

Exiting the European Union Committee

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

Wednesday 15 May 2019

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Members present: Hilary Benn (Chair); Joanna Cherry; Richard Graham; Wera Hobhouse; Stephen Kinnock; Jeremy Lefroy; Craig Mackinlay; Pat McFadden; Jacob Rees-Mogg; Stephen Timms; John Whittingdale; Hywel Williams; Sammy Wilson.

Questions 4171 - 4232

Witnesses

I: Pieter Cleppe, Head of Brussels Office, Open Europe; Dr Emily Lydgate, Senior Lecturer in Environmental Law, University of Sussex, and fellow of the UK Trade Policy Observatory; Sara Ogilvie, Public Affairs Manager, Trades Union Congress; George Peretz QC, Monckton Chambers.

Examination of witnesses

Witnesses: Pieter Cleppe, Dr Emily Lydgate, Sara Ogilvie and George Peretz QC.

Q4171 **Chair:** On behalf of the Committee, I welcome our panel this morning. We are very grateful to all of you for giving up your valuable time to give evidence to us today. Can I introduce our witnesses, Pieter Cleppe from Open Europe, Dr Emily Lydgate from the University of Sussex and a Fellow of the UK Trade Policy Observatory, Sarah Ogilvie from the Trade Union Congress, and George Peretz QC from Monckton Chambers. We have, as always with this Committee, a lot of ground to cover. Therefore, as succinct answers as possible would be very helpful. Please do not feel under an obligation, all of you, to answer all of the questions. Indeed, some will be directed to particular members of the panel because of your expertise.

It is not the view of the House of Commons, but there are those who say that we should just leave with no agreement at all, a no-deal Brexit or a WTO Brexit as people describe it. What would be the implications of that for a level playing field? What would the EU say in those circumstances about how trade and the provision of services would work if there was no agreement at all? I do not know who wants to have a go at that first. Mr Peretz, you are leaning forward.

George Peretz: Shall I start by looking at the area that I have been asked primarily to comment on, which is competition and state aid? As a matter of Government policy, the position on no deal would be that we would retain domestically state aid rules that aim as far as possible to replicate those of the EU, which we may want to discuss later, and in terms of ordinary competition policy, to retain the current prohibitions on anti-competitive conduct, which we find in both our domestic law as it currently stands and EU law. From that perspective from the UK side, there would be no change.

On the EU side, there might well be anxiety, notwithstanding what the UK wants to do domestically, about the position on state aid and subsidies. You can appreciate that if you have a very large amount of trade with a very close neighbour, you will be concerned if that neighbour takes a free hand in subsidising industries that are competing with your own domestic industries. There would be concern. One of the things that the EU would almost certainly do is watch very carefully for any hint of breach of the WTO anti-subsidy rules, with a view to imposing countervailing measures, which it has a right to do under WTO rules in response to breaches of the WTO anti-subsidy rules.

Q4172 **Chair:** Of course in any such dispute, if it did go to the WTO, in the end the WTO could rule on whether our behaviour was within the rules or not.



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George Peretz: Yes. The disputes can go to the WTO, but in this field there is a lot of room for self-help measures. The EU can simply impose what are effectively retaliatory tariffs called countervailing measures, which it has a right to do under WTO rules. It would almost certainly do that if it felt that subsidies were being granted in a way that contravened WTO rules.

Q4173 **Chair:** If it did go to the WTO, would this be through the dispute resolution body?

George Peretz: It would be.

Q4174 **Chair:** What sanctions does it have on a WTO member state?

George Peretz: The WTO can rule that there has been an anti-competitive subsidy in breach of its rules. A challenge might be brought by the UK to the EU's countervailing measures, saying, "You have no right to this because we have not in fact been subsidising". There would then be a dispute and the UK would be bound by the ruling of the WTO. The UK has always said that it would respect its international obligations. If there is a WTO dispute panel that finds there has been an unlawful subsidy, then presumably the UK would cease that subsidy.

Q4175 **Chair:** What in practice is the difference between being bound by a ruling of the WTO dispute resolution body and being bound by a ruling of the European Court of Justice?

George Peretz: When it comes to enforcement, there is a lot of difference between the state aid rules as they are currently set up or as they would be set up under, say, the backstop agreement and WTO. The substantive rules are not that much different, although WTO rules do not apply in the area of services. One must remember that. The enforcement is very different. WTO enforcement is state to state, so there is room for diplomacy to play its part in decisions as to whether to enforce or not enforce. The state aid rules are part of domestic law, produce rights for third parties and are enforceable by the national courts, which WTO rules are not.

At the moment—and I am involved in litigation where this is happening—if you are a complainant who thinks that a state aid measure has been granted by some public authority and has not been appropriately cleared by the Commission, you can take that issue to court, get a ruling and ask for an injunction stopping the aid or a decision quashing the decision in question on public law grounds and so on. You have something that is domestically enforceable. While we are a member of the EU, that is something we have to do as a matter of EU law.

Because the Government's own policy is that we continue to operate the state aid rules, I suspect that in a no deal, assuming that the commitment reflected in the current no-deal statutory instrument continued to be maintained, it is in practice very unlikely that there would be any WTO dispute. If we have an effective domestic state aid structure,



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we are simply not going to be or are very unlikely to be in a position where there are WTO issues. It would be more an issue if the Government changed its policy or a different Government came along with a different policy.

Chair: That is very helpful.

Dr Lydgate: Another element of no-deal preparations that is relevant to the level playing field issue is that the UK Government have produced a vast amount of legislation—over 10,000 pages—in the form of statutory instruments, which essentially converts EU-derived legislation into the UK law books. The Government's position on this is that these are simply technical changes and that they do not embark upon major policy changes. We need to keep it in mind that they are actually replicating what the EU is doing and in so doing are creating new competencies and new procedures for the UK Government.

This is something that disproportionately impacts environmental law. Defra produced the greatest number of these of any Department—116, I think. We have a piece of research coming out today that looks into, for example, pesticides secondary legislation. We find that it is essentially creating new procedures for the UK Government, for example, to approve new active substances, which are the active ingredients of pesticides, which was previously done at the EU level. It also sets maximum residue levels for food, again done at the EU level previously. There is quite a dramatic overhaul of the EU legislative process, which has already been put into place to come into effect when we exit, whether through no deal or a deal.

Q4176 **Chair:** The Northern Ireland Protocol, the backstop, contains provisions relating to a level playing field. Looking at those, are they the minimum that you think the EU will expect in any circumstances in any agreement? If the future partnership negotiations take place and an agreement is reached, do you think the level playing field provisions will look basically the same as what is in the Northern Ireland backstop anyway?

Pieter Cleppe: The level playing field arrangement is basically a condition in return for market access. Under backstop status, the United Kingdom only enjoys tariff-free access; it does not enjoy market access, as provided currently by the EU. That is something that still needs to be negotiated. As a result, the conditions that the EU has required in return for market access are, in the EU's mind, lower than they would be in the case where the UK would enjoy more market access as a third country. Whether the EU secures that or not, it will definitely ask for higher level playing field conditions for more conditions.

For example, at the moment, if you look at the level playing field arrangements in the backstop, there is a commitment from the UK side to follow the non-regression principle when it comes to environmental and labour regulations, but no arbitration arrangement is foreseen. If the EU says, "You are actually regressing and that is in violation of the backstop



arrangement", then no arbitration procedures can follow. I do not want to go into too much detail unless you ask me to. Many of the arrangements in the backstop are not that strong for the EU at the moment. To answer your question, it is quite likely that if the United Kingdom asks for more access, the answer from the EU side will be, "Sure, but there have to be more stringent conditions in return".

George Peretz: It may be helpful for me to comment. The very glaring exception to what Pieter has rightly said about the slightly weakly enforceable nature of some of the backstop provisions is in terms of the state aid provisions, where the backstop provisions tie the UK quite tightly down. To put it bluntly, there is quite a lot in the backstop provisions about state aid.

For those who are not familiar with what the backstop provisions about state aid do, for a start there is a separate regime for Northern Ireland. Northern Ireland effectively remains in the current EU state aid regime, supervised by the Commission. The Commission will still be looking at UK measures insofar as they affect Northern Ireland. In relation to Great Britain, there will be an independent state aid regulator, the Competition and Markets Authority. That will have to apply the full gamut of EU state aid policy, including state aid policy and law as it develops. It will have to follow along. It will have to send all of its decisions to the European Commission, which will have the right to comment on them. The CMA will then have to treat the Commission's views "with utmost respect", which probably means that it has to have really good reasons for not following what the Commission says. You have quite a tightly specified and controlled regime.

