

Exiting the European Union Committee

Oral evidence: The progress of the UK's negotiations on EU withdrawal: role of Parliament, HC 1962

Wednesday 6 March 2019

Ordered by the House of Commons to be published on 6 March 2019.

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

Questions 1 - 57

Witnesses

I. Professor Alison Young, Faculty of Law, University of Cambridge; Swee Leng Harris, Head of Policy and Public Affairs, The Legal Education Foundation, and Senior Policy Adviser, Bingham Centre for the Rule of Law; Dr Brigid Fowler, Senior Researcher, Hansard Society.

Examination of witnesses

Witnesses: Professor Alison Young, Swee Leng Harris, and Dr Brigid Fowler.

Q1 Chair: On behalf of the Committee, can I welcome our panel of witnesses to this morning's session: Professor Alison Young, the Faculty of Law at the University of Cambridge; Swee Leng Harris, head of policy and public affairs at the Legal Education Foundation and senior policy adviser at the Bingham Centre for the Rule of Law; and Dr Brigid Fowler, senior researcher at the Hansard Society? Thank you all very much indeed for giving up your valuable time this morning. Your timing and the timing of this session is impeccable. We tend to say that a lot on matters to do with Brexit because every week brings a new deadline and an important moment.

Can I kick off with this question? There is some debate, and some Members are arguing, that the approval of any withdrawal agreement and political declaration should or could be subject to a confirmatory referendum by the British people. I would be very interested to know, if Parliament were to pass such a proposal, under the EU (Withdrawal) Act, would the withdrawal agreement and political declaration have been approved by the House of Commons or not? I do not know who wants to kick off.

Professor Young: That is probably a legal question.

Chair: I suppose it is.

Professor Young: It is. The difficulty would be with regards to making sure, first, you comply with Section 13 of the European Union (Withdrawal) Act, with which I am sure you are all very familiar. You will need to make sure that there is the House of Commons resolution prior to ratification. The current legal requirements of ratification are, obviously, lay the agreement, approve the agreement, then you have to have legislation to implement the withdrawal agreement, and then, currently, until you amend the requirements of Section 13, subsection 14, you would have to go to the Constitutional Reform and Governance Act procedure as well.

If you were to add on a referendum afterwards, then you would need legislation in order to set up that particular referendum. You would need, obviously, the time to set up how you are going to set up the referendum in order to make sure your questions were done properly, scrutinised correctly, and also to make sure there is sufficient time to hold the referendum after it. That legislation would come in addition. If you were concerned about the extent to which you were adding an extra condition, later legislation could add an extra condition.

Chair: The acoustics are not fabulous in this room, so if everyone can speak up.



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Professor Young: I will try my best. As you know, I am struggling a little with asthma. If you were to add on, in addition, a further requirement, you would need further legislation in order to add that on to make it a legal requirement.

Q2 **Chair:** Indeed. That is extremely helpful. Would the passing of a motion that says, "We approve of the withdrawal agreement and the political agreement subject to a confirmatory referendum", constitute, under Section 13 of the Act, approval? It could be argued it is conditional approval because it is not actually approval until it has been confirmed.

Professor Young: My argument would be that, if you look at the wording of Section 13, it says it has to be agreed. A motion has to be agreed in terms of both. It would be very difficult to say, "We have agreed it, but it is conditional on future conditions". If you were to take that line, you leave yourself open to potential litigation that you have not complied with the requirements of Section 13 because you have only conditionally agreed to, rather than agreed to. Therefore you would have to have the further condition, and there could be discussions as to the extent to which you had satisfied the earlier ones. My recommendation would be, if you did want to say, "We are going to approve, conditional on a referendum", you would then, in your referendum, have to say, "We have now modified the earlier agreement", to make sure you have fully ratified it later.

Chair: That is so all the legal bases have been covered.

Professor Young: It is always wise to avoid litigation if you can.

Q3 **Chair:** On that, I am sure we are all agreed. Ms Harris or Dr Fowler, would either of you like to comment on it? Yes, Ms Harris.

Swee Leng Harris: I would agree with everything my colleague has said and only add that it could be possible, in amending the wording of the motion, assuming it was an amendment that led to a referendum, to try to clearly state the will of Parliament for the purposes of judicial review, in which case, given the courts' deference to Parliament, it would be arguable that a court would not look behind that. Therefore, if the motion were worded such that it said, "For the purposes of Section 13, Parliament approves this; we also want to hold a referendum, but it is approved for the purposes of Section 13", then the chances are a court would give a great deal of weight and deference to those words, rather than looking behind it to question whether, in substance, this constituted approval.

Professor Young: Of course, because of Article 9 of the Bill of Rights 1689, the courts will not look behind the wording and will not question proceedings in Parliament. The court is not going to question proceedings in Parliament with regard to whether you have validly enacted a particular motion, but if you put a legal requirement for ratification, the courts will look at whether you have satisfied the legal requirements to ratification.



Dr Fowler: I am the non-lawyer on the panel. From that perspective, I would say if you have any language in there about “conditional on” or “subject to”, I would say, “No, that would not meet the requirements of Section 13”. That would not be approval in and of itself for the purposes of Section 13.

Q4 **Chair:** That is very helpful. There is just one other question from me, which we will explore in a bit more detail. It could be that by Thursday of next week the House of Commons has voted to, in effect, instruct the Government to seek an extension to Article 50. In those circumstances, it would just be helpful as an introduction to have a sense as to what considerations you think the European Council that would be meeting the following week would be bearing in mind in deciding whether to grant such an extension.

Swee Leng Harris: A key consideration is obviously the purpose of an extension, and therefore whether the time proposed for the extension is likely to be adequate for the purpose. There are political decisions and judgments to be made, on which I would not venture an opinion, as to how much time is needed if, for example, the purpose was further negotiation, but the overriding consideration I would anticipate would be about what the purpose of the extension is, and whether the time proposed is sufficient for that purpose.

Dr Fowler: Yes, I would agree. I will perhaps make two points. One is that the discussion about this is slightly odd in some respects because extension is, in one respect, equivalent to exiting with a deal on 29 March or exiting on 29 March without a deal, in the sense that it is one of the other things that could happen on 29 March. In another respect it is not really equivalent to those other possibilities, because it is not a decision, other than to just carry on the Article 50 period.

The second thing I would say is that the circumstances in which the Government currently envisage asking the House whether it would wish it to seek an extension of the Article 50 period are the ones that are less likely to see the other 27 member states granting it, i.e. it would come after the withdrawal agreement had been rejected again. If the withdrawal agreement were to be approved and then the UK Government were to say, “We need an extra few weeks to finish the ratification process”, that is far less problematic than the other 27 receiving a request for an extension after the withdrawal agreement has been rejected again. I am not making any definitive judgment, but it is an important point.

Q5 **Chair:** Do you think that avoiding a no-deal Brexit for both sides on 29 March would constitute a purpose? That would be the principal purpose why the House was requesting such an extension, because it only gets to that point if it has rejected, on the previous day, leaving with no deal on 29 March.



Professor Young: It does constitute a purpose. The question is with regard to how long the extension is going to be and the likelihood of the possibility of extensions for what you are doing after that. Yes, it is the purpose, but the purpose is essentially just to delay leaving with no deal. You still have the further question of whether we are then going to be moving towards a different deal and, if so, what it is going to be? When the council is exercising its decisions, it is an institution of the European Union. It is going to act within the confines of European Union law, so it will go away and look at things like the recent Wightman decision, which set out when you have unilateral revocation issues.

Within the decisions of the discussions of the AG, there were concerns about potentially abusing the Article 50 process; this was in the context of revoking to then come back and negotiate again in order to try to achieve extra time. There will be concerns within the European Union about whether we are just doing this to get extra time with no further purpose. They will be thinking about the extent to which this a legitimate purpose. Do we have a way forward? Do we know where we are going with the negotiations, or is this just extra delay, extra time? They will be considering the extent to which it could be perceived as abusing the purposes of the delay.

