

European Scrutiny Committee

Oral evidence: [Post-Brexit Scrutiny of EU Law and Policy](#), HC 17

Wednesday 16 October 2019

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Members present: Sir William Cash (Chair); Martyn Day; Mr Marcus Fysh; Kelvin Hopkins; Darren Jones; Mr David Jones; Stephen Kinnock; Dr Philippa Whitford.

Questions 86-163

Witnesses

[I](#): Adam Cygan, Professor of Law, University of Leicester; Dr Brigid Fowler, Senior Researcher, Hansard Society; and Maddy Thimont Jack, Institute for Government.

[II](#): Sir Ivan Rogers, former UK Permanent Representative to the European Union, 2013-17.

Written evidence from witnesses:

- [Adam Cygan](#), Professor of Law, University of Leicester

Examination of witnesses

Witnesses: Adam Cygan, Dr Fowler and Maddy Thimont Jack.

Q86 **Chair:** Welcome to the three of you this afternoon—you are very welcome. We look forward to hearing what you have to say in reply to our questions. We are at what could be described as a cliff edge, with things running at the speed of light, so we are very interested to hear what you have to say about various matters in what is, by any standards, an extremely important moment in British history.

Let us simply move on to the first question. When considering what Parliament should be looking to achieve through its European scrutiny in future, what challenges and factors should we take into account? The second question is connected to that: bearing in mind the challenges that we have identified, what should scrutiny aim to achieve? I address those questions to Maddy first.

Maddy Thimont Jack: I think that the first quite obvious challenge is the fact that we do not yet know what the future relationship with the EU will be, and that will dictate what the Committee, and Parliament more generally, will want to do in terms of engaging with the EU. Under Theresa May, there was a proposal for a closer relationship with the EU than the current Government necessarily want, so that will impact what scrutiny might do.

We do know, however, that, provided a deal is agreed, there will be a transition period when EU rules will continue to apply to the UK—most of those will have been negotiated while the UK was a member state. But, within the withdrawal agreement, there is a possibility that a transition will be extended for up to two years.

Q87 **Chair:** That is in article 132.

Maddy Thimont Jack: I am afraid I do not know the article off the top of my head, but I am sure you are right. There is a possibility that more rules, which the UK will actually have had less of a role in negotiating, might start to apply to the UK. How to scrutinise that will be one big question for the Committee.

There is also the wider context of the fact that we do not quite know what the future relationship will be. The EU sets global standards in some areas, so the decisions that it makes in terms of its future regulation of data or financial services might have an impact on the relationship that the UK can have with the EU. From the perspectives of Government and Parliament, I think that there is a role in monitoring what that is.

The final reason why there might be a reason to continue to monitor what is going on is that the UK Government will continue to have a relationship with the EU, and Parliament's role is to scrutinise what the UK Government does, so there is a role for the Committee, and Parliament more generally, in monitoring what that engagement is. Keeping an eye on what the EU does means that you can better scrutinise the choices that the UK



HOUSE OF COMMONS

Government makes in terms of co-operation with the EU and potential decisions to continue to align with the EU in certain areas. Those might be some of the reasons why the Committee would want to continue to follow what goes on in the EU and to engage with EU affairs.

- Q88 **Mr David Jones:** Could I just come back on that point? Is there a particular reason why you think that there should be a discrete Committee dealing with this, rather than that it should be the role of individual departmental Select Committees?

Maddy Thimont Jack: I mentioned this Committee, but I also said “Parliament more generally” because I do not necessarily have a view on that at this stage. I think that is a really good question because departmental Committees will be scrutinising what separate Departments do, and if certain areas that Departments focus on involve a closer relationship, or align more closely, with the EU, it might be more suitable to allow those Departments to do that. That is probably quite a big question in terms of how you arrange that scrutiny. It might be that, actually, it makes more sense to have a central pool of EU expertise, or it might be that that is that official level that Departments can draw on. I think that is a question that I cannot necessarily decide, but it is definitely something that Parliament and Committees should be considering.