The reason for that is the customs union provisions. As I explained earlier, one of the things you can do in response to a close neighbour with whom you have a lot of trade who is inappropriately subsidising the industries that compete with you is impose retaliatory tariffs and countervailing measures. You cannot, as a matter of practice, do that if you are in a customs union with no trade barriers and no checks. If that is what one is asking the EU to do, it is inevitable the EU will say, "Since we are effectively disarming and you are asking us to throw away the weapon that we would have, we therefore expect you in return to sign some very clear and firm commitments that you are going to stick by the state aid rules". Those provisions are very tight.

As a matter of general policy, the EU in its relationships with countries such as the Ukraine and Turkey, where there is a sort of customs union, has also agreed state aid provisions that require those countries to have a domestic state aid regime. One can say that a condition of any deep relationship with the EU along the lines advocated by any Member of the House, including Canada-plus, will be signing up for the state aid rules. The extent to which the EU keeps the very close supervision of the UK's implementation of those rules might be somewhat less if you are not in a full customs union relationship. That would be the negotiation.



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Dr Lydgate: I was going to make a clarification about the environmental commitments, but perhaps that will come up a bit later. The Commission has been clear that it will seek enforceable level playing field commitments in any model of trade agreement going forward, even a more basic Canada-style agreement. Of course, the political declaration on the future relationship also says that it will build on the level playing field commitment. It is useful to view these as a minimum standard going forward.

Q4177 **Chair:** Is it fair to say that in just about any circumstances the EU is going to require from the United Kingdom level playing field commitments in return for any kind of deal? Is that your assessment of what the position will be?

George Peretz: Yes.

Dr Lydgate: Yes.

Chair: Fine. That is extremely helpful.

Q4178 **Sammy Wilson:** In relation to Northern Ireland and the rest of the United Kingdom, is it the case that, in Northern Ireland's example, the level playing field will extend to measures that will not be required in the rest of the United Kingdom and that the means of enforcing the level playing field in Northern Ireland are different insofar as the European Court of Justice will make the final decision, whereas in the rest of the United Kingdom it will be the Competition Commission or some other independent authority, and the only requirement for the Government is to notify the Commission when it intends to make any changes that may affect the level playing field provisions?

George Peretz: That is certainly right in the state aid field. Northern Ireland will effectively remain in the EU state aid regime in terms of enforcement, so the Commission will retain its powers and the European Court of Justice, because that is the body you will appeal to against a Commission decision, will retain its role. In relation to Great Britain, enforcement, as you say, will be domestic; it will be the Competition and Markets Authority, subject to control by the UK courts.

It is important to be aware, though, that, as I explained, the CMA in Great Britain will in practice need to follow very closely what Commission policy is. Indeed, the Commission is likely to play a major role, because of its right effectively to supervise or cast a close eye over CMA decisions. It will have a considerably input into those decisions. It is also likely as a matter of practice that UK courts, in interpreting the state aid law rules, will remain very close to what the European Court of Justice line is on questions of state aid law. In practice, it is going to be very difficult to persuade the UK courts under the backstop regime to interpret the law any differently from the way in which the ECJ does it. In practice, the rules may be the same, although the characters enforcing them may be somewhat different.



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Q4179 Sammy Wilson: When the protocol in Annex 4 of the withdrawal agreement talks about consulting with the European Commission on all of the draft decisions that the Government intend to take, it really goes beyond consultation because the Commission can prevent changes being made in UK law on a wide range of issues if it decides that it militates against the level playing field.

George Peretz: In state aid, the agreement will require the UK to operate a domestic state aid law regime. The UK will have to do that. That regime has to track EU law. That is also a requirement. When it comes to individual decisions, state aid law involves a lot of judgment calls about legal questions, so whether something is made at all can be legally quite difficult. As a matter of legal policy, in what circumstances and for what reasons do you clear state aid on general public interest grounds? In that sort of decision-making, which is administrative, what the backstop requires is that the CMA, which will be the decision-maker, must, as you say, consult but also must treat the response from the Commission with "utmost respect". That is the phrase used. Lawyers can probably have a bit of fun arguing about what precisely that means, but I would interpret that as meaning you follow the opinion unless you have a really good reason not to. That is probably accurate enough.

Q4180 Sammy Wilson: Michel Barnier talked about any partnerships having to be governed by specific obligations that guarantee a level playing field. It includes taxation there.

George Peretz: Very much so.

Q4181 Sammy Wilson: Does that mean that, if not in the withdrawal agreement then later on in the future relationship, we could specifically find that there are obligations that we have to guarantee in relation to, for example, corporation tax or VAT rates? How much freedom does that then give a Chancellor when it comes to fiscal policy?

George Peretz: It would be the same position as there is now. It is important to remember that state aid can be given in the form of a tax break. When you think about it, that must be right. There is no point having a law that stops Government writing a cheque to a company if you allow the Government simply to give a company a tax break when it wants to. It is essentially the same thing. It has been well established since the European Economic Community was established that state aid rules have a tax implication. State aid law does not stop a general reduction in the tax rate. If, say, Northern Ireland had the power and wanted to reduce general corporation tax rate levels, there is no difficulty with that. Ireland after all has a lower corporation tax rate and is free to do so within the state aid rules.

What the state aid rules deal with is effectively discrimination. If you think of it as tax breaks, you have it roughly right. It is exceptions from a general tax rule in favour of particular companies or particular industries so that an exemption from corporation tax for the widget-making sector would be state aid because it is effectively giving the



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widget-making industry better treatment. It is effectively the same as just writing them a cheque. In that sense, it does constrain what Chancellors can do. It constrains them in the particular but not in the general. Of course, at the margins you can have arguments about whether a measure is general or not. That keeps people like me happily employed.

Q4182 Sammy Wilson: It will constrain, for example, specific regions. If Northern Ireland wished to reduce the level of air passenger duty, corporation tax, VAT or whatever applies to a specific region of the United Kingdom, would that be regarded as free from state aid rules?

George Peretz: There is clear case law on this. Yes, a regional Government or national Government—whatever you want to call it in Northern Ireland—can have a lower rate for its area, provided that it is not immediately refunded by a cheque from central Government. If, when making its own Budget, the Northern Ireland Assembly says, “We are going to have a bit less revenue and we want to have a lower APD rate or corporation tax rate”, that is absolutely fine. The Azores case decided that about 10 years ago and makes it absolutely clear.

Q4183 Hywel Williams: Can I ask you, Mr Peretz, specifically about the financial rates of VAT as decided, if you recall, in the Ecofin meeting in 2008, where you had differential rates for labour-intensive industries, which some countries have applied to their tourism industry? The UK has decided not to do so. What would be the fate of that sort of provision? Is that state aid or is it aid to a specific sector? I am concerned that in the future, tourism will have the full rate of VAT in the UK but other European countries will not.

George Peretz: Yes, in principle you can give state aid through an indirect tax, VAT. If the UK decides to lower VAT for a particular sector, that can be state aid. In practice, while we have been a member state of the EU, that has not mattered that much, partly because the VAT directive itself sets out permitted exceptions or in some cases required exemptions from VAT. As long as you are sticking within the directive, there is no question of there being state aid; you are simply applying EU law. On occasions when there is member state discretion, there is a separate area of EU law applicable to VAT called the principle of fiscal neutrality, which effectively constrains what any member state can do in terms of discriminating between industries in its VAT structure.

In effect, state aid has taken a backseat. It potentially applies, but VAT law itself constrains member states to such an extent that problems tend to be dealt with in that framework. Outside the EU, quite probably there will not be much constraint in terms of specific VAT commitments on what the UK can do. State aid may have a bit more to say. There is not much case law in that particular area.

Q4184 Hywel Williams: Does the relationship with Turkey and the Ukraine shed any light on the potential status that the UK would have in the



future after leaving?

George Peretz: Not as far as I am aware. I have to say I have not followed that. I simply do not know whether there are Turkey state aid cases involving indirect tax. They have their own domestic regime, about which I am afraid I know very little. I know it is there and the Commission keeps an eye on it.

Q4185 **Jeremy Lefroy:** Continuing on state aid, maybe to everybody, but first to Mr Peretz, what do you believe the main challenges are for the UK setting up our own state aid authority?

George Peretz: There is the immediate challenge of finding enough people to properly staff and run the authority. State aid is a little bit of a niche discipline, even within the field of competition law. A lot of competition lawyers steer away from state aid. It has its own volumes of case law, legal practice and knowing your way around the system that takes a little while to master. The CMA has, by and large, done that. They have recruited a team that is up and ready to go. The more fundamental challenge is finding a role for the independent authority within the UK constitutional system.

The Commission, when it applies state aid rules, is of course an international body; it is not answerable to any particular Government, whereas the CMA is constitutionally part of the Crown and the UK Government. Though its current area of activity in classic competition law does on occasion cause it to come up against Government agencies, because Government agencies can in certain circumstances breach the competition rules if they are trading, that is only a minor feature of the overall competition rules, whereas in state aid dealing with Government is right at the heart of what it is about, and maintaining political independence in those circumstances is obviously much more difficult. There is much more tension between the Government and a regulator than there is in ordinary competition policy. That will be a major challenge for the CMA.