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

Q6

Emma Reynolds: I wanted to ask you a follow-up question about the extension of Article 50. What would be the impact of an extension of Article 50 on the reallocation of the UK's seats in the European Parliament to other member states? Obviously the European Parliament and the EU institutions have been planning around us leaving on 29 March. Should we request an extension beyond 2 July, for example, what would happen to the decisions that have already been made about the reallocation?

Swee Leng Harris: The starting point is that the EU has passed law to reallocate the UK's seats. However, that law only comes into effect if and when the UK leaves before 2 July, so from a purely technical legal perspective, it is possible for the UK to not leave before 2 July, in which case that law would not come into effect. There are obviously follow-on practical difficulties in terms of the conduct of the European Parliament elections.

Professor Young: I agree that it can be delayed, because it ties into the dates on which we leave. Obviously, you then have to think about how far the extension would be. One of the key elements that the Parliament is also going to have to think about is the interaction between the European Parliament election dates, both in terms of making sure that a European Parliament can appear to approve the withdrawal agreement if we reach a situation in which there is a deal and also in terms of going forward with regard to whether we would have to hold elections for the European Parliament.



To your follow-up question on what would happen to knock-on seats, technically, legally, nothing would, if we do not leave by 2 July, because they would not implement the decision then. Obviously, the European Union would have to think about, if we were to leave mid-term in the next European Parliament, what they would they do with the seats then, and maybe perhaps they would reissue the decision to take effect then. That would be for the European Union to determine.

Q7 Emma Reynolds: Some have suggested that we could have some sort of protocol that meant that if, for example, we requested an extension to the end of the year, instead of holding European elections we could perhaps find another solution, such as some MPs from our Parliament taking the place of our MEPs. Legally, given that that would not be in the treaty but would be a protocol, how watertight would that be? Could it still be the case that an individual could take the UK Government to court to say, "I have not had my democratic right to vote in these elections"?

Professor Young: If it was a protocol attached to a treaty that became European Union law, you would have to make sure it was taken under the requisite provisions of European Union law. That would fall under the aspects of an additional protocol, so treaty amendment procedure, because arguably it would not require a convention to get together, because it is not necessarily changing drastically the substance or process of the treaty. That could probably go through the more simplified treaty provision procedure. You are still going to need to have the element of approval going through from Council, member states and everything. Once that has been approved effectively in law, then obviously that becomes a legally binding element of European Union law that can be attached to a protocol, and you can put within that aspects of how that would work in terms of bringing actions. You would have to make sure it was drafted carefully enough to make sure that you had dealt with that particular situation within the protocol and that it was passed in the proper terms under EU law.

Q8 Emma Reynolds: On the process that you have just helpfully explained, how long would that usually take?

Professor Young: Normally a lot longer than this, but obviously the European Union is in a similar position to the UK. It is dealing with unprecedented situations. There would be an incentive on the European Union to make sure this could be enacted through as quickly as possible.

Q9 Emma Reynolds: So it is legally possible.

Professor Young: It is legally possible, but that does not necessarily mean—

Q10 Emma Reynolds: Sure. If next week our Parliament decides to ask for an extension to the end of June, and then by the end of June we are still continuing to kick the can down the road, do you think it is practical for us to require or request multiple extensions? You can see that scenario.



Professor Young: I can see the scenario. The question, obviously, becomes an aspect of the precise wording of Article 50 of the TEU. We know that you can ask for an agreement for an extension. We know that the way in which it is worded is that you leave either with a deal or with no deal at the end of the negotiation period, and obviously the deal has to be enforced. You may ask for an extension and that is in the privilege of the council to agree by unanimity to grant that particular extension. Whether the fact that you can ask for an extension means you can ask for multiple extensions would then become an issue of the interpretation of EU law, and then you would have exactly the same as we had with Wightman. You will have different opinions as to the extent to which the treaty could be read to allow for multiple extensions.

That is against a backdrop in which, while Wightman is respecting aspects of member states' unilateral ability to join and leave, because it is looking at the extent to which states retain sovereignty while members of the European Union in terms of being able to join and leave, you still have to tie that against the element of their concerns about using an abuse of the process. Each one you asked for will be subject to unanimity, subject to the same backdrop of political requirements as to whether you are going to grant that or not. In that particular scenario, you would probably find that, again, you would have an element of aspects of potential litigation to ask whether it would or would not be legally possible to ask for multiple extensions.

Q11 **Emma Reynolds:** Is there anything in the treaties, or indeed in Article 50—any sort of wording—that seeks to prevent multiple extensions? Obviously the multiple extensions would not all be required at the same time. It would be successive failures to get something through the House of Commons, and then, maybe, May requests one at the next EU summit, and then there may be another request two or three months down the line.

Professor Young: This is when the best thing is if you have the precise wording. The difficulty with lawyers is we will not give you an answer to that unless we have the precise wording of Article 50 in front of us. From recollection, I think it is "may ask for an extension", but I will have to go away and check the wording.

Swee Leng Harris: While Alison is reading that, I will just note that there would be two distinct legal questions in relation to the elections, one being whether the EU Parliament was legally constituted on 2 July if there had not been EP elections in the UK and we were still a member at the point of 2 July. The other distinct question would be whether, as Alison alluded to, there had been a breach by the UK of treaty obligations in not holding the elections. In such a case, the hypothetical facts that you suggest would obviously be a very particular set of circumstances that the court would have to examine as to at what time, if any, the relevant grounds for a breach of the treaties had arisen. For example, if we do not hold EP elections in May because we are out or because we are



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planning to be out, then there would not be a breach for not holding elections. It is confusing, because one of the aspects of the breach would be not holding the elections, but another aspect of the breach is the UK not being a member, and that would not be certain until a later date. It is complicated.

Professor Young: I return to the wording of Article 50, paragraph 3. The precise wording is, "Unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period", so you are in a situation where you have no words expressly saying "only once" and no words expressly saying, "You can do this multiple times". You are in a traditional situation of essential legal silence in which you are going to have to go away and look at the backdrop of the purpose of the treaties as a whole in order to interpret what that would mean, and there will be arguments either way.

Chair: This has definitely got the Committee going. I have now caught three pairs of eyes who want to follow up on this point.

Q12 **Wera Hobhouse:** I want to go a little bit beyond this. It is all hypothetical, but what is the likelihood and what are the implications of the EU actually proposing an extension of 21 months? I know that is less a legal question and probably goes to Dr Fowler.

Dr Fowler: I have read the same reports and speculation as you have. Where the idea of 21 months comes from is that that takes you to the end of the current EU budgetary period at the end of 2020, which just would make things easier.

Again, I would come back to the purpose point. What are we doing in that 21 months? Just to come back on the issue of the shorter extension and the possibility of getting to the end of June, say, that is the kind of scenario that I was referring to in my previous answer. From the perspective of the EU 27, if there were to be an extension after the House of Commons had rejected the withdrawal agreement for a second time, it would be balancing out the increased likelihood that granting an extension would see a withdrawal agreement go through against the fact that it might just be another however many months of uncertainty, and you might end up in the same place anyway. That is basically the balance on the EU's side.

Q13 **Wera Hobhouse:** Could the EU actually put some proper conditions on to granting an extension? Is that legally possible, or is it actually an interference in other countries' affairs?

Dr Fowler: It is a joint decision under Article 50, is it not?

Professor Young: Yes.

Dr Fowler: I would imagine it could not be entirely unilateral on the EU side. The decision has to be formally a joint decision, but it would be subject to negotiation. If the UK Government were to go to the council



and say, "We would like to request an extension", then there would be a negotiation about that, I assume.

Wera Hobhouse: It has to be jointly agreed.

Dr Fowler: Yes.