- Q89 **Chair:** Just to leave Dr Fowler to the end, I will ask Professor Adam Cygan whether you have any comments to make on what you have heard or what you think?

Adam Cygan: I agree with much of what has been said there, but there are a couple of things I would say. It is also going to be determined by how Government is structured afterwards. Will there, for example, be a Minister who has overall responsibility for the relationship with the European Union? What happens to DEx? Will that be rolled over into some other Department, which perhaps looks to see what the future relationship is going to be? I think that is going to be important as well.

With respect to whether it is a specialist Committee or whether this is looked at more horizontally, I think there still is going to be a role for a specialist Committee, particularly if there was to be some form of common rule book. There is going to have to be some process by which Parliament, even if it cannot influence that legislation, at least makes some judgment about the impact of that legislation within the UK legal system—not just the legal system, but the administrative and political consequences it may have.

I think there is another reason why this is important. One of the challenges that is going to be here, if we do keep a degree of alignment—if there is some common rule book in trade, for example—is that Parliament is going to end up being the gatekeeper of coherence of laws. We will no longer have that relationship with the European Union through, for example, courts going through the article 267 procedure, where they are looking to get preliminary rulings to see how laws are going to be applied. I think what Parliament is going to have to do is ensure that laws are

clearly crafted so our judges can apply them with as little scope for doubt as possible, because they are not going to have that position that they have now.

Q90 Chair: Or even disapply them, unfortunately.

Adam Cygan: Yes, whichever, but there is going to be an issue here with respect to what the statute book looks like once we have left, because we know that, with directives, the House of Lords, when this existed, made it very clear in *Litster* that the position is one that you look at the aims and objectives of the treaty when looking to implement the legislation. So with retained EU law, for example, that would no longer be the case. I think there has to be some mechanism for oversight of that. I think that is going to be the biggest challenge that Parliament faces.

Q91 Chair: Dr Fowler?

Dr Fowler: I would agree that one of the determining factors is going to be, obviously, the nature of the relationship—the treaty-based relationship, or lack thereof—that the UK has with the EU.

I think another factor that you will want to take into account is the amount of time that you have available and the number of times that you may need to change these structures. Obviously, if you are trying to get some structures up and running in 16 days, you are going to take different decisions than if you are trying to get some structures up and running for the end of 2020, potentially. So time factors come in. Obviously, I think you will also wish to give consideration to the resources available in this House, and in the Lords as well if you are thinking on a cross-House basis—resources in terms of staff, time, money, and the knowledge and expertise among Members.

When you are thinking about what I think is your key question—what is the purpose of this, and what is the scrutiny supposed to be achieving?—it would be helpful to reflect a little on the experience of European scrutiny in this House so far, and in the Lords. There is years of experience about what has gone well and what has not, what has been achieved and what has not, and I think it would be a shame to just assume that that is no longer relevant.

Q92 Chair: Well, as somebody who has been on the Committee for 35 years, I must say that I am well aware of the fact that an awful lot of water has passed under a lot of bridges—including a lot of treaties.

I would like to ask you a question that is highly pertinent at the moment. It is related to the question of the transitional period in relation to these questions, because, under article 4 and article 127, Union law would apply under the withdrawal agreement to the United Kingdom as a country. Yet, the decisions that would be taken in making laws will, for the first time in our history, other than within the framework explicitly of the European Communities Act 1972, be made over our heads. In other words, we will be expected to obey laws that were made by other member states. The bottom line is, therefore, what protection could there



HOUSE OF COMMONS

be, as there was, for example, when we came in, under the 1970 White Paper, which said that we would protect our vital national interests by a veto? The question during the transition period, therefore, would be that—despite the fact that it would end on 30 December 2020, as you said, because it can be extended for another two years under article 132, which is why I mentioned it—we could be faced with three to three and a half years of potential law-making over which we would have absolutely no control whatever, and it would be imposed on us by what we might call our own voluntary political and constitutional act—there are other words one could use for it: surrender and/or capitulation.