There will also be particular challenges when it comes to the devolved Governments, as I wrote in an article that some of you may have read, and like the point that Mr Wilson brought up, if a devolved Government passes legislation using its tax powers that involves state aid. To take a crude example, if a devolved Government decide that they want to exempt the widget industry in their nation from a corporation tax—that is fairly straightforward state aid—the Competition and Markets Authority, under the current domestic rules as set out in the no-deal state aid measure, would have power to say that that piece of legislation was invalid, as a matter of state aid law. That is slightly startling if we are thinking about legislation passed by a devolved Parliament.

Another point I have made is that the backstop provisions would require the CMA to have power to overrule even an Act of Parliament—Westminster Parliament—that involved state aid. That is because the



backstop requires the CMA to have the powers that the Commission has. The Commission currently has that power. It has never used it because Parliament has been wise enough not to pass that legislation. The recent decision on controlled foreign companies effectively says that regime is contrary to state aid rules, and that will have to be replaced. You can get tax problems with the Westminster Parliament. Under the national regime, you then have to work out what the CMA's relationship with central Government is. The politics of this are difficult and the CMA is well aware of the difficulties of this.

Q4186 Jeremy Lefroy: Thank you very much. You have answered my second question, which was going to be about the interaction with devolved Governments, which other colleagues might want to pursue.

My final question is about what the constraints are on the European Union in its own state aid policies. We assume that the European Union itself will have the most beneficent, purest state aid policies, but they might decide in their own way, for their own reasons, to go in a very different direction of much more state aid if they feel that certain industries are, as they see it, under threat from around the world, particularly perhaps from Asia and other places. What constraints do they have in terms of rolling back on the state aid provisions that they are currently saying are ones that we should also follow? Might we find ourselves in a position where our rules on state aid are much stricter than those of the EU? Would we then have comeback and be able to go to the EU and say, "I am sorry, but what you are doing in terms of state aid is not acceptable, because our standards are much higher"?

George Peretz: Yes. There are a couple of points. First of all, it is fair to say that the United Kingdom, under all Governments since its membership, has tended to be on the more liberal side of the argument, for want of a better word, and more sceptical of justifications for subsidy, and has tended, in general terms, to push the EU in that direction. The UK has certainly always been very keen that the EU has very strong enforcement powers and uses them. The UK is obviously delighted when the Commission uses those powers in relation to the other member states, but it has also tended to accept that it is fair enough on those occasions when the powers have been used against the United Kingdom.

Without the UK there, there is probably an increased chance that policy might move in a bit more of a pro-subsidy direction. There are constraints on that within the framework of the treaty. The treaty defines what state aid is, and that is effectively unchangeable, except through judicial development of the law. The main area for policy change is in deciding on what grounds you rule an aid to be compatible with the common market, ie. clear it. There is scope for policy development in that area, which might move in a less liberal direction.

Q4187 Jeremy Lefroy: Would the UK's remedy ultimately be via the WTO in such circumstances?



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George Peretz: There might come a point at which we felt that a subsidy that had been cleared, even though it had been cleared under EU state aid rules, nonetheless violated the WTO. We have always had the freedom to do that. It is certainly right that EU policy can move, as indeed UK policy could. One of the challenges the EU currently faces in its relationship with countries such as the Ukraine and Turkey is how to keep the regimes broadly marching in step when quite a lot of the day-to-day decision-making is about policy as much as it is about law.

Q4188 **Richard Graham:** I am sorry to stick with just one of our witnesses for this, but you seem to be the state aid man, Mr Peretz. It has been mooted that the leader of the Labour party's interest in not being in the EU, or part of his interest, is in order to be able to use state aid much more flexibly. Can you clarify for us where state aid rules kick in? For example, if the Government of the UK wanted to renationalise utility companies or train companies, would that come under the EU's level of interest, or, because they are purely domestic-only operations, would it not do so, whereas it would do so for the nationalisation, for example, of an airline operating in the EU? Can you give us an idea of what the level of interest is?

George Peretz: Nationalisation of an industry as such is not a state aid matter at all. The only situation in which state aid would arise in nationalisation would be if the Government paid too much for the assets it was acquiring and therefore conferred aid on the sellers of the business. I suspect that that is not Labour party policy, so it is a slightly academic point.

There is a debate going on as to the extent to which other provisions of EU law, rather than the state aid rules, may constrain nationalisation in practice. The problem tends not to be that there is any objection to state ownership of industry; the problem tends to be that there are various sectors, such as post, rail and so on, where there is a requirement to permit competition. You cannot have a state-owned monopoly.

Q4189 **Richard Graham:** Very briefly on energy, what about subsidies for renewable energy, onshore wind, solar, marine or whatever? What about pumping taxpayer funds into resurrecting closed coalmines? Do any of those things cross state aid?

George Peretz: Those would all in principle involve state aid.

Q4190 **Richard Graham:** That is regardless of whether we were actually in the EU or not, because they would have an interest in a neighbour's activity.

George Peretz: If we had agreed to implement anything like the state aid rules, those sorts of things would be covered by that, yes. It is fair to say, though, that a lot of measures in the environmental and energy sector are covered in any event by what is called block exemptions, which are categories of aid that you do not even have to notify to the Commission for clearance but are automatically cleared. In the area of environmental and energy policy, there are a lot of those and they are



important. In fact, the vast majority of aid that is given by member states is covered by this exemption if it goes anywhere near the Commission. I would expect that, without any complaint from the European Commission, we would apply our own exemptions regime, which the Commission could hardly complain about if it more or less mirrored the EU regime.

Q4191 Mr Whittingdale: Can I ask you a fairly broad question, just to clarify in our minds in relation to level playing field requirements? To what extent does the relationship between the EU and a third country—and there are a variety of different types of such relationship—impose requirements for level playing field provisions that go beyond the WTO blanket requirements? Is it possible for you to give a brief description in relation to, for instance, EEA members, association agreement members, Switzerland and then FTAs like Canada?

Pieter Cleppe: If you look at the lightest requirements, those are to be found in the trade deals that the EU has concluded with Canada and Japan. There is a requirement to have something like international standards, but there is not proper enforcement. The methods used are to have consultation mechanisms. If you go further than that, you end with the relationship between Switzerland and the EU.

The initial idea back in the 1980s came from the Commission President, Jacques Delors. He wanted to have a uniform arrangement for third countries. The principle was very simple. He wanted to have the principle that they would get 100% market access in return for being a full rule-taker. That is eventually the arrangement that Norway, Iceland and Liechtenstein have, but that arrangement was rejected in a referendum very narrowly in 1992 by the Swiss. What happened afterwards was that they agreed what you can describe as a pick-and-choose arrangement, whereby the Swiss would selectively align with EU regulation in return for selected market access. For example, in services the Swiss only have limited market access. In many cases, the Swiss take EU rules, but they take them in a voluntary manner.

The enforcement mechanisms are relatively weak. There are two main concerns the EU currently has with the Swiss arrangement, and this is one of the reasons that they are absolutely not keen to grant it to the UK. First of all, it is not dynamic; the Swiss are not obliged to take updates of regulation.

Secondly, the European Court of Justice does not have a role, nor does a court like the EFTA Court, which is not like the ECJ; it is a bit more lenient. You do not have a proper court system, so if there is a dispute it has to be sorted out on the political level. At the moment, the Swiss Government have sort of committed to agree to some kind of arbitration system very similar to the one that Theresa May agreed in November. Secondly, the Swiss Government have more or less committed to the dynamic aspect; to take updates of EU regulation. Within the Swiss political system, until today it appears not possible to have that agreed.



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Just before Christmas, the EU issued an ultimatum. It is quite interesting to follow that from the United Kingdom, because there are a lot of similarities. The Swiss, in terms of level playing field requirements and conditions in return for market access, are somewhere between Norway and Canada.

Q4192 Mr Whittingdale: Can I ask you a second general question of the same kind? Looking at all of those different levels of obligation to maintain a level playing field, in each case to what extent has that constrained the third country from reaching trade agreements with other countries?

Dr Lydgate: There are a couple of key issues. One of them is about the extent to which the trade agreement requires substantive alignment with EU regulations. The second one is about the extent to which it covers product regulations. If we take the association agreement model, there is a broad alignment with EU regulation, which encompasses not only broader environmental regulation but also product standards. That would certainly constrain, say, Ukraine from changing those standards to match with another trade partner.

If we look at a more basic example—Canada—it does not just include an agreement to uphold international standards; it also includes a non-regression commitment to uphold domestic environmental enforcement and not to lower environmental standards in order to benefit trade and investment. That is in there, but there is no specific alignment with regulations. It goes beyond a best endeavours clause because it does involve convening various groups to discuss and monitor this, but it is not enforceable through the main dispute settlement mechanism of the agreement. It is probably more useful to look at this in the context of how the backstop would constrain us, because it is quite a unique model. Should I elaborate on that? Would that be of interest?