- Q14 **Mr Whittingdale:** The essential difference between the extension of Article 50, and therefore our remaining a member state, and the proposal that we have a 21-month implementation period, is representation: the European parliamentary election participation, representation around the table. If we were to leave on 29 March, even if there has not been formal ratification of the withdrawal agreement, would it be possible for the UK and the EU to agree that we nevertheless went into a 21-month transitional period, as proposed before, and to use that period to sort out the remaining issues, look at the future trade agreement—in other words, proceed exactly as was always intended, even though the withdrawal agreement has not been formally ratified?

Dr Fowler: As the non-lawyer, I do not see what the legal basis would be for that on the EU side.

Professor Young: The difficulty, again, returning to the wording of Article 50, is that Article 50 says that we leave the European Union "unless". You are in a situation where you are a member of the European Union to the end of the period unless it has been extended or unless you have a withdrawal agreement in force. If you have rejected a particular withdrawal agreement, it would then be very difficult to go to the European Union and say, "But nevertheless can we just transition anyway?" I do not think there would be a legal basis for that.

- Q15 **Mr Whittingdale:** We would no longer be a member state, but we would have voluntarily said that we would continue to comply, as we have already said will be the case, and I just wonder why there needs necessarily to be any legal process, or if the European Commission could not say, "Okay, we accept that you are going to be still compliant for the next 21 months, and therefore we will choose not to impose any checks or customs, et cetera".

Professor Young: When you are dealing with the interrelationship between the UK and the EU, you are dealing with different types of issues. When you look at aspects of European Union law that we have implemented into UK law, then of course it is perfectly feasible for us, as we are doing under the European Union (Withdrawal) Act, to continue to have those obligations as they operate within the UK. It becomes much more difficult when you are dealing with those that rely on reciprocal interrelationships between the European Union and other member states.

If you look at things like trade, for example, the free movement of goods is relying on an interrelationship between other member states and the UK as governed by European Union law. Yes, you could say, "Could we just carry on with this?" but there would be absolutely no obligation on



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the European Union to say, "Yes, you can carry on". If we are no longer a member state there are no requirements under European Union law for them to continue to facilitate the freedom of movement of goods in that particular way.

Yes, it is open to you to approach them and say, "Can we renegotiate something else?" but it is also open to them to say, "You had your chance. You used the Article 50 procedure. Nothing was agreed. You are leaving under these terms". I do not think you would be in a very strong position to be able to get the European Union to agree to those particular elements after having gone through these negotiations.

Q16 Mr Whittingdale: We would still be subject to European law, because that was always going to be the position in any case under the transition agreement.

Professor Young: Under the transition agreement you are subject to European Union law. If you leave with no deal, you leave with no deal; you are no longer a member of the European Union; you are treated in the same way as any other non-European Union member state.

Q17 Mr Whittingdale: What I am suggesting is that essentially it is a kind of deal. It is an agreement on both sides that we apply the transitional procedure as if the withdrawal agreement had been ratified, and otherwise go ahead on that basis.

Professor Young: Again, you have no legal basis in order to enter into negotiations with the European Union to achieve that. It is up to them to decide to agree that in those particular circumstances. If it has been in a situation where you have had a long period in which you have gone through a very detailed withdrawal agreement in order to set out the terms of a particular transition, it is going to be very difficult to then say, "Could we just have that anyway, even though we have not necessarily agreed it?" You would not be in a very strong bargaining position to be able to achieve that.

Q18 Joanna Cherry: I just have a quick follow-up on the multiple extensions question. I was just looking back at the Wightman judgment. It was a fundamental principle underlying the judgment that Article 50 could be unilaterally revoked. They set out, at paragraph 70 of the judgment, under reference to paragraphs 65, 67 and 69, "a member state cannot be forced to leave the European Union against its will", but they also make a distinction between extension and revocation.

It just occurs to me that if we got a short extension of three months to faff around, and the faffing around was inconclusive, and then we then went back and said that we want another extension to hold a general election or a second vote, which could by implication lead to revocation, could it not then be legally argued that to refuse us an extension for that would be to expel us from the EU against our will? We would have quite a strong argument there for multiple extensions for the purpose of, say, a general election or a second referendum.



Professor Young: That is definitely an argument that could be made, building on the aspects of the Wightman judgment, as you point out. In addition, when you are looking at aspects of how you go and interpret EU law, as you know, they go and interpret it against the backdrop of general principles of European law, which include respect for democracy, democratic decision-making and also upholding the rule of law. If you were in a situation where you have had a general election that has moved in a particular direction, or you are in a situation where you are asking for an extension because you wish to hold a further general election or you wish to have a referendum on the agreement, there would be very strong arguments within European Union law to further bolster the argument for an extension, yes.

- Q19 **Craig Mackinlay:** I am just looking at the wording of Article 50, which is quite mercifully brief, in terms of much EU legislation. Extension can only be approved by the European Council acting unanimously. That is fairly clear. Just looking through into the constitutions of EU member states, is the decision by the European Council, i.e. the head of state of whichever EU member state, sufficient, or are there any other processes underneath there that go into any EU member state's Parliament, that would require an endorsement of that approval to extend, or is that it? Is the power just with that head of state from the member state and does not need to go any further?

Professor Young: You would have to divide it. There is a matter of European Union law and there is a matter of the national laws of the EU 27. As a matter of European Union law, it is a unanimous decision of the council. With regard to each member state, if they have within their own particular constitutions further requirements of having to, say, ask permission from the national Parliament or to consult with the national Parliament, then that would be a matter of the laws of those particular member states and the constitutions of those member states. I do not know all 27, I am afraid.

- Q20 **Craig Mackinlay:** Do you know of any member states that require that? That is the question.

Professor Young: To my knowledge, no, but then that is from a position of only knowing certain constitutions of the European Union.

- Q21 **Seema Malhotra:** There is a question that has been a bit confusing in relation to what other options there could be, if any, should an extension of Article 50 be sought and potentially agreed for after 2 July, but for us to not then also have European elections. Some have talked about arrangements that are given for accession states—the other end—whereby there is some sort of observer status or some way of being engaged in some of the institutions. Is there any legal basis that could be made for other arrangements that you might be aware of, or what would the EU need to do for that to be the case?



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Professor Young: The information you are referring to with regard to the accession arrangements is to do with particular instances when member states accede. There are accession treaties, and there are accession treaties that set out various aspects of how they accede to the European Union, which means that they are dealing with matters in the accession treaties before they become full members of the European Union. It is difficult to apply that by analogy to a situation when you are leaving. The requirements to hold European elections are treaty requirements. Because they are treaty requirements, you would have to have a modification of the treaty, as was suggested earlier, perhaps with a protocol in order to ensure that you were then complying with European Union law obligations.

Q22 **Stephen Timms:** If in the middle of July we are still a member state of the European Union and we have not held European parliamentary elections, presumably at that point the European Parliament is in some sense not legally constituted. I am just wondering what that would mean? Would it mean it could not function? What would happen?

Professor Young: This is one of the difficult questions on which there has been contradictory legal advice within the European Union institutions themselves. There is legal advice that says that the obligation lies with the member state, the UK, to hold these elections, and therefore the UK would be in breach of European Union law and therefore face the possible issues of claims within the UK, references up to the European Court of Justice with regard to those particular instances, and also potentially claims from the other member states or the European Union institutions through the mechanisms of European Union law.

A secondary issue is whether the Parliament would not be constituted. There is one argument that it would still be legally constituted. It would just be the UK that was in breach. Another argument is to say, "No, it would not be legally constituted". When you are facing contradictory legal advice from within the European Union institutions, it is going to be very difficult to predict precisely which way the court would go in that particular circumstance.