The real question that I want to put to you is this: what do you think will happen? Do you have a sense of that? There is no doubt that there are potential laws that could be made. There is already a proposal by the European Commission to remove the veto on tax. There is the question of competition law and state aid—things that are not to do with what I call the broadest elements of landscape, but very specific, economically damaging matters, where we know that the European Union has been reported as indicating that it does not want us to be competitive or to benefit from leaving the European Union. There must be at least a suspicion, if not a judgment, that they will potentially bring in these laws.

The problem we have is that there is no defence mechanism unless we put it in the withdrawal agreement. Do you recognise that as a problem? It may not be as big as some people might want to create it to be, but, equally, it could be very severe. There is an element of risk here that I would like you to evaluate. Please give me some thoughts on that. I ask Adam Cygan first.

Adam Cygan: I think your analysis is correct. It's going to be difficult because Parliament is going to lose the one opportunity that it does have to engage with this process, under protocol 2, through the reasoned opinions. The irony will be that we might well have to accept legislation in this country that, had we still been members of the European Union, we potentially could have been issuing reasoned opinions on, in relation to all sorts of issues that might come forward. Parliament will certainly be in a much weaker position.

There is no experience as such of a member state leaving the European Union and trying to have a relationship afterwards—trying to have this transition period. The closest we have is something along the lines of what the Norwegians do. The Norwegians have tried over time to build up a relationship with the European institutions—the Commission, in particular. They go as far as possible with respect to going upstream in the legislative process, to identify what the Commission might be doing and thinking about what impact that might have on Norway. The challenge of course is that they also have part of EFTA, so the EFTA secretariat works with them to assist them in getting the documentation. I think that will be the other challenge. Over the transition, we would expect the Commission still to deposit documents in the same way, with them being made available in the same way as they are currently. But that still does not change the



position that there is going to be no opportunity for this Parliament or for the Government to influence directly what is happening.

- Q93 **Chair:** And it is done by majority voting—we have taken evidence on this in the past—and, invariably, by consensus. You will be familiar with Simon Hix's extremely important work on VoteWatch. Therefore, when you look at the evaluated options and the procedures available, there is at present—unless it is in the withdrawal agreement—no form of formal protection, even if you were to say, "Well, it wouldn't be likely to happen," because it still could happen. Therefore, you would have thought it would be prudent, would you not, to include something?

For example, article 129 is the only area where there is an actual exemption. To put it in broad terms, it states that, where, for vital reasons of national policy, the Government wants during the transition period to guarantee that they will not be bounced by anything that happens in the EU, notwithstanding that we are in a transition period, a power is given to the United Kingdom unilaterally to declare and to get the protection that it would need. My argument is that, in a sense, as a matter of prudence and caution, you would need to have a similar kind of arrangement with regard to vital national economic interests, of the kind that I have already mentioned. Do you agree?

Adam Cygan: In an ideal world, yes. I think the difficulty that the UK has got is that the European legislative agenda is going to continue with or without the UK being there. The European Union is going to be pursuing ever-closer integration, which means that the UK will then have choices to make after the transition period as to the extent to which it wishes to remain aligned. In response to you, we would want to keep the transition period as short as possible, to keep that impact to a minimum.

Chair: But four years is a long time.

Adam Cygan: Four years is a long time, but that is the incentive for the UK to go off and negotiate the future relationship as quickly as possible. How we influence that decision-making process is going to be problematic. It only, potentially, leaves the soft-power approach, which the Norwegians also use, which is to seek friends in the Council.

- Q94 **Chair:** The Swiss have the same problem, don't they?

Adam Cygan: Yes.

- Q95 **Chair:** If I could move on, Brigid do you have any thoughts on that subject as well?

Dr Fowler: I would simply add that the problem that you identify is obviously a real one. It is inherent to the nature of the transition period, which was a UK negotiating request in the article 50 negotiations. As you say, that is potentially in the treaty, if there is going to be one, so there is a limit to what this House or this Committee can do about that.

When I saw that automaticity still in the withdrawal agreement, I thought you're going to need somebody in Parliament, jointly or probably in each

House, that is still doing the kind of function that this Committee has been doing, in terms of monitoring and informing the House.