Q4193 Mr Whittingdale: Before you do, I am particularly interested in whether we can ever get out of the backstop and we are therefore able to have, let us say, a Canada-plus-plus arrangement with the EU. To what extent, with whichever type of relationship we have or indeed any third country has with the EU, do we have to translate the requirements that we have accepted as part of our agreement with the EU into any trade agreement that we then reach with a third country? If we say to the EU, “Yes, we will maintain these standards”, in order to protect the EU from goods coming in through an open door of our own trade agreement, do we then have to include those same provisions in the trade agreement we might sign with any other country?

Dr Lydgate: Are you speaking about in the backstop?

Mr Whittingdale: No, I am not. I am speaking post backstop, if ever such a situation exists.

Dr Lydgate: Again, this really gets back to the issue of product versus non-product related alignment. It depends on what we agree with the EU. If we agree with the EU that we are going to harmonise our SPS



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regulation with the EU, that would very clearly limit our ability to diverge in those areas. If we develop a broader environmental co-operation agreement that involves air quality, for example, that would not impose that constraint.

Q4194 Mr Whittingdale: What I am getting at—and I think you have essentially suggested that this is the case—is that almost whatever limitations we accept as part of a future trading arrangement with the EU, we are going to have to put those same arrangements into whatever relationship we have with other countries with whom we reach a free trade agreement. Is that essentially correct?

George Peretz: It rather depends what area you are talking about. In the area that I have been talking about, state aid and competition, there is simply no reason why there should be a read-across at all. These are matters of regulating our own domestic conduct.

Mr Whittingdale: I was not thinking so much about state aid.

George Peretz: If you are talking about environmental rights or a commitment to the EU to maintain workers' rights within the United Kingdom, I would not see that that would impose any obligation on us at all to specify minimum levels of workers' rights protection, say, in an agreement with the United States. I suspect that a requirement might cause the United States some difficulty. I just do not see why it would do that.

Environment is Emily's area, rather than mine. That is an area where, as she says, you can get into product-specific regulation. If we had agreed with the EU, to take the example of agriculture, that meat that contained unacceptable levels of hormone would not be sold in the EU as part of an agreement on SPS measures, that potentially does constrain the type of arrangement. You have to look at exactly what level playing field measure you are talking about. There are a lot of level playing field commitments in the areas that we are all talking about that would have no impact at all on what we had agreed with third countries.

Q4195 Mr McFadden: I would like to ask some similar questions, but about labour law. I will perhaps bring in Sara for the first time. Could you begin, Sara, by telling us what our obligations on labour law are under the backstop provisions?

Sara Ogilvie: What the backstop says is that, during the lifetime of the backstop, the UK will not reduce the level of employment standards that exists.

Q4196 Mr McFadden: Is the phrase you used, "Will not reduce"?

Sara Ogilvie: Yes. In terms of what we have at the moment, it is essentially a non-regression clause. Whatever employment protection is in place at the end of the transition agreement, that is what will be in place throughout the backstop. What it does not do is commit to keep



pace with developments that take place in the EU after we have left the arrangements. What it does not do is set out an international enforcement mechanism. At the moment, if you want to enforce your employment rights, you can go to courts in the UK or the Court of Justice of the European Union; infringement actions can be brought by the Commission against member states. All of these things have happened to the UK. We will not have the benefit of any of that stuff. Instead, you will be reliant on the domestic legal system to enforce your rights. Even though there is not going to be a regression of your rights, your enforcement of them will be a bit tougher. It will not come necessarily with the interpretation of the Court of Justice of the European Union. There is a bit of a loss all round.

Q4197 Mr McFadden: Let me tease out some of that, if I can. First of all, on this business about non-regression or dynamic, let us take an example. If the EU were to agree a new posted workers' directive that developed rights in that area, which is quite an active area of discussion, under the backstop provisions there is no compulsion on the UK to amend its law in line with whatever that new directive would be. Is that the way it is?

Sara Ogilvie: Yes. That is completely right. In the specific example of posted workers, we know that when it was being discussed at the level of the Council, the UK abstained. When it was discussed at the European Parliament, Conservative MEPs abstained on those votes. You can read into that that under the current Government we would be likely not to adopt those progressive measures.

Q4198 Mr McFadden: In these cross-party talks that are taking place, this issue of dynamic alignment of rights is quite live. I am a Labour MP. My party is asking for dynamic alignment. To take that posted workers' directive example, as I understand it what we are asking for is a commitment from the Government to align with such future directives. There is a question then of enforcement, which you raised. Enforcement at the moment is fairly regular through the ECJ. It is not a rare thing for employment law cases to be held before the ECJ. Even if there was a political agreement on dynamic alignment in the future, what would be the recourse to enforcement mechanisms for a worker seeking to enforce those rights?

Sara Ogilvie: This is where we come to the problem. One of the TUC's concerns throughout this whole process is that what we want to do is look at the kind of protections that working people have right now and make sure that, whatever happens and whichever deal is adopted, there is absolutely no reduction in those protections. It is not just the laws that are written down that are protections; it how they are enforced. A very particular feature of the Court of Justice of the European Union is that in the area of labour rights and labour standards, it has historically adopted a very broad interpretation. It is trying to make sure as many people can benefit from a right as possible. It has managed to keep laws up to date and help the law make sense a little bit. Equality and discrimination law can be quite complicated and the court has really helped us to work



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through those issues. We want to hold on to all of that under whatever future deal we have.

We would really welcome the Government saying that they would commit to dynamic alignment, but for as long as we sit outside the CJEU or some other independent judicial system, there will certainly be a loss of enforcement rights for workers here in the UK.

If I am completely honest, anything short of an international agreement that we will have dynamic alignment and that there will be some sort of additional arbitration process that individuals can access themselves—that is another thing that they can do with the Court of Justice—would be a loss for working people here in the UK. We would find it hard to back up MPs who wanted to vote for that sort of deal.

Q4199 **Mr McFadden:** You have raised a very important point there, because what you seem to be saying to us—correct me if I get this wrong; I do not want to put words in your mouth—is for the phrase “dynamic alignment” to be meaningful, it is not just a question of the legislation, it is also a question of the enforcement mechanisms, because very often how rights are translated into real practice on the ground does not just stem from the legislation; it stems from ECJ judgments. Absent that pillar of those kinds of judgments, we are not in the same situation even if we have, on paper, an agreement to dynamic alignment.

Sara Ogilvie: Yes, that is what I am saying.

George Peretz: There are two issues here. One is the very difficult and rather judgmental question about the extent to which UK courts left to their own devices, which they effectively would be in these arrangements, would adopt the same, as Sara put it, expansive approach to employment rights. That is an unknowable. We simply do not know. Some writers in this area are a bit sceptical; some are more positive. It is a bit unknowable. That is one set of issues.

The other issue is that in the EU at the moment effectively these rights have a constitutional status. This is the supreme law above anything that domestic legislation can do. They are a way of challenging domestic legislation. Outside the EU, given the UK constitutional position on sovereignty of Parliament and the primacy of Acts of Parliament, it is very difficult to constitutionalise protection of workers’ rights in the same way. You can half do it. There is the idea of declaring that a particular piece of legislation has constitutional status, which means the courts will be reluctant to find it has been impliedly repealed or altered by subsequent acts of Parliament, but that is as much as you can do. It is very difficult to entrench anything.

If you compare that to Ireland, where there is some constitutional protection of workers’ rights, it is a different position. In ours, it is very difficult to see how you can write something down that is entrenched.



Q4200 **Mr McFadden:** My memory of this as a Minister is quite old now because, as I said, I am a Labour MP, but I do remember some of these judgments being quite important. For example, if memory serves me right, the ECJ ruled on rolling up holiday pay while on maternity leave, which became quite important. That was an area of dispute: the extent to which women on maternity leave were entitled to holiday pay. There was quite an important judgment on that.

Going back to some of the earlier questioning about the various models of international agreements that have been mooted in terms of the future UK-EU relationship, in this Committee we have been all around the world on this. I do not mean physically, but I mean in terms of the evidence we have taken. We have talked about association agreements such as exist between the EU and Ukraine, customs union agreement as with Turkey and best-in-class free trade agreements with Canada, Japan and South Korea. On the matter of labour law, do any of those models that currently exist come anywhere near the access to enforcement for workers' rights that exists at the moment? I will start with you, Sara.

Sara Ogilvie: The long answer is that there are other international labour standards. The International Labour Organisation has a series of conventions that countries across the world are signed up to. I would not denigrate that system at all. It is incredibly important. It sets really important standards and we are all really pleased to sit in this room knowing that the clothes we are wearing or the food that we eat have been produced by workers who are protected by those standards. International Labour Organization standards often feature in some of these other agreements that you have outlined. The Canada deal, for example, says that the parties to that agreement agree to stick to the International Labour Organisation's standards. The problem is that they are not as well advanced and developed as the standards we have in the EU. CETA says it will respect International Labour Organisation standards, but it does not come with any enforcement mechanism and it does not come with any sanctions.