Q23 **Mr Djanogly:** Good morning. I am going to pull us back to UK legislation. I believe there are some six outstanding Brexit Bills, not including the withdrawal agreement Bill, which Professor Young has already explained has quite a lot to be done on it. Are you confident or not that the Government will be able to get their Brexit legislation through Parliament on time if the UK leaves the EU with, or indeed without, a deal? I am going to add a question to that, which is more fundamental. If we did not, what would actually go wrong? If we do not get royal assent for these Bills before we leave, what actually happens?

Swee Leng Harris: There are a number of questions there. One is to note an important distinction between were the UK to leave with a deal versus whether the UK leaves without a deal. Obviously, if the UK leaves with a deal in the shape of the current draft withdrawal agreement, then



there would be an implementation/transition period, which would mean that much of the legislation that you refer to is not necessary in the near term. It is not necessary on exit day one, although, based on the Government's announcements of these pieces of primary legislation being necessary at some point, it would be right to conclude that they are needed before the end of the implementation/transition period.

On the other hand, if the UK were to leave with no deal and therefore there is no implementation period, then based on the Government's statements as to the legal necessity for these pieces of primary UK legislation, one would conclude that all of those Bills need to be passed prior to exit.

Q24 **Mr Djanogly:** What could go wrong?

Swee Leng Harris: What could go wrong? The question is, at its core, one of legal certainty and legal uncertainty. For example, the UK is obviously part of the common agricultural policy at the moment. The Agriculture Bill would establish the legal infrastructure to replace the common agricultural policy, and if the UK were to leave without a deal and without that legislation in place, then there would be uncertainty and unpredictability as to the law that applies to agricultural policy in the UK.

Q25 **Mr Djanogly:** Would anyone like to add to that?

Dr Fowler: If I can perhaps come in again, it is critical to distinguish between the deal and the no-deal scenario. If we are doing the deal scenario, then the withdrawal agreement Bill must be passed. There is a legal requirement that it must be passed before the UK can ratify.

Q26 **Mr Djanogly:** Do we have time for that?

Dr Fowler: That is an interesting question. Obviously, if the House were to approve the withdrawal agreement and political declaration next Tuesday, you would then have two weeks to get a major piece of constitutional legislation through both Houses. It is more doable than often seems to be assumed, but it would be less than ideal. I am quite happy to say that. There are obviously procedures in play, but there are also ways in which you might be creative with the Bill to make its passage easier. Thirdly, there is going to be politics, and a lot will depend on how you and your colleagues behave if the withdrawal agreement were to be approved next Tuesday night.

The Government, judging from their language, would clearly wish to present the Bill at that stage as quite a technical ratification requirement: "The political decision to exit on 29 March with a deal has been taken and this is just another ratification requirement that we have to get through". That is my reading of the Government's language, but then I can well imagine people in this House and certainly in the other House who might not take that view. That is the deal scenario.



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In the no-deal scenario, as Swee Leng said, there is more legislation that would have to get through, and some of it is really not very far advanced yet.

Q27 Mr Djanogly: In a no-deal scenario, where there are gaps in legislation, do you have fears as to how the Government might proceed? Might we see the use of Henry VIII powers to quickly get things through, for instance? Could you foresee what would happen to plug the gaps?

Dr Fowler: We have been thinking about it and perhaps thinking that wash-up is perhaps the nearest equivalent—at the end of a session when bits of Bills get dropped, bits of things get put through much more quickly than might normally be the case. There are ways of doing it, but it is a heavy legislative agenda. It would be a tough couple of weeks.

Q28 Mr Djanogly: Indeed. Do you see a role for the Civil Contingencies Act being used?

Dr Fowler: I am trying to remember. This has come up in a select committee evidence session; I am trying to think who it was. A Minister has said that they are not planning to use it and they are not envisaging it. I can check which one it was. I know I read it. It has come up in certainly one evidence session.

Q29 Mr Djanogly: Are there any other comments on that?

Swee Leng Harris: One would need to balance the need for laws and certainty and predictability and the rule of law as against the need for proper parliamentary scrutiny and proper law-making. One option would be to find a bit more time, either by seeking an extension of Article 50 or by increasing the number of days that Parliament sits. Another option would be, for example, deeming provisions. There was an amendment to the EU (Withdrawal) Bill during its passage, I think proposed I think by Bob Neill, to have a fall-back interpretive position for certain words, such as references to EU institutions. Although not perfect, because one would want to interpret things accurately for the context in which they appear, that is a fall-back, deeming provision: "All such references to X are deemed to be references to Y, unless the contrary has expressly been provided for in legislation", would be one way of overcoming some of the gaps and legal uncertainty.

Another option that might be possible for certain kinds of legal provisions would be to sunset them and ensure that there was an opportunity at a later time for careful, slower parliamentary scrutiny in good time and good order. Of course, the risk with sunset provisions is that you are then creating uncertainty down the track because there is obviously no guarantee that a replacement provision would be passed.

Professor Young: The thing I would draw your attention to most is with regard to leaving with the deal scenario, because then you do have to have the European Union (Withdrawal Agreement) Bill brought through. The best way to say this is that it is easy to underestimate the extent to



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which that could create huge constitutional changes. You are going to have to deal with the interaction between the European Union (Withdrawal) Act, which is an enacted but with some of its provisions not yet in force, for obvious reasons; obviously, the repeal of the European Communities Act will not come into force until exit day. Removing it, you have to make sure you still have the same aspect of European Union law, as per the withdrawal agreement, having the same ability to have direct effect, to disapply legislation. You are going to have to come up with very careful wording of that. That will then have knock-on constitutional consequences as to how you word that, particularly against the backdrop of the way in which we will also be repealing the European Union Act 2011 from exit day forward.

These are very complex interactions that could have quite large constitutional ramifications. In those scenarios, you need time to make sure you get the wording right, because if you get it wrong the constitutional consequences of that could be quite major.

Q30 Stephen Crabb: Good morning. Could we move on to Parliament's involvement in future trade deals, please? Last week, I think it was, the Department for International Trade published a document outlining a proposed set of processes for parliamentary scrutiny of future trade deals. Do you regard those processes as giving Parliament an adequate role over future trade deals? Perhaps, Dr Fowler, you could lead off.

Dr Fowler: This was a paper that had been long awaited out of the Department for International Trade. If it helps, as background, the Government have made a strict distinction, in their handling of this entire process, between so-called successor or continuity agreements, with countries and blocs with which the EU already has a deal, and the new ones. Previously, we had had only a statement from the Secretary of State last July, and nothing further about how the Government proposed that these new agreements be made.

This paper was, as it were, finally flushed out of the Government last week because of an opposition amendment to the Trade Bill in the Lords that said that that House would not take report stage of the Trade Bill until something more had been said. The paper is a mixed picture. It represents significant movement in the direction of parliamentary involvement and transparency compared to where the Government started off. There are, as you would expect, also still some shortcomings with it and some lack of clarity, and I am conscious that your colleagues on the International Trade Committee are taking evidence from the Secretary of State as we speak, so I am sure they will be pressing him on it some more.

Q31 Stephen Crabb: Am I right in thinking that you have said that what was proposed last week could actually result in Parliament having less of a say over trade agreements than it currently does?



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Dr Fowler: If I remember rightly, that was what I had said, as it were, before; if nothing had changed, that was the default position. I think it was a piece I wrote at the beginning of last year.

Stephen Crabb: We have very good researchers on the Committee.

Dr Fowler: It was basically saying that if nothing changes, then the UK Parliament could end up with less than it has at the moment because of both the role that the EP has and the role of the domestic European scrutiny system here. One of the main innovations in the Government's proposals that they have now put forward is that they are at least accepting that Parliament should have some kind of role at the outset of the process. The Government are proposing that they will publish something called an outline approach. They are not using the word "mandate" but that seems to be the kind of thing that they are thinking about. They have not made a commitment to what exactly might happen with that. One area where it would be useful to get firmer commitments is about having a debate on that document, which as a concomitant means that it would need to be published in time; there would be no point in publishing it and announcing that you are starting negotiations the following day. There is also an issue about whether or not there might be an amendable motion that the Government might wish to move in such a debate, which would probably be helpful in allowing Members of both Houses to express their views about what the Government were proposing before any negotiations actually started. That is one element of it.