Chair: Which we've been doing since 1972.

Dr Fowler: If there is a transition period, that's one of the functions that will definitely need to continue.

Maddy Thimont Jack: I agree entirely with what Adam and Brigid have said. One of the big questions, though, in terms of what a Committee might do during that period, is what the function of it is. Monitoring is one thing, but, as you say, if there is nothing that Parliament can do to challenge things, there is a bit of a wider question about what the point is. I think there definitely is a point; it is important for Parliament to know what is happening to the UK's statute book.

But, building on Adam's point, there is a question about the soft power that Parliament can use and about, rather than just responding reactively to what's coming out of the EU, thinking a bit more proactively about engagement. One thing you already have is the National Parliament Office in Brussels, and that is a really good opportunity to try to build more relationships with other countries. The Norwegians are a great example. You can build coalitions with other countries who are having to follow EU rules in certain areas, but who also might want to influence what comes out of the EU institutions and build more relationships with the European Parliament. That can be an opportunity to influence what is going on in Brussels.

The Government will have to do the same thing, but there is nothing to say that Parliament can't also be thinking about that. Again, in my view, it allows Parliament to better scrutinise what the Government is doing, if Parliament itself already has an idea of what might be coming out of Brussels.

Dr Fowler: I have two quick points to add. On the National Parliament Office, I had heard somewhere that it is already not operating in Brussels as it used to, but I'm not sure about that.

Maddy Thimont Jack: I heard that they have reduced it.

Dr Fowler: I heard that it is no longer operating and there are no staff.

Chair: Because this is so topical, I want to get your view. You do see that there is a problem, and there is an accountability question. A Parliament that has laws imposed upon it, under a withdrawal agreement, without any protection or any ability to stand in the way, let alone to influence, represents a democratic deficit, does it not? That's as much as I think we can do at the moment. Having said that, I now move on to Marcus Fysh.

Q96 **Mr Fysh:** With regard to the operations of Joint Committees and regulatory committees, in terms of the governance of our relationship with the EU going forward, how should we hold the Government to account for what it might do within those fora? Within the withdrawal



HOUSE OF COMMONS

agreement, for example, there is the potential for even officials to be in Joint Committees making decisions. How do you think that we, as a Parliament, should try to interact with the Government, to ensure that that process is controlled or understood?

Maddy Thimont Jack: That is a really important question, particularly because we are talking specifically about the Joint Committee for the withdrawal agreement, but we do not know what the governance arrangements might be for the future relationship. Whatever is put in place at this stage for that might influence how Parliament can engage with the Government's future relationship more broadly. It is a really key question.

What is quite interesting is that the EU, the European Parliament and the Commission, already have an agreement in terms of how the European Parliament will be engaged. They will basically be informed in line with how they are engaged during international negotiations—again, under article 218 is their basis for that. For example, the European Parliament will be informed if the Council authorises a specific member state to negotiate a bilateral agreement with the UK. That is an interesting starting point in terms of seeking certain information and updates from the UK Government.

I think there is a Lords Committee—I am not sure if you were also involved with that—that asked for publication of meeting schedules and agendas ahead of the Joint Committee meeting. I think there is a question about whether it is, from your perspective, just as simple as getting Ministers to appear before the Joint Committee meeting, or whether there are documents that you want shared and then you can go further and request private briefings.

It is quite difficult to say now how that could necessarily operate, because we are still not entirely sure how the Joint Committee itself will operate. Although we know that there will be certain decisions that the Joint Committee can make, in theory, and that there might be working groups set up—specialist committees underneath the Joint Committee—we do not actually know how much they will be used and exactly what decisions the Joint Committee will end up making. So there is a question about seeking more detail from the Government about how they envisage the Joint Committee operating, so that Parliament can effectively respond to it.

Q97 **Mr Fysh:** Sure, because it is a power there within the Joint Committee and within the withdrawal agreement, for example, to make decisions and have them implemented as if they were law.

Maddy Thimont Jack: Exactly. I think that is a really—

Mr Fysh: That does seem to be potentially a rather large power-grab. Let's see what the actual thing is.