The short answer is no. Membership of the single market is a really unique beast. It is one that workers here in the UK and across Europe are pretty grateful for.

Q4201 **Mr McFadden:** Would anybody like to add anything?

Pieter Cleppe: I have a small point. The current arrangements in the backstop, if the backstop ever enters into force, are not likely to be the only requirements in place, because these are only requirements in return for tariff-free access. It is very likely that, if the backstop enters into force, market access will have also been negotiated, at least to a certain degree. It is very likely that the EU will have requested more conditions in return for that market access. Of course the question then is to what extent the UK can negotiate the freedom to set its own labour standards or not. That is another question. It is quite likely that, on top of the requirements as part of tariff-free access, you will see other



requirements as part of market access. If that market access has not been negotiated, you will have a lot of disruption.

Q4202 Joanna Cherry: Mr Peretz, can I start with you please and go back and ask about what you said about the implications for the devolved Administrations of the UK taking control of its own state aid rules? I am thinking very much about the Administrations in Edinburgh and Cardiff, not Northern Ireland, because there are obviously potential differences there. You have written quite extensively about the implications under the backstop and what we know of the final relationship. What I would really like you to do is take us through in a bit more detail what you were alluding to earlier: that there are implications here for the competences of the devolved Parliaments. What exactly are those?

George Peretz: The position at the moment is that the devolved Parliaments act unlawfully if they pass motions that involve state aid. In that sense, the powers of the devolved Parliaments will not have changed; it is just that the enforcement mechanism will be a UK enforcement mechanism rather than an EU one.

It is also important, to put it in context, that part of the justification for the state aid rules is one for which there is some support, certainly from the Welsh Assembly. I heard a speech last year by Carwyn Jones, who was then the First Minister of Wales, in which he made the point, in relation to state aid rules, that, from the Welsh Government perspective, they were very keen that they be maintained because he was concerned that, without them, it would be possible that different regions and nations of the UK might get involved in what are called subsidy races. This is a real problem and it is part of the reason why you have state aid rules within the EU—to avoid the almost farcical situation you get in the United States where different states start bidding vast amounts of money to get a particular company to locate within their state. I remember hearing, the last time I was in the United States, that Maryland, where I happened to be staying, had just offered £8 billion to Amazon simply to locate in their state. It is that sort of completely ruinous competition, which benefits nobody, that is right at the heart of the justification for state aid rules. That is one of the reasons why, as a matter of policy, the UK Government want to maintain a state aid system.

Of course, the current devolution arrangements were devised against the assumption that state aid rules would continue, so there is nothing in the devolution legislation designed to deal with this problem. If it was thought about, it was assumed that it would all be dealt with by the EU state aid regime. It seems to me that, as a matter of policy, there is every justification for wanting to maintain the state aid rules, in terms of maintaining the proper relationship between the devolved Administrations and avoiding completely ruinous subsidy races and other ways in which a decision of one devolved Government could impact on the rest of the country.



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In terms of the competences, there is a debate going on at the moment, which I have seen, as to whether state aid law is a devolved competence or not. There are two views on that. It may have to be sorted out by the courts, although, of course, because of the Sewel convention and the decision of the Supreme Court in *Miller*, it is ultimately a political question anyway. If Westminster chooses to legislate on state aid, then it is a political issue.

In terms of competences, as I have written and as I said earlier, it is certainly right that under a domestic regime, whether the backstop or a regime devised in the light of the final relationship or the Government's proposed no-deal regime, there could be a situation in which the CMA, which will be part of the Crown and part of the UK Government, could issue a decision that found that an Act of the Scottish Parliament or of the Welsh Parliament was beyond its powers because it contravened the state aid rules, by awarding aid that the CMA found was incompatible with the UK internal market. That is certainly right and that is certainly a possibility, and it would be a politically delicate position for the CMA to be in.

Q4203 Joanna Cherry: You have said that the CMA could be forgiven for seeing that task as a poisoned chalice.

George Peretz: Yes.

Q4204 Joanna Cherry: There would be quite major political implications if the Scottish Parliament passed a law and a UK-based agency was able to strike that law down. Do you see the political implications of that?

George Peretz: Absolutely. That is precisely the thought that was in my mind when I wrote that sentence. One suggestion I have made, which one may need to think about in the long term, is that, if we were to have an internal regime as a long-run feature, it might well be worth thinking about giving the devolved Governments much more of a say in the appointment of the CMA.

Q4205 Joanna Cherry: There might be an option to put the new agency in Edinburgh or Glasgow.

George Peretz: Unless, of course, Scotland became independent, in which case that might not be the appropriate place for it to be.

Q4206 Joanna Cherry: Indeed. If we become independent, we will just be sticking with the EU rules.

George Peretz: Indeed. Just looking at the EU system, one of the reasons why the Commission is in a stronger position vis-à-vis any particular national Government is that it is answerable, at the end of the day, to all of them. It might be that the CMA will be in a slightly stronger position if it was able to say to any of the UK, Scotland, Welsh or Northern Ireland Governments, "Actually, we are the servants of you all and not just one of you". That was a thought in my mind.



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Q4207 **Joanna Cherry:** Are you saying that the CMA might be seen as having more legitimacy in Cardiff and Edinburgh if it was seen as a servant of all the Governments in the UK and not just the UK Government, in the same way that the competition authorities in the European Union are servants of all the member states?

George Peretz: That seems to me to be a perfectly legitimate point of view. Ultimately, it is a political question, but there is a lot of force in that point.

Q4208 **Joanna Cherry:** What legal remedy could the Scottish Government, or indeed the Scottish Parliament, have if the CMA struck down an Act of the Scottish Parliament?

George Peretz: It is not entirely clear what the right of appeal would be under the backstop. That is one of the things you will need to look at very carefully when the withdrawal agreement Bill is published, as I hope it will be any day now. Under the no-deal instrument, which gives a clue as to where the Government are going, the remedy would be judicial review in the ordinary courts. Given that it was in Scotland, it would be a judicial review in the Outer House of the Court of Session.

Q4209 **Joanna Cherry:** Ultimately, it would end up in the Supreme Court, would it not?

George Peretz: If it was a question of law, yes, ultimately.

Q4210 **Joanna Cherry:** I wonder if I could ask Sara something, going back to Pat's questions. Pat has explored very effectively, if I may say so, what the loss of the Court of Justice of the European Union would mean for individual workers in the United Kingdom. I wanted to ask you about what the British Government have said that they intend to do in order to protect workers' rights. They made some proposals earlier this year, which they describe as proposals for enhancing workers' rights once the UK leaves the EU. In particular, they have talked about having a statement of compatibility with legislation and I believe the TUC has raised some concerns or some critiques of what the UK Government are proposing. Can you talk us through that?

Sara Ogilvie: Yes. What was proposed back in March is that, when the Government introduce primary legislation, they would be amending an employment right or a health and safety right that was derived from EU law. When they bring forward that legislation at Second Reading, it would issue a statement of compatibility setting out whether the Government believe that the new measure is a regression of rights or is fine in that sense.

There are a number of problems with this. As anyone who knows the Human Rights Act can testify, a statement of compatibility is not an objective statement. It is what the Government want people to think about a piece of legislation. That would be the first problem.



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The second problem is that a huge number of changes that are made to employment rights are not brought by primary legislation anyway. It does not cover the whole range of mechanisms that would be used. There could no doubt be arguments around the edges as to which pieces of legislation and which rights actually require a statement to be made anyway.

In a sense, they are slightly technical concerns. Fundamentally, it relates to non-regression, but it is not giving us that dynamic alignment that we want to go forward. It still does not account for all the other losses that Mr McFadden was setting out in terms of enforcement. Again, this is not something we have touched on in detail, but we do have concerns about protections for employment rights that are set out in domestic legislation when at the moment we have an international system of protection. A statement of compatibility system in the current environment, even if it were passed by the Members of Parliament sitting in this room, might not survive very long under a new Parliament.

Q4211 Joanna Cherry: Could I just finally ask you all this? Clearly, when we are talking about level playing fields, the observation of rules in the field of public procurement is very important. Would any of you like to comment on whether, to any extent, the saga of the no-deal ferry planning and Seaborne Freight has impacted on the European Union's view of the British Government's good faith and competence in observing public procurement rules?