Swee Leng Harris: I would note that another aspect of the question you have asked is about the constitutional propriety, as it were, of Parliament having a role in these foreign affairs matters. From that perspective, it is worthwhile understanding and noting the impact that international law has in domestic law and therefore the matters that Parliament ordinarily legislates for. For example, trade agreements are often these days coupled with investment agreements and contain investor state dispute resolution mechanisms, which can be quite controversial.

In the Australian context, for example, when the Australian Parliament passed plain-packaging laws for tobacco, there was an arbitration claim from a tobacco company under an investment treaty that Australia had entered into as to whether those laws were allowed, as it were, under the investment treaty. In that case, it fell away for preliminary matters, so there was not even a decision on the merits per se, but what it illustrates is why there can be anxiety among domestic stakeholders as to the nature and content of these agreements and the legal reasons as to why Parliament might wish to have a role in the negotiation of them.

Professor Young: I am not a specialist in international trade per se, but I would reinforce Swee Leng's point about the extent to which you would need parliamentary scrutiny involvement. You have to understand that when you are dealing with international trade agreements, they are very difficult and very complex. They are not just aspects of ins and outs of



trades, but they will have, as you say, financial commitments and knock-on consequences. There can be discussions as to the extent to which you want to bring in human rights obligations or minimum standards of labour across international trade.

These are very delicate and sensitive areas, and you are in a better position with Parliament scrutinising. You also have to realise that often you can be in a better negotiating situation if you have parliamentary backing for certain clauses that you want to achieve. To that extent, there are good arguments in constitutional propriety to ensure Parliament continues to have a role.

Q32 Stephen Crabb: Given the increase in activism around trade deals and some of the controversies related to post-Brexit trade around food standards, public sector procurement and things like that, do you think it is inevitable that the Government will have to come back with an enhanced set of proposals for parliamentary scrutiny?

Dr Fowler: A lot will depend on how last week's document is received. There has already been criticism from some of the NGOs that are active in this area saying it does not go far enough, and indeed there was a paper last year, quite a remarkable joint document, that brought together some of the business associations—I think the CBI was involved—with some of the NGOs, all saying that Parliament should be involved in setting a mandate at the beginning and there should be a parliamentary vote at the end. There will be pressure for the Government to go further. One thing that obviously also needs to be built in is a review and learning process. Sorting out how a particular country wants to do trade agreements is a process that might go on for some while, and you try different things and it shakes down, but there will obviously be particular importance attached to the first ones that the UK makes.

I have referred to the beginning of the process, but at the end of the process the thing to note is that, at the moment, Parliament's role is extremely weak in the treaty approval process per se, so there is not normally any kind of vote at all, and the procedures under the Constitutional Reform and Governance Act are both weak and unclear. There is certainly a job that could be done, as a minimum, clarifying, and again it is things like getting a guaranteed route to time for a debate and time on the Floor of the House.

We would say that it is important to encourage parliamentarians to get involved. We have seen it in our work on delegated legislation; because it is often felt that there is not any point, it discourages parliamentarians from getting involved. There is a sense, certainly in the Commons, that that applies to treaty scrutiny at the moment. Having some kind of vote, or at least giving a committee the option of recommending that there should be a vote, is one way of getting people more engaged, because these trade agreements will affect your constituents and constituencies very directly, as I am sure you are aware.



Stephen Kinnock: Many thanks for coming today to speak with us. I wanted to ask about the withdrawal agreement Bill, but just before I do that, I just wanted to go back on one point around the constitution of the European Parliament, in the context of the possible extension. We have talked, of course, about the risks of litigation, but there is another very important function that the European Parliament will have over the course of the summer, which is the nomination and confirmation of the President of the European Commission and of his or her team of commissioners, which will be done, first of all, according to the President, on the basis of the Spitzenkandidat system, and then each of the European Parliament committees will have hearings to confirm each of the candidates for each of the commissioner posts. What is your assessment of the integrity of that system if the United Kingdom is still a member state when those hearings are going on but we have not taken part in European parliamentary elections?

Professor Young: You are right that it would question the integrity of that particular process, but you are going to have to think about it, again, in terms of how long the extension is and how that links into a particular process and whether we have been in a situation where we have been able to negotiate a protocol. The shorter the extension, if there was an ability to go away and raise this, and negotiate a protocol for us to have some kind of say that relates into how long we will be continuing membership and what our role would be, then you can shore up the integrity that way. If you are dealing with a longer extension, then obviously in that scenario you would have to move to holding elections, because we would be going beyond 2 July, and then having the integrity of the process that way, because we would have gone through the election process and have members.

Q33 **Stephen Kinnock:** In the context of the proposal for a possible second referendum, the Institute for Government has said it would take a minimum of 25 weeks to organise and hold a referendum. That would actually be in direct parallel with the period in which the European Parliament would be nominating and confirming the new European Commission. If it were specifically for a request for an extension to hold a referendum—we think that is a minimum 25 weeks—that would inevitably therefore be at the same time as the European Parliament is going through this process with the new Commission. In that scenario, your view is that the integrity of that process would be fundamentally undermined if the United Kingdom is still a member state but we have not participated in the European Parliament elections.

Professor Young: It is important to recognise what I mean by “undermining the integrity” there. I am thinking of it in terms of background constitutional principles. It is much more complex in terms of the ins and outs of what the precise legal situation would be, because obviously this is a novel scenario and it would require interpretation. In terms of upholding good constitutional values, you are in a very difficult position if, on the one hand, the member state is still a full member of



the European Union pending leaving but, on the other hand, is not in a position where it can take part in those decisions, which is why you would have to have very complex and difficult negotiations to uphold the integrity of that process, yes.

- Q34 **Stephen Kinnock:** It is not just about the Parliament as an institution; it is also about the European Commission. That would be a massive issue, of course, for the EU.

Professor Young: Absolutely.

- Q35 **Stephen Kinnock:** Moving on to the withdrawal agreement Bill, could you just give us a sense of the constitutional, legal and political significance of the withdrawal agreement Bill? It seems to me that it is of massive and fundamental significance, and yet here we are without even having a draft of it to look at? It would just be good if you could give the Committee a sense of how important that piece of legislation is.

Professor Young: I will try my best. I have already mentioned the requirement under the withdrawal agreement to ensure that European Union law and the provisions of the agreement continue to have the same force, which means they still have to have direct effect and they still have to be able to disapply contradictory legislation during the implementation period. Obviously, that is going to require careful wording to ensure that we do have that particular constitutional effect. The precise wording will then interact with the potential of other provisions that could be potentially entrenched in this particular manner.

It is not just in terms of maintaining the wording. You also have provisions. For example, there is the lifetime commitment to citizenship rights of individuals who have started to commence citizenship rights during the implementation period. We already have a mention, in the White Paper that was produced when it was known as the implementation Bill, that this would require, in some way, shape or form, special procedural requirements in order to be able to protect these particular guarantees. It is not just with regard to the lifetime citizenship rights. You also have non-regression clauses in the withdrawal agreement to maintain various standards—for example, environmental law and labour law rights. All of those are going to be very difficult to ensure you succeed in a way that satisfies the requirements of the withdrawal agreement and that satisfies the European Union that you have effectively implemented the withdrawal agreement in a manner that is carefully negotiated in terms of its impact on parliamentary sovereignty, if we are including special procedures that would need to be used in order to remove these rights.