Chair: And they are certainly not elected.

Mr Fysh: Yes. So how we control that matters. Do you think that we

should try to insist that Parliament has a right to request particular things to be discussed in Committees like this?

Adam Cygan: There is an argument to be made for having an equivalent of the current scrutiny reserve to continue to apply in some form, because although we will have to accept that the Joint Committee will tell Parliament what legislation it has to abide by, the issue will be that at some point the UK Government will be negotiating within that Joint Committee. There will be a process and there may be an opportunity to influence that Minister in advance.

What do we see the Joint Committee as? What would Parliament or any Select Committee view the Joint Committee as? Is it sort of an equivalent body, like the Council currently, where there needs to be that element of control over what is happening there, and Ministers are aware of that position? That is very much one part of it. The other part of it is to flesh out what the terms of reference would be for any Committee that is doing this. Would legal and political importance remain the primary considerations going forward, or would there be other factors that the Committee, or a Committee, would want to consider when doing this?

Finally, it also goes back to the point that I made at the very beginning. It would be helpful to have a Minister responsible here, who was a primary point of contact and who could be brought before a Committee to answer these questions specifically.

Q98 **Chair:** That is really why I asked that question. The other thing of course is dispute resolution, and the whole question of arbitration and who has the last word. Ultimately, as I understand it, it is the European Court of Justice, but that is an extraordinary situation when you consider what it is intended to try to achieve.

Adam Cygan: The Court of Justice will protect its autonomous legal order and will not allow another judicial body to determine what the scope and application of EU law is. I do not think that precludes the possibility of there being some sort of joint apparatus in place, whereby the UK and the EU could oversee the work of the Committee without necessarily redefining what the principles would be or what the application of the treaty would be.

Chair: That raises exactly the same question as I have raised before about where something comes under the purview of vital national interests, and then you find yourself in a committee that is unelected but at the same time subject to these procedures. There does not seem to be any way of resolving it for the United Kingdom in its own national interests.

Q99 **Mr Fysh:** If there are such abilities within such committees to effectively make law or alter the terms of a treaty arrangement, would it not be appropriate to have a veto power of the Parliament in a decision through a—would it not be appropriate for some sort of statutory instrument to be required to govern such a change, and therefore the permission of Parliament to be needed? Why would that not be appropriate?



HOUSE OF COMMONS

Adam Cygan: To some extent, would it not be part of the difficulty that we currently see with the negotiations, where Parliament is in effect telling the Executive how to behave when negotiating a treaty? That was one of the problems we had with the current process, where Parliament took control and said that it expected X of the Executive. I would see that as raising very similar questions, particularly if there was a difference in view about what the national interest is between the Executive and the Parliament of the day.

Q100 **Mr Fysh:** There is a difference, though, between ratifying a decision that was proposed by the Executive in the Joint Committee and governing a mandate for how that negotiation should be undertaken, isn't there?

Adam Cygan: There is, but it still requires the process of Parliament, in effect, coming to a decision and informing the Executive of what it wants it to do in that forum.

Q101 **Mr David Jones:** How is that different from the scrutiny reserve?

Adam Cygan: The scrutiny reserve is currently recognised within the treaty as part of the process where, in every member state where scrutiny does exist, that is something that can take place. It can be; my point is that it would have to be within that agreement that this could be part of the process. It would not be something that the UK could suddenly try to do unilaterally subsequently—to say, "We don't like this. We think this raises the national interest. We think this should be an issue that we don't subscribe to, and therefore we want to have some sort of opt-out of this."

Q102 **Mr Fysh:** Are you saying that if the withdrawal agreement were to come back as drafted and were to be agreed, Parliament should not then be able to say that, on a particular decision in a Joint Committee, they should have a veto power to ask the Government not to agree such a measure as they were proposing?

Adam Cygan: That would be a change to the draft withdrawal agreement. There would have to be some mutuality—

Chair: But that is where we are, because at the moment, I have to confess that I do not know what the draft withdrawal agreement has turned into. That is where we all are, so for practical purposes, what we are talking about is based upon what we knew the old—if I may say—Theresa May withdrawal agreement was like. The question is what it is going to be like when we see the text, and we have not seen it yet.