George Peretz: A very large number of members of my chambers are involved in those disputes. I am probably not the right person to ask as to what the EU is making of them. Pieter is, perhaps. The overriding point is that the Government have made it very clear that they want to maintain the public procurement rules. They are well enforced in this country and one conclusion that one could draw from the saga is that, when things go wrong here—and it is safe to say, without any of my colleagues screaming at me, that things went wrong in those cases—the courts exist and are very effective in sorting them out. Pieter will say what the EU actually thinks, but one conclusion that one could draw from that is that, actually, the UK system for complying with its public procurement obligations is a robust mechanism and that, when things go wrong, they are picked up and dealt with.

Q4212 Joanna Cherry: You have already indicated that that saga has been something of a dripping roast to lawyers, with a lot of litigation coming out of it. That is going to cost the United Kingdom taxpayer a lot of money, is it not? Regardless of what eventually happens, what has happened will be very costly in relation to the no-deal ferry planning.

George Peretz: When public procurement decisions go wrong, there are court challenges and a large amount of public money is spent. That is certainly true.



Pieter Cleppe: There are many examples in the EU27 and mainland Europe of the mismanagement of public procurement. All I can say is that I am pretty sure that, when we are talking about the future relationship, the EU will insist on including public procurement because this has been included in the EU-Canada deal, even to the extent that, at the moment, Canada has had to open up public procurement within its own provinces, which was apparently not already opened up, as a result of the EU-Canada deal. The EU sees this as a great success so I am pretty sure that the EU will try to include it in the future arrangement.

Joanna Cherry: Dr Lydgate, would you like to comment?

Dr Lydgate: I will pass.

Q4213 **Stephen Timms:** Thank you. I want to ask some questions about environmental regulation. Is there a model for dynamic alignment with EU standards on environmental regulation whereby we can see what it would entail?

Dr Lydgate: That is a very good question. The EU has associated dynamic alignment with, essentially, the single market model—the EEA—in which it forms part of a very broad regulatory alignment. It is very intensive in terms of co-ordination with legislative changes in the EU. There are opt-outs, but they are essentially not used. That seems to be what the EU means by it.

In terms of what Corbyn means by it, he has spoken about maintaining the benefits of the single market, which suggests broad alignment as well, but he does not want free movement of labour. That, to me, seems problematic in terms of securing EU buy-in.

Of course, there would be the possibility of having a standalone agreement on dynamic alignment of environmental regulation between the UK and the EU. That would be very innovative. There are no existing models. I would ask questions like, “Would derogation be challengeable through arbitration? What kind of sanctions would there be? How would the administration of it function?” We are looking at a lot of questions.

Q4214 **Stephen Timms:** If you were asked to draft such an agreement, is it clear what would need to be in it and what it would look like and what it would need to cover, or is all of that, at the moment, unclear?

Dr Lydgate: The starting point for it would have to be broad alignment with existing EU regulations. We are specifically talking about environmental regulation. The starting point is that the UK would substantively incorporate the EU Environmental Acquis, because that gives a starting point from which you can begin to evaluate changes. In terms of models, again, we are looking at very closely integrated models—EEA or some association agreement.

Q4215 **Stephen Timms:** Would that imply that the UK would need to become a rule-taker for EU environmental standards?



Dr Lydgate: Dynamic alignment does imply that the UK would need to become a rule-taker. First of all, it is very unlikely that the EU would agree to align to UK standards. Secondly, we would need to, in a sense, calibrate with the EU. Some would see that as a protective mechanism—that we would have built-in protection—but others might say that that would limit our ambitions.

Q4216 **Stephen Timms:** I just want to pick up one other point you touched on there. If we have dynamic alignment, arguably you could say that the EU ought to keep up with UK environmental regulations, given that the UK has an ambition to be a world leader in addressing climate change. However, you are saying that there is no question that the EU would agree to such an arrangement.

Dr Lydgate: I do not think the EU would agree to such an arrangement with a third country.

Another interesting point about dynamic alignment is that it differs from the model in the backstop, which does not actually require the UK to align to the substance of EU environmental regulations. However, it does require that both parties maintain common standards in a wide variety of areas that are listed as categories, which are almost comprehensive in terms of covering the EU Environmental Acquis. That is another model where you say, “We are not going to exactly incorporate the entire substance of the regulation, but we are going to ensure that the level of protection is the same”.

It is worth noting that these common standards are tied to the end of the transition period, so this is a moving target. Again, in that instance, it is the EU that is the default party setting the common standards, rather than the UK.

There are also a lot of questions about how you evaluate what is a common standard or level of protection. If you think about environmental regulation, you have things like management plans for river basins and public participation requirements. It is not just quantitative emissions limits and things of that nature. Quite a lot of work would have to take place in terms of just drilling down and trying to identify what the substantive common standards are and what it would mean to lower them. It is not at all self-evident.

Q4217 **Stephen Timms:** Picking up points in the earlier discussion about labour market standards, do these matters frequently end up at the European Court of Justice?

Dr Lydgate: Environmental non-compliance is a very frequent category of adjudication for the UK as well as many other member states.

Q4218 **Stephen Timms:** What are the implications of that for dynamic alignment?



Dr Lydgate: There are multiple ways to address that question, but one of them is in terms of enforcement of the dynamic alignment model, which is totally unknown. I would imagine, as I said before, that, because of the constraints that the EU would impose on the process, if we ended up with something like that in an agreement, it would come with very broad regulatory alignment and that would come with quite a strong role for the Court of Justice.

Stephen Timms: You are saying that any kind of conceivable dynamic alignment between the UK and the EU on environmental standards would entail a big role for the ECJ in determining what happens in the UK.

Dr Lydgate: The EU has its red lines, as does the UK. As I said before, the EU's understanding of dynamic alignment is that it is a feature of a single market model and that it would come with very broad alignment. There could be a standalone environmental agreement on dynamic alignment, which certainly seems like an interesting option and which would be quite innovative. There are existing models out there.

If we are looking at the backstop and that sort of dispute settlement model, effectively that was a concession to the UK from the EU, having independent arbitration. I would like to say for the record, because this is often misunderstood, that the environmental commitments in the backstop are actually enforceable, but they are only enforceable against the UK. Essentially how that works is that both parties agree to maintain these common standards—and that is Article 2 of Annex 4—and that is not enforceable. Then there is Article 3, which says that the UK is obligated to effectively enforce its environmental standards, and that involves the public being able to initiate investigations and it involves having strong remedies and having an independent authority that can initiate investigations against the Government. If the EU feels that the UK is not effectively enforcing its environmental regulation, it can initiate a dispute through that arbitration process. It is another model for making that actionable.

Q4219 **Stephen Timms:** Is it true to say that in the environmental area the EU has set the standard for worldwide regulation?

Dr Lydgate: Environmental regulation is a very complex picture. There are areas in which the EU is clearly exporting regulation. For that reason, its regulation is globally important and influential.

Q4220 **Stephen Timms:** Why do you think that has been? What is it about the way that the EU has set about this task that has made it so influential worldwide?

Dr Lydgate: Market power and market size is the short answer to that.

Q4221 **Stephen Timms:** You do not think it is because they have done a good job, particularly. It is just that they are big.



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Dr Lydgate: In terms of why they have tried to export their model and have been successful in doing that, it is due to market size. However, they also have quite a rigorous approach to certain regulatory processes such as the REACH regulation. The precautionary principle is very strong. There are consumer protection regulations. That is considered by many to be a gold standard.

George Peretz: I would add something as a practising lawyer, although I do not do much in environmental law. One of the features of EU law is the remedies that it creates so that you have a mechanism for NGOs and private citizens to invoke environmental rights, take them to a court, get them adjudicated and get difficult interpretations sorted out by the European Court of Justice in Luxembourg, which has tended to take, in very general terms, a pro-environmental interpretation of the legislation. That is important in a context where there is always a temptation for Governments and laws to announce wonderful-sounding general principles, but then to be reluctant to apply those principles in the particular. In those situations, it is rather important to the honouring of the general principles that there is a way of effectively challenging Governments and Parliaments that, to put it bluntly, say one thing and do another.

Dr Lydgate: I would absolutely agree with that and there are questions as to the UK Government's proposals falling short in replacing these functions.

Q4222 **Jeremy Lefroy:** I am very interested in this, and obviously the EU has brought in some extremely important environmental protections, but why was it, for instance with the Volkswagen scandal, that it took a US investigation to bring up what clearly must have been known to people within the EU and certainly within Volkswagen? I find that interesting. Would the UK have the similar ability to challenge the EU if a similar scandal arose in the future, with things like antifreeze in wine, to quote another example in the past?

Dr Lydgate: It is absolutely true that the EU is not stainless. Of course, we are talking about 27 member states, and some of them have quite chequered records as well. You cannot monolithically say, for example, that the EU is ahead of the US. There are some areas where the US is more stringent in its environmental regulation. In a sense, a weakness of the backstop is that it is a unilateral scrutiny and monitoring process of the UK by the EU. The justification for that is that the EU has the Commission and the Court of Justice that play a very strong role in monitoring and enforcing. They inspect member states and they can take member states to court for not applying environmental law; that process can result in fines. They have these mechanisms in place, whereas the UK is leaving and does not have these mechanisms. That is the EU's justification for that approach. However, if we were moving on to the future relationship, we would hope that that dispute settlement mechanism would work both ways.