This is a hugely controversial, contentious issue in constitutional law, which would require very careful wording, not just in terms of how you set out the legislation but also in terms of how the courts would then interpret that legislation, specifically with regard to other areas of the law. It has huge knock-on constitutional ramifications. You also then have



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to look at aspects, for example, in terms of how far you would want to have parliamentary scrutiny over the joint committee and how far you would perhaps need legislation, or further discussions as to how you would deal with scrutiny over joint committee decisions.

You would also have to think very carefully about the interactions between the European Union withdrawal agreement and the European Union (Withdrawal Agreement) Bill, because there are differences in terms of not just aspects of the law. The European Union (Withdrawal) Act, as it stands, would remove the charter from exit date, which would be incompatible with the withdrawal agreement, which would require the retention of the charter during the implementation period. That is obviously not yet in force, but you would have to make sure that was carefully negotiated, and you would also have to ensure the continuing role for the European Court of Justice within the withdrawal agreement, which is not currently in the European Union (Withdrawal) Act. You have quite large constitutional modifications in order to ensure that we satisfy the requirements of the withdrawal agreement so that we implement it correctly, but also this is going to require us to think very carefully about parliamentary sovereignty.

Q36 Stephen Kinnock: Would you say, then, given what you have said there, that the fact that the Government have not yet published a draft of this Bill is a constitutional outrage?

Professor Young: I would go so far as to say that I am very severely constitutionally concerned, as a constitutional lawyer. I am not sure if that is an outrage or not, but I am very concerned.

Q37 Stephen Kinnock: I have one final point that is specifically around Article 4. It is the case that Article 4 gives supremacy to EU law during the implementation period. Is that something that you predict would be politically contentious if Parliament was given the chance to debate and vote on that particular issue of the withdrawal agreement Bill?

Professor Young: It obviously will raise political concerns, not just with regard to the continuing role of the European Union withdrawal agreement during the implementation period, but also because, within the withdrawal agreement terms, you are in a situation in which, in terms of the legislation that would be enacted by the European Union during the implementation period, we do not have the political rights and we do not have a say in that law, but at the same time the withdrawal agreement, during the implementation period, would require us to give primacy and direct effect to that law, which is obviously a very different position from current membership of the European Union, where we do have that political say in the enactment of the law that then has direct effect and can override or disapply legislation.

Q38 Joanna Cherry: I have a couple of questions about Parliament's role in agreements with third countries and also the scrutiny of free trade agreements. I am particularly concerned about the role that the devolved



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Administrations should have in this. The House of Lords EU Committee have expressed concern about the Government's engagement with the Scottish Government—the UK Government's lack of engagement—in relation to all three treaties it recently drew to the special attention of the House.

The International Trade Committee carried out an inquiry into this issue—into UK trade policy transparency and scrutiny—and it noted that the Scottish Government had suggested that perhaps the UK should consider the Canada model in terms of how the devolved Administrations should be involved in trade policy formulation. The Committee went on to make some pretty strong recommendations about greater involvement for the devolved Administrations. How do you think the problem that the House of Lords EU Committee has drawn attention to should be addressed, that is a requirement for a greater involvement of the devolved Administrations in the scrutiny of these agreements going forward?

Dr Fowler: The devolved aspects of this are not something I have looked at directly, but I am familiar with material you have referred to. Part of the issue is, again, this distinction that the Government have drawn between the successor agreements or the continuity agreements and the new ones. On the successor agreements, yes, my understanding is that the devolved Administrations are, as it were, being told what is happening, but they are not being consulted in the making of them. Part of the issue there may well be time pressure, as ever: that the successor agreements, those that have been made so far, have been driven by the possibility that they might need to come into force on 29 March, so there has been an overwhelming concern with trying to get some of those in place quite quickly.

For the prospective new trade agreements, in the new White Paper from the Government that was referred to earlier, the Government are now saying that they will set up what they are calling an interministerial forum or an intergovernmental forum—I forget the exact title—with the devolveds, to discuss the new trade agreements. My understanding is that discussions are still underway between Westminster and the devolved Governments about how exactly this will work, but the key issue will be whether that proves to be a more effective and toothsome body than the current intergovernmental bodies, which, as I understand it, are generally regarded as not being terribly effective.

It has been notable how both the Welsh and Scottish devolved Governments have been putting their own demands for involvement forward pretty forcefully in this area, so it is still up for grabs. The issue, obviously, is that where trade agreements involved devolved competences, there will need to be legislation in the devolved jurisdiction, so it is in the Government's interest to make sure that there would not be a problem at that end of the process if they have not sufficiently involved the devolved Administrations upstream.



Swee Leng Harris: The constitutional issue underlying the question and the answer is that the devolution settlements have been established in the context of EU membership, and hence EU laws have provided shared frameworks in areas like environmental laws and agricultural laws, which enables the devolved Administrations to have their competences in a shared context, so there is a constitutional question for the UK to answer as to how those arrangements operate going forward.

Dr Fowler: I have the wording, if it helps, from the White Paper. It says the Government have "recently announced our intention to form a new ministerial forum for international trade. This will ensure there is regular and formal structure to support discussion and engagement between the UK Government and the devolved Administrations on trade agreements. The operational agreements ... are subject to ongoing discussion".

Q39 **Joanna Cherry:** The House of Lords expressed particular concern about fisheries; of course, fisheries are devolved, are they not? If we look at the issue of human rights, which was mentioned earlier, of course, human rights are not a reserved matter; the Human Rights Act is reserved in terms of the Scotland Act, but otherwise human rights are devolved, and in Scotland the First Minister has a separate advisory framework, which has recently reported on a new human rights Bill of rights for Scotland in relation to devolved competences. Would we be right in thinking that the Government are going to be in trouble, in terms of the existing constitutional settlement, if they do not consult the Scottish Government, and indeed the Scottish Parliament, in relation to issues such as fisheries and human rights?

Swee Leng Harris: There would be a rule of law risk, in particular, if there were to be a divergence of views between the devolved nations and the UK Government. The UK could have obligations at an international law level, under international treaties, that the UK would be in breach of by reason of improper implementation of or failure to implement those treaties in domestic law where the matter fell within a devolved competence. Yes, there is a rule of law risk in terms of a misalignment between the law as it stands within the UK versus the law internationally.

Professor Young: In terms of constitutional propriety, there is a potential risk with regard to ensuring we have effective democratic scrutiny. If you are dealing with a decision that is going to have to be implemented within the devolved areas of powers, then we have to face the reality of devolution and recognise that there should be aspects of consultation and discussion. Because it will be the responsibility of the devolved nations to implement the particular agreement, there should be, in a sense, also involvement in the discussion and transparency at that level too.

You have to think not just in terms of setting up committees, but also think very carefully about making sure they operate effectively, making sure there is sufficient transparency to Parliaments, when required, in order to be able to look at these negotiations that go through, in order to



facilitate proper democratic deliberation. It might be an area in which you want to think about memorandums of understanding or concordats in order reinforce those elements of committees.

- Q40 **Joanna Cherry:** We saw during the CETA negotiations how powerful the provinces in Canada were, and also the power of the Parliament in Wallonia in relation to delaying and holding up the CETA agreement. Are any of you able to tell us a bit about how these things are done in other countries such as Canada, Australia or Belgium?

Dr Fowler: One obvious point to make is that those are federal states, and the rights of, certainly Wallonia, over what the federal Executive can and cannot do internationally are in the constitution, so there are extremely useful comparisons, but it is not an exact comparator, given that the UK is not a federal system. That is not to say that useful lessons cannot be drawn about how to get the devolveds meaningfully involved in this process. There are formal process mechanisms that you might want to insert. There are things like who is in the actual negotiating team. Do you want the devolved Administrations actually in the room, which some countries do?

Another parallel that I have seen raised is how the UK has done negotiations within the EU, in terms of the role of the devolved Administrations in the UK's positions and negotiations within the EU, and there being a dedicated committee for that, and whether or not there is any read-across from that to how they might be involved in the negotiation of future trade agreements.