Q103 **Mr David Jones:** To pursue that point, would it not be possible for our own domestic legislation to provide that a Minister should attend the Committee, and that before attending the Committee, the Minister should be required to at least give his rationale for whatever steps he proposes to take in committee to a Committee of this House?

Adam Cygan: I do not see any particular problem with that, no.

Mr David Jones: That might be a way of resolving things.

Chair: Brigid, do you have a thought?

Dr Fowler: Yes. This Parliament has control over any processes that it wants to put into place as regards control of the UK Executive. Obviously, there is the distinction between what the UK as a state has signed up to in an international treaty and whatever internal, domestic processes it wishes to put in place in terms of legislative control over the Executive. As far as the Joint Committee goes, I think that is the nearest equivalent to current Council meetings, and where you might—in fact, I think you should—try to replicate something like the current scrutiny reserve. I think the Joint Committee is one of the key places where Parliament needs to get a grip over this, because it is potentially extremely powerful, as you say.

Also, if there were to be changes to the withdrawal agreement after it was in force, one issue would be whether those changes required any changes to UK domestic implementing legislation. We do not know that, but what kind of domestic implementing legislation might be needed?

Q104 **Chair:** We have never seen the withdrawal implementation Bill. I tried for six months to get it out of the Government and they would not send it to me. They thought it was rather unwise to send it to me.

Dr Fowler: For example, it would be entirely within the powers of this House to improve its scrutiny procedures for delegated legislation. There is nothing in international treaties stopping that happening.

Q105 **Chair:** You used a rather nice expression, “get a grip”, which I always like as an expression. You could apply exactly the same criteria as we are discussing in the Joint Committee to the question of protecting our vital national interests. I assume you agree with me. They might be determined to go down an uncompetitive route. Do you know about the tax proposal for the abolition of a national veto? If they decide to do that, we will then really need to get a grip. Well, but let’s do it ahead of time. Do you not agree?

Dr Fowler: Again, I would make the distinction between commitments that the UK might have signed up to in a treaty and whatever domestic arrangements it wants to put in place in advance for control over its own Executive.

Q106 **Chair:** So are we agreed that protection is required in both of these areas under the withdrawal agreement and also under the Joint Committee for this purpose in general? We need some form of “get a grip” protection?

Dr Fowler: I would say for the parliamentary control over the Executive, definitely. I would not wish to comment on what might be in the actual withdrawal agreement.

Chair: Well, that’s understandable because none of us actually knows yet.

Q107 **Kelvin Hopkins:** There has been some mention of Norway and its relationship with the EU. Would you not agree that it is unwise to imitate a relationship that exists between two other countries but that might not suit us? I have spoken twice to people in Denmark with interests in these



HOUSE OF COMMONS

matters. It was suggested that Denmark has so many opt-outs that it is further outside the EU than Norway is, which has tried to become as close as possible to the EU because the governing elite is fanatically pro-EU, but the people made the terrible mistake of voting not to join on two occasions. We ought to be very cautious about imitating any other country if it is not in our national interest.

Adam Cygan: I agree. I am not suggesting that we should follow what Norway is doing. Indeed, certainly in some of the discussions that I have had with Norwegian officials, they felt very sceptical that the UK could mirror what they do, simply for the reason that we are a member state that is leaving. We are not a member state that has always had a different relationship. We could learn from the Norwegians, though. This goes back to the point about what type of Committee does this. The Norwegians have a sort of hybrid: they have a Committee that monitors EU affairs, but they also bring together specialists from their other Committees where relevant, and they bring them in and involve them. That could be a possibility as a *modus operandi* within Parliament afterwards. There is a core specialist Committee and one that brings in experts as and when required.