Q4223 Wera Hobhouse: That certainly leads quite neatly on to the proposed environmental protection mechanisms. The question is, again, to you Dr Lydgate. The Environmental Audit Committee has described the proposals of the Office for Environmental Protection as being woefully inadequate. Do you agree?

Dr Lydgate: There are three main concerns with the Environment Bill that I will summarise very briefly. One is about the independence of the Office for Environmental Protection, which is essentially meant to scrutinise Government. Much of its funding and appointments come from Defra, which it is supposed to be scrutinising. A second point is about the role of environmental principles, which are now quite discretionary in their application.

The final one is about enforcement, because the OEP cannot initiate investigations. In that sense, it arguably goes against what the UK has agreed in the backstop, which includes the EU having obligated us to ensure that our body can initiate investigations. It is currently not able to do that. Even if it finds a serious failure to enforce environmental law, it can only issue a report that is not enforceable.

Q4224 Wera Hobhouse: Could you actually describe in which way it would differ from the way the EU mechanisms work?

Dr Lydgate: On all three of those points, it is a weakening from the EU. In terms of the independence, the Commission is a supranational body so independence is built into that. In terms of the role of principles, it is set out in the EU founding treaties that environmental law in the EU shall be based on these principles, whereas now Ministers just have to have regard to them and there are certain opt-outs.

In terms of enforcement mechanisms, the Commission monitors and the Court of Justice has the ability to inflict penalties, including fines, whereas in this model there is a possibility for judicial review, but that is more limited in its scope and it is not really clear how that would function, because the Office for Environmental Protection cannot make binding rulings against the Government anyway. It therefore does weaken on all these axes.

Another point that has received less scrutiny, but which is equally important, is about the content of the statutory instruments that I mentioned at the beginning. Again, when we looked at the pesticides regulation, we saw that it actually removed all the checks and balances on Ministers. In the EU regulation you have the Food Safety Authority, you have the Commission, you have a standing committee and you have individual member states all putting checks and balances into the process of approving new active substances in pesticides, whereas, in the UK statutory instrument, it is literally just Ministers who have sole competencies for doing this. It also weakens the requirement for independent scientific advice. There are various indications that we may be weakening the protections that we had under the EU.



Q4225 **Wera Hobhouse:** Are you saying that your main concern is about the independence of these bodies? Ultimately we could still look at our own legislation and improve that, could we not?

Dr Lydgate: Absolutely, yes. A best-case scenario of this would be that the Government are essentially temporarily consolidating authority until we know what our official relationship is with the EU and until we know what kind of regulatory structures we are going to have, because this is obviously a huge point of transition. The concern is that we are going from what is sometimes described as the "legal lock" of the EU, where Ministers could not change, say, pesticide approval procedures unilaterally, even if they wanted to, to the opposite end of the spectrum where we have this huge body of secondary legislation, which can be very easily reformed and amended in the future. As lawyers, we like to see things on paper and we like to have legal guarantees and legal protections rather than just hoping that there will be positive reforms.

Q4226 **Stephen Kinnock:** Thank you to our panel. I just want to unpack this notion that being a non-EU member of the European Economic Area makes a country a rule-taker. I suppose the first point would be that most single market legislation is passed by qualified majority voting, so the United Kingdom, as a member state, does not have a veto on single market legislation and therefore, by definition, is a rule-taker. If there is a piece of legislation that it is supposed to take up but does not, it is not able to form a blocking minority.

As a non-EU member of the European Economic Area, the United Kingdom would have an independent voice on global standards bodies. We would no longer be represented by the EU on those global standards bodies. Of course, as you have said, many of the EU's positions flow from those positions on global standards bodies, so there would be an influencing opportunity for the United Kingdom far greater than we currently have through membership of the European Union.

Only about 30% of EU rules apply to non-EU members of the European Economic Area because, of course, there is no common agriculture policy and no common fisheries policy, which generate vast amounts of legislation. There is no direct effect when you are in the EEA and not in the EU. The EFTA Court is not obliged to follow European Court of Justice decisions. New EEA law is only incorporated with the unanimous agreement of the EEA/EFTA member states. Norway has obtained derogations from 55 legal Acts up until June 2011, and Iceland 349. These include the third energy package, the third postal service directive and the hygiene package, just to give some examples. Each country has a right of reservation so, if the United Kingdom were out of the EU but in the EEA, the British Parliament would have to pass all new EEA legislation based on debating and voting in the normal way in this Parliament.

Given all of that, would you agree that it is quite a lazy description that being in the EEA but not the EU would mean we are a rule-taker? Perhaps I could ask Mr Cleppe to comment on that.



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Pieter Cleppe: Sure, thank you. These are arguments that you often hear. I do not think there is any doubt that there are some advantages in EFTA/EEA, in terms of sovereignty as compared to the EU, for example in terms of the right of reservation. However, the right of reservation is really only a right to delay. For example, Norway managed to delay the implementation of the postal liberalisation directive, but ultimately it had to fold. I am sure you know the quote from the current NATO Secretary General, Jens Stoltenberg. He has been saying that, when he was Prime Minister of Norway, his own country was a “fax democracy”. Now, again, you are right that at the moment, if you are a member of the EU, there is QMV so you do not have a veto. However, what is very important in this is that, as an EFTA/EEA member state, one is obliged to take up 100% of the relevant legislation. It is true that many of the European Union rules are not relevant to countries like Iceland or Norway, and there is often a bit of haggling about the question whether a piece of legislation is actually relevant or not. Fundamentally, if regulations are relevant, an EFTA/EEA member state has to apply it.

What you often hear is that, if the UK were in EFTA/EEA, it would have more power to shape global standards, which is true. Those global standards often inspire EU regulations. However, I often respond with the argument that, in Geneva, you do not have 30,000 lobbyists. The industry finds that ultimately where you need to be to shape legislation is in Brussels, not in Geneva or other places where you have these global standards. I may be wrong, but ultimately I do not see this model being a sustainable fit as a transition for a country the size of the UK. Ultimately, it would be very complicated.

Sara Ogilvie: I did not make the rule-taker comment, and it is not how the TUC thinks about things, but it is clear that we live in a globalised world and no country gets its own way on things at all. In addition, there is strength in numbers. The way we see it is, essentially, whose gang do you want to be in? You have Trump’s America, you have China and you have the EU. There can be different forms of relationship but in terms of history, shared values and proximity, a close relationship with the EU seems to us to be one that will much better serve our country than one of those other alliances.

George Peretz: I do not disagree with anything you said in your list of points about how the EEA agreement works. It is worth working out why there is a difference of view about this where you get such different perspectives with some people describing it as being a rule-taker and some people not. Part of the reason for that is simply that, because at the moment the EEA three are two very small countries indeed and one quite small country, large parts of the EEA agreement have simply not been tested. There is an open question about how large parts of it would actually work with a very large member state as opposed to three very small ones.



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It is worth remembering that when the EEA was originally set up it was designed not to deal with one quite small state and two very small states but to deal with quite a large number of medium-sized states. It was envisaged that Sweden, Austria, Switzerland and Finland would all be in it and, for various reasons, they disappeared off in different directions, leaving just the three quite unusual economies. There are large areas in which those countries are simply not interested at all. When one looks at large parts of the EEA agreement and one asks a fundamental question of, "What would happen if...?" the answer is that we do not really know because it has never happened. That is one point.

The second point is that it is important, when thinking about the EEA, to understand that it will be a comparative exercise in the end, rather than an absolute one. You have to measure that model against other models that may or may not be available. In any regime where we are in level playing field territory and dynamic alignment, the UK will be the smaller party vis-à-vis the EU. The EU is bigger and has legal difficulties of its own in agreeing ever to be influenced by a third country because of the principle of autonomy of EU law. In any model of dynamic alignment aligning to the single market, whatever that means, whatever one is thinking of, there will be a relationship where the UK is reacting to EU developments and under some form of obligation to follow, which may be qualified and limited in various ways.

The question one has to ask is whether that model that one comes up with is better or worse than the EEA model. In the end, that is a political question, but that is the right question to ask, rather than whether the EEA will turn the UK into a rule-taker.

Q4227 Stephen Kinnock: I completely agree with that last point because this is not an absolutist debate; it is a relative debate. It is not that one option will be the perfect world for everybody. It is much more about, compared to the other options, whether this is the one that most people could live with. I specifically just wanted to follow that up with the issue of jurisdiction and the role of the European Court of Justice vis-à-vis the EFTA Court. There is no direct effect in the EFTA/EEA countries. Given the legal expertise that we have on the panel, it would be interesting to unpack that a little bit more. Could you say a bit more about how you see the dynamics of the relationship between the European Court of Justice and the EFTA Court?