- Q41 **Peter Grant:** Can I come back to you, Dr Fowler? Last year, you published a blog post that suggested that Brexit could leave Parliament with less of a say over international trade agreements than we have just now. Could you just explain why you think that is a possibility?

Dr Fowler: As I mentioned before, that was comparing the way in which EU trade agreements are currently made with, as it were, the default UK process if nothing is added on the top of it. In thinking about these things, it is helpful to think about the different stages in the process. I normally think of there being four decision-making steps: opening the negotiations; signing it; legislating if you need to; and then ratifying. One of the key differences between the default UK process and the process that happens currently in the making of EU trade agreements is that there is a role for Parliament and Parliaments at the two earlier stages, whereas in the default UK system, Parliament only gets involved at the two latter stages. The way in which EU trade agreements are made now is a result of the combination of the EP's role in the EU institutional system and the European scrutiny system that was put in place here as an entirely domestic decision.

What I was thinking of was the fact that, for example, the EU now publishes mandates at the start of trade agreements, and through the European scrutiny system here there will be some kind of hold over



whether or not the UK Minister agrees to sign these agreements, so it is before signature. That is what I was thinking of.

The interesting political question, which is much bigger than this—it is a bigger Brexit question—is the extent to which simply repatriating powers and having UK institutions doing all these things is enough politically, or whether you want to create some new processes that reinstate or recreate some of these steps at the beginning of the process. As I say, things have moved on somewhat since that initial blog post, with the Government now saying they will at least publish what they are calling outline agreements. There is a role for trying to strengthen Parliament's role there.

At the end of the process, again, as I say, parliamentarians need to think about whether or not they want a vote and at what stage they want a vote. There are principled arguments why you might want to have Parliament with a stronger role in terms of conveying democratic legitimacy and transparency, but there are also instrumental arguments, which Alison has already alluded to, i.e. if you have a vote at the end, does it strengthen? Does it give you leverage that you can lever to get more influence over the actual content as you are going along?

That is a bigger political question because you can make the argument that, in a parliamentary system with a majority Government and disciplined parties, the House of Commons will vote for whatever the Government bring back. However, you might want to think about whether we want to be thinking much more about fragmented Parliaments and minority Governments being much more normal, party discipline being not as strong as it has been, and the capacity for some of these agreements to be really politically quite controversial. I know that when TTIP was in play there was a lot of mobilisation around TTIP; MPs' inboxes were full, as I understand it. That is the kind of thing that could happen again. Parliamentarians need to be able to think about what they are going to say to their constituents about what they can do with this process.

Q42 Peter Grant: Could I widen it a bit further to either other international agreements or even to the ways decisions have been taken in the EU previously? I am quite happy for any of the panel to come in on this. We had a visit to The Hague some time ago, and during a meeting with members of the Dutch Parliament the meeting had to be stopped because there was a division called, and they all went off to vote. They were voting on how to mandate the Dutch Minister before he or she went to a meeting of one of the European councils, and the Dutch MPs were astonished to hear that, in the UK Parliament, there is literally, most of the time, no discussion, even by the European Scrutiny Committee, before the Minister goes out and casts their vote.

Can you give us any insight as to what happens in most other European Union countries? Are the Dutch out of step because they let Parliament decide what the Minister is to do, are we out of step because we let the



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Minister do what they want and maybe come back and tell us afterwards, or is there a wide range of practice?

Dr Fowler: It is a very wide range. Some Parliaments pay pretty much no attention to what goes on in the EU and others, as you say, have an extremely strong mandating system. There is a very wide range. It is very much up to parliamentarians as to what powers or what role they want to have in the process.

I would say that getting information from the Government is one key thing. There are benefits in having some understanding in writing, whether it is a memorandum, an exchange of correspondence or something about what information the Government are going to provide, to whom, when and under what conditions. That adds to transparency and it saves an awful lot of time and effort, apart from anything else, trying to have an argument about information. That is one important thing.

The concept of mandating raises particular constitutional concerns. One of the very interesting things, watching the Article 50 process, is about how the Government's position has appeared to change from their very firm insistence, at the time that the EU (Withdrawal) Bill was going through, that it is not Parliament's role to direct the Executive, to quite somewhat different language now in the context of the Brady amendment, saying, "This is actually now extremely useful and is extremely helpful in our negotiations". There has been really quite a striking shift in Government language. That is something this House and perhaps the Liaison Committee should explore with the Prime Minister and others who have been negotiating the withdrawal agreement, when you want to think about how you want to do things going forward.

Q43 **Peter Grant:** Would it be fair to say then, given that the Dutch and some other EU member states have found a way through which their elected Parliaments can have significant influence on what happens at the European Council, that concerns about European institutions taking decisions without recourse back to the individual Parliaments is not actually a European Union problem? It is more a feature of the way the United Kingdom chooses to set up the relationship between Parliament and Government, because that type of relationship is not copied in some other countries.

Professor Young: It would be fair to say that is one aspect and element of it, and it would be fair to say that member states do have a responsibility to be aware of what is going on in Europe and to think about how far they want to be involved with regard to European Parliaments and the role that they take with regard to the motion that comes through. It is only part of the issues with regard to the legitimacy of the institutions within Europe. A lot of it also lies not just with making sure that there is parliamentary involvement but also making sure that there is sufficient awareness, from different citizens in different member states, of what is going on in Europe, so that there is greater



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participation in the European parliamentary elections, for example, where there is not a particularly high turnout across all the different member states for those elections. There is definitely an element to it, but it is not the whole story.

- Q44 **Jeremy Lefroy:** I just have a brief question, following on, regarding trade agreements. With countries such as Switzerland, the other EFTA countries, Norway, Iceland and so on, which conclude their own trade agreements with certain countries, do they have strong human rights clauses within them, or do they take the view that that would not be possible given their particular status as representing a much smaller bloc than, say, the EU?

Dr Fowler: My apologies. I really would not be able to speak about Norwegian or other states' trade agreements. I can certainly have a look.

- Q45 **Jeremy Lefroy:** I am just interested to know what sort of level of negotiating power states that are not part of a very major bloc have when it comes to negotiating with, say, the United States, China, Japan and so on.

Dr Fowler: I can certainly have a look.

Jeremy Lefroy: My understanding is that the Swiss do not have any, or negligible, human rights clauses despite Switzerland being a country that does stand up internationally for human rights. They take the view that they do not have those within trade agreements, but I would be very interested to have an analysis of that.

- Q46 **Mr McFadden:** I just want to return briefly to the questions my colleague Emma Reynolds asked near the beginning of the session about an extension of Article 50 and European elections. We have heard very senior EU voices tell us that if there is an extension a day beyond three months, there have to be European elections. They think they would be subject to legal challenge if there were not. I am keen to try to bolt this down, at least in terms of your opinion and voice, before we go. If there is an extension of longer than three months, whether it is six, nine or whatever it is, is it your view that the UK is under a legal obligation to hold European elections? Can I just go along the row, beginning with you, Professor Young?

Professor Young: Yes.

Swee Leng Harris: Yes, unless there was a change to the treaties agreed.

Mr McFadden: Explain that a bit.

Swee Leng Harris: As Alison already outlined, if the member states were to agree a protocol change to the treaties, then the obligation might fall away.

Dr Fowler: I am not a lawyer but that is also my understanding.



Q47 Chair: We touched on how Parliament might hold to account the process. We are dealing, first of all, with a deal that is approved. In terms of the future partnership negotiations and the work of the joint committee, do you have any suggestions to make to us as to what the mechanisms might be that would enable Parliament to do its job and this Committee to do its job, above and beyond the Government saying, "We would really like to reach out now", which, to be honest, there has not been much of in the last two and a half years. We are interested in ideas. If we do get to that point—because we are preparing for two possible outcomes here—what might that look like?

