, because otherwise you have a back door into each other's markets.

There is a bigger question on this. People focus on the stakes, the infrastructure or the like. There is a problem in Northern Ireland from the moment we leave without a deal, because the terms for the people living



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there have changed. They have become distinct. People in the north who thought of themselves as Irish are suddenly concerned. "Okay, maybe that has changed. Maybe something is going on". We do focus on the economic and trade issues when it comes to Northern Ireland quite a lot, but the backstop goes much further beyond that. The aim is to make sure that nothing is changed practically speaking for the people living there. In a no-deal scenario it would have done, if only to begin with in terms of the increased uncertainty over their position.

Q3550 Sir Christopher Chope: But nothing will have changed on the border.

Sam Lowe: No, not necessarily. I have just laid out a scenario where that could not be the case on day 1. In terms of the long term, yes, absolutely, things will change on the border.

Dr Hughes: We cannot say for sure. As I mentioned quite a bit earlier, there will be very serious discussions amongst the EU 27 at that point. The EU is a peace project above all else, but it is also a trading bloc. It has an external border. It would create a very difficult situation, and the result would not simply be borders as now; there would be change.

Chair: You have been very patient and generous with your time. As I said at the beginning, we had a lot of stuff to cover and I think we have done so. On behalf of the Committee, can I express our profound thanks to you for giving up your time today and wish you, since this is the last session of the Committee, a very happy Christmas and an interesting new year?