I know it is a bit difficult to do crystal ball gazing, but imagine for a moment that the United Kingdom were a member of the EFTA Court but not a member state of the European Union. What effect do you think that might have on the relative relationship between the two jurisdictions? Who would like to answer that?

George Peretz: It is a question about courts. I have been in front of them, so I suppose it falls to me. One feature of the UK being in the EEA arrangement would be that there would be a UK judge on the EFTA Court. It also deals with a problem that one hits in negotiating other



forms of arrangement with the EU, which is the principle that, when it comes to questions of EU constitutional law, the ECJ has to be the final arbiter. The EFTA Court is a very clever way through that, which has received the approval of the European Court of Justice as a mechanism that allows another court to apply EEA law—effectively EU law—in parallel with the ECJ. There are attractions to that mechanism, particularly if one is concerned by an arrangement that leaves the UK subject to what might be characterised as a foreign court with no UK presence at all. If the EFTA Court had a UK judge on it, it would be an international court rather than a foreign court.

Also, because the EFTA Court hears far fewer cases than the ECJ and always sits with three judges, there would be a UK judge in every case, which is not the case in the ECJ where there is a UK judge only in a minority of cases because the ECJ hardly ever sits in a court of 28 for very obvious reasons. One might argue that the UK influence would be maintained and possibly increased under an arrangement where it was playing full part in the EFTA Court.

We always have to be careful about this sort of thing because it is wrong in principle to assume that a UK judge will decide things in the interests of the UK. That is entirely wrong. Judges are very independent. It is very difficult to comment on particular judges because the ECJ and the EFTA Court deliver all their judgments collectively, so the fingerprints of an individual judge are never on the judgments and therefore one is indulging in a bit of guesswork here rather than anything else. One must avoid stereotypes about what particular judges decide. One could broadly maintain the point—it is quite a political comfort at least—that there would be a UK judge sitting on a court taking important decisions.

Q4228 Craig Mackinlay: Dr Lydgate, you are probably the most useful at this one. We are very pleased to have you here with your skills and experience. I just want to examine what we Eurosceptics perceive as where we would like to be, in terms of the CETA-type deal. It has been agreed by the EU. It is best in class and has all of those good things.

I just want to look at one major export of Canada—wheat. I know that the EU has managed to not allow full access straight away, but it will over time. There must be a bundle of different pesticides, herbicides and all sorts of things going into the manufacture of wheat. There is seed quality and soil quality. It is a complex thing. How on earth has the EU managed to get its head around workers' rights standards for those working in agriculture and all of those different environmental rules with all of those things that go into the manufacture of wheat? It has managed to get its head around that. Might I assume that it is because it has taken the very sensible view that this is an advanced economy and an enlightened economy and a highly litigious economy, and so has accepted that these international norms will apply and that they are going to be fine for us?

We seem to be in a situation now where the EU is telling us, "You are right up to our standard on the day you leave, but suddenly we are not



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going to trust you, whereas we are trusting Canada because it is one of these advanced economies". Is that where we are with CETA? How has it got its head around workers' rights, maternity leave and holiday pay? How has it accepted what Canada does as perfectly acceptable?

Dr Lydgate: That is a good question. We actually would not be placed into a different category from Canada; rather we would be placed in the same category. For example, with pesticides residues, the EU's approach is that certain pesticides are prohibited and you cannot even have residues of them, and that entails that Canadian exporters comply with those regulations and it also entails border checks. That is the kind of regime that would then be applied to the UK. It is the imposition of border checks.

Craig Mackinlay: Or the potential for them.

Dr Lydgate: Yes.

Craig Mackinlay: Whether they happen in reality is another thing.

Dr Lydgate: That would ascertain whether regulatory requirements had been met. To take another agricultural example from CETA, the beef quota was revised upwards. My understanding is that Canadian beef exporters are taking advantage of that quota because their supply chains are set up to integrate with the US, so it is not cost-effective for them to comply with EU regulations. It is not simply the market access element; it is also the fact that supply chains are regional and countries are often set up to integrate with their local regulatory powerhouse, shall we say.

Q4229 **Craig Mackinlay:** The triangulations between countries are a very interesting dynamic. The best in class, even further than Canada and the EU, would be New Zealand and Australia. They are completely independent countries in terms of legislation and everything else and yet they have accepted each other tariff-free and have said, "Your standards are as good as our standards". How does that then interact? There must be some countries that New Zealand has free trade with that Australia does not. How do they agree in terms of, if something has come through the back door from Fiji, which New Zealand has an agreement with, how does it then go to Australia? Are they just a little more enlightened and sensible on these things?

Dr Lydgate: Your choice of words is quite leading.

Craig Mackinlay: My questions often are.

Dr Lydgate: My understanding is that you are correct in that New Zealand and Australia have been more relaxed than the EU in terms of having differentiated trade agreements that then allow goods to circulate freely once they enter the border of one country. Having said that, they have quite a lot of integration and co-ordination of rules that comes alongside that.

Q4230 **Craig Mackinlay:** I just have a very quick one, if I may, Chair, for



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Mr Peretz. I am a chartered tax adviser. I know you have some interests in VAT and all those sorts of things. You have strayed into some sort of tax policy. The daft one that always comes to mind is the Enterprise Investment Scheme. We had to get state aid rule agreement, I assume on the basis that a small widget-maker might get an advantage over a large widget-maker if they took advantage of the Enterprise Investment Scheme. It seems to be the most minutiae control from the EU. We had to get clearance from the Commission to implement that. Are you saying that in the backstop we would be at exactly the same level of Commission agreement for some type of tax change?

George Peretz: Or the CMA.

Craig Mackinlay: Or the CMA, which is effectively acting as the agent on its behalf. I think you used a term.

George Peretz: "Utmost respect".

Craig Mackinlay: The direction of travel that we see in the political declaration could see that type of tax policy alignment and asking the Commission for rights to do things as a perpetual state of affairs under a future political declaration once that is translated into the future framework.

George Peretz: If you have an arrangement where we keep anything like the state aid rules—and, again, one looks at Ukraine, Turkey and other large European countries, although obviously they are very different in many ways—we keep some degree of scrutiny of tax measures. It is important to keep that in perspective. As I explained when I was answering Mr Wilson's question, state aid rules do not constrain general tax rates. EIS is an example because it benefits particular types of companies, although, in a way, that demonstrates that actually, provided you target your aid at small companies with the EIS scheme, it is relatively easy to get clearance. In some cases they fall under exemptions anyway, so you do not need to approach the Commission or, in a domestic regime, the CMA. Yes, you are right that, if you continue the state aid rules, there continue to be tax law implications of that.

Q4231 **Craig Mackinlay:** If Canada wants to implement an EIS-type arrangement, does it have to ask the Commission for approval?

George Peretz: No, it does not and that is because it does not accept the state aid rules.

Q4232 **Craig Mackinlay:** It accepts the WTO standard.

George Peretz: There are circumstances in which a tax break would be a breach of WTO rules, so there would be a state-to-state issue, so it is not entirely free. You are right that it does not accept the state aid rules. The question is whether any of us think that the EU is likely to enter into the sort of relationship we want without it requiring some form of state aid rules as a red line from their point of view. My own judgment is that,



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right across the spectrum of agreements that have been talked about in this House, the answer to the question is, "Yes, that would be a red line". That includes a Canada-type agreement or Canada-plus-plus, whatever that means. The answer to, "Why not Canada?" is that we are not Canada. We are differently located. We are right in the heart of the EU and surrounded by it.

Craig Mackinlay: So is Switzerland, even more so.

George Peretz: You are quite right that Switzerland does not accept the state aid rules, but that is best regarded as a historical anomaly. The EU's position on any future relationship with Switzerland has been pretty clear. It wants Switzerland to accept the state aid rules going forward. New agreements with Switzerland, such as related to air services have brought in the state aid rules. The EU's line is very clear on that.

As Emily alluded to, we want arrangements where there are no regulatory checks on the border. We want to have no issue about retaliatory tariffs. We want to have a number of things that Canada actually does not have. If we want anything more than Canada, and if the option chosen by the House and the Government is for a closer relationship, then even more so the state aid rules are going to be a quid pro quo. From the point of view of any EU politician, that seems to be inevitable. You cannot sell to your own domestic constituency an arrangement that opens the EU up to a very large volume of imports from a very closely neighbouring country that is not bound by rules that you yourself are bound by. How are you, as a politician, going to justify that to your own electorate? That seems to me to be very difficult.

Chair: That seems to be a very good answer on which to draw the session to a close. Members have asked all the questions they want to ask. On behalf of us, can I thank all four of you for coming along here today? It has indeed proven to be an extremely interesting session that will be of great assistance to the Committee in our work in the months and, perhaps, years ahead. Who knows?