Swee Leng Harris: Obviously, an existing precedent or example, as it were, is Section 13 of the withdrawal Act, which, regardless of one's perspectives on the merits or otherwise of Government policy on Brexit, has been used by members of all parties across the House in different ways and at different times to express a view and influence the process. One of the shortcomings of Section 13 has been the highly timetabled nature of it and the limitations in terms of flexibility that that results in, specifying days, as it were.

In terms of thinking about negotiations of the future relationship, which would extend over possibly nearly two years, or more if the transition implementation period were to be extended, there would need to be a thought-through, considered process of producing Section 13 mark 2, as it were, because you are thinking about a set of negotiations that may well break down by subject matter. It will not necessarily be one negotiating team but a set of negotiating teams talking about phytosanitary standards and customs. The opportunities for parliamentary involvement are going to change over the course of time. Setting out a set of principles as well as institutions could be one way of developing a new Section 13 that was more fit for purpose in the context of negotiations on the future relationship.

Professor Young: Your question splits into two elements. You mentioned the joint committee. You are dealing with the how far Parliament should have a role with regard to negotiating the future framework. You are also dealing with how far you think Parliament should have a role in scrutinising aspects that come through the aspects of the withdrawal agreement.

With regard to the future relationship, I agree that Section 13 provides a model, but I think it would be good to be much more flexible in terms of debates. It would also be good to think more in terms of specific committees that can then go away and deal with specific areas in reporting. There could also be another parliamentary committee that is able to move this forward.

One of the missed opportunities that we had was that there was not necessarily a large debate in Parliament as to the precise direction. Contrast that with papers that came through from the Scottish Parliament and from the Welsh Assembly, where there was an aspect of where they



saw the future relationship going. There is a need for full debate on those issues as well, in order to set principles and directions of the framework for the future relationship. You now have a longer than original document; I believe it is now 26 pages. There are some outline provisions, but there is plenty of flexibility and scope for those to be debated and refined further.

With regard to the withdrawal agreement, you mentioned the joint committee. I was looking at some of the aspects of its powers. It does have decision-making powers within the joint committee. It can make decisions and recommendations that will then be binding on the EU and on the member states. Within that, it has a limited ability to modify the withdrawal agreement itself. Those are quite large powers. It is important for Parliament to be aware of what is going on. There would be a need for an aspect of a committee that is able to oversee what is going on. Although there is confidentiality of the discussions within the joint committee, there would be a need to have reporting back on their decisions. There is a requirement that we may publish them; it would be important to make sure that we did publish those decisions that came through from joint committees so that we would be able to look at those decisions and recommendations that came through. You would need a specific committee that is able to oversee and negotiate what is going on.

Q48 **Chair:** Certainly if it is making decisions that are binding on both parties, we ought to, first, find out what they are considering, to have a chance to express a view, and, secondly, find out what the decision was at the end of the process.

Professor Young: Absolutely.

Q49 **Chair:** That is very helpful. There is one final question from me, bringing us right back to our current moment, which is the negotiations that are taking place between the Government and Michel Barnier on what might be done about the backstop. It has been reported that one of the possibilities they have been considering is arbitration if there is a difference of view between the EU and the UK about whether alternative arrangements were to exist that could replace the backstop if we had joined it. I suppose this is a legal question, given the legal order of the European Union. Can you see circumstances where the EU would sign up to an agreement that would put what it might regard as the integrity the single market and the customs union in the hands of an independent arbitrator as opposed to ultimately the Court of Justice of the European Union.

Swee Leng Harris: If one turns to the terms of the withdrawal agreement as it stands, although the Protocol on Ireland and Northern Ireland is in a sense silent to a final dispute resolution mechanism, it does already provide, of course, for the review mechanism under Article 20 of the protocol, whereby there would be notification by a party that they thought that the protocol fell away, joint committee consideration and then, ideally, a joint UK/EU decision. If a joint UK/EU decision cannot



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be reached, one would assume that the general provisions on dispute resolution that are set out in the rest of withdrawal agreement apply. That includes that the joint committee refers the matter to an independent arbitration panel. To an extent, reading the withdrawal agreement and the protocol in their entirety, that is already there in the agreement.

Professor Young: There is also the ability to make references up to the Court of Justice of the European Union for determinations on aspects that touch on European Union law with regard to those decisions. Again, you are in a situation where we have to consistently remember that the European Union is bound by the terms of the EU treaty. It is legally bound to make sure that it only acts within the competences of the treaty. When it enters into any form of agreement it has to make sure that it is agreement that would have validity as an aspect of European Union law. There is a mechanism to refer an opinion before the European Court of Justice to determine whether any particular international agreement would be within the scope of European Union law. The European Union would have to make sure that it acted within the confines of EU law in that scenario. It would be difficult to do that without the possibility of a reference up to the Court of Justice of the European Union with regard to aspects of EU law.

Q50 **Chair:** Can you just remind the Committee: on the joint arbitration panel that you have referred to, which is indeed in the current draft of the withdrawal agreement, would its finding be binding or not binding on the parties?

Swee Leng Harris: Binding.

Q51 **Chair:** It would be binding on the parties and there would be no further subsequent right of appeal for either side to the CJEU?

Swee Leng Harris: No. The structures of the provisions for arbitration are that where there is a question in relation to EU law, then the arbitration panel would refer that question to the CJEU and be bound by the opinion of the CJEU on the interpretation of EU law, but once the arbitration panel had reached its decision, that would be final.

Q52 **Chair:** Why would anybody be discussing the possibility of arbitration in respect of the backstop, given that the withdrawal agreement already makes such provision?

Swee Leng Harris: There might be political considerations that I would not venture to offer an opinion on, Chair.

Q53 **Chair:** Legally, what you appear to be saying to us is that there is already one there. A dispute about whether the backstop is needed any longer or not can eventually go through to the joint arbitration mechanism, which is indeed in there and which is indeed binding as you described it. It is just a bit hard to see, apart from presentational reasons, why you should come up with some other arbitration



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mechanism.

Swee Leng Harris: It is to the extent that any dispute concerned the terms of withdrawal agreement.

Q54 **Chair:** Then the backstop, the alternative arrangements and the review mechanisms are all part of the withdrawal agreement.

Swee Leng Harris: Indeed.

Q55 **Richard Graham:** Just on that point, presumably everything that both of you have just said would be normally the way of resolving disputes between members of the European Union, but the process of arbitration on any dispute about the backstop would take place after we have ceased to be a member of the European Union. Would it not therefore be usual, in any dispute resolution between a member of the European Union and a non-member, to have a third party form of arbitration, rather than depend entirely on a process that ultimately refers back to European Court of Justice?

Swee Leng Harris: The structure of the arbitration process, as laid out in the withdrawal agreement, is independent of the CJEU, save for questions of interpretation of EU law. In that sense, it looks quite similar to other arbitration mechanisms in other international agreements.

Q56 **Richard Graham:** The joint arbitration panel is an independent body.

Swee Leng Harris: Yes. It is established as per the agreement with two panel members nominated by the UK, two members nominated by the EU and I think one independent member, making five in total.

Richard Graham: That may give us the answer we are looking for, in a sense.

Q57 **Chair:** Just following up this point, I have just been reminded, if I have this correct, that the Attorney General, when he referred to the role of the independent arbitration panel, said that the better view is that its decisions are binding. If I have quoted him correctly, that would suggest that there is some debate among the parties or lawyers, as there always is debate among lawyers, about what the outcome is. Is there any further light you can shed on that?

Professor Young: I currently have the withdrawal agreement in front of me. I will take some time to have a look.

Chair: It would be helpful if, subsequent to your appearance, you wanted to drop us a note in the way of further evidence on this subject. That it would be very helpful.

Professor Young: I would be happy to do so.

Chair: That concludes this morning's evidence session. On behalf of the whole Committee, can I thank our witnesses for what has been really useful, informative and enlightening session? Thank you for coming.