Chair: We have an arrangement with other Select Committees to do just that. The only problem is that—I say this without disrespect to some of the others—there is less direct engagement than we would like. There are things where we make judgments and we have an accumulated amount of knowledge and experience, but I would not be unhappy to defer, for example, to the agriculture Select Committee, and we have had joint sessions with them. When we have had joint sessions and took evidence, we found them incredibly helpful because the questioning becomes much more direct and acute.

We have covered the general remit of the Joint Committee for the time being. Darren, will you ask the next question?

Q108 **Darren Jones:** Thank you, Chairman. Presumably, the best way to influence EU law is to be a member of the EU. Is that right?

Maddy Thimont Jack: If you are part of the EU, obviously there is a process by which you engage with EU law making as a member state. That is part of it. The UK has voted to leave the EU. That is the Government's policy. As I say, this all depends on the future relationship, but I want to jump in quickly on the Norway point. We were talking about Norway very much in the context of a transition period, when the relationship between the UK and the EU will be a lot closer. If you have a more distant future relationship, Norway might not be the best example to follow. You can look to Canada, for example, which obviously has a more distant relationship with the EU, but the Canadian Parliament still sends delegations to Brussels to engage with the European Parliament and institutions. The countries you are looking to depend on the nature of the future relationship.

I will do a plug for my colleagues who are writing a paper about how the UK should engage the EU as a third country, including parliamentary engagement, and we must wait to see where we end up in figuring out the best way to engage. The relevance of that engagement, and why and how it matters, will depend on the future relationship.

Q109 Darren Jones: You would make a good politician, Maddy. You answered a different question, which I don't mind at all. I am asking about the hierarchy of enforcement powers, and for a factual statement, regardless of political view, about whether the best way to have an enforcement power over EU law is to be a member of the EU.

Chair: If that is a good reason for being in the EU at all.

Darren Jones: I agree—elected representatives and judges are part of the deal. On enforcement powers, in whatever our future relationship will be, we have talked a little about the scrutiny reserve for this Committee. Are there any other enforceable powers or checks and balances that you would recommend we consider for a new version of this Committee, should we leave the European Union?

Dr Fowler: I am not quite sure which phase of the process we might be talking about. We have not yet mentioned scrutiny of the negotiations of the future relationship, which is another big piece of this after the UK leaves. That comes back to the key institutional question for this House—not so much for the Lords—which is about the relationship between the Brexit Committee and any other Committee, if any other Committee continues to exist, or whether it will all end up as one large Committee. When we started thinking about this issue, it seemed there was a possibility that DExEU would not survive the UK's exit. I now understand that it is formally tasked with being the lead Department in negotiating the future relationship. If the Commons follows its normal practice, that means that the Brexit Committee will continue to exist, and that brings into focus the key institutional question.

Chair: And we will keep on asking the questions that they do not ask.

Q110 Darren Jones: The key point is that the DExEU Committee does not have any particular powers of enforcement in the same way that this Committee does. Would it still be a scrutiny reserve type power, or would there be additional powers that we might want to consider?

Dr Fowler: I am not sure about the language of powers, but I would encourage all Members of this House to reflect hard on the experience of negotiating the withdrawal agreement, and the experience of this House during the article 50 process. There might be general agreement that this House has not always had the information and influence that it might have wanted during that process. I do not necessarily think that you need to start talking about formal powers to try, in the Chair's phrase, to get a "better grip" on the negotiations of the future relationship than has sometimes been the case during negotiations under article 50.

Adam Cygan: To answer your first question directly, yes, it is the only way. If you want to influence, you have to be round the table, despite



HOUSE OF COMMONS

there being qualified majority voting, and you must also be members of the European Parliament. The co-legislative relationship between the Council and Parliament now ensures that there is a voice to be heard—we can see that by the number of First Reading decisions that are taken in the European Parliament, and the agreements that they get through the trialogues. They can come to an arrangement quite quickly.

Q111 Chair: Perhaps I can ask a question about that answer. Accelerated procedures are a serious problem, as recognised by the evidence that we took in our Committee from VoteWatch Europe, Jon Cunliffe, and a lot of people. That is recognised as a serious issue. The more it becomes the norm, the less democratic the position becomes. The ombudsman then says that it wants more transparency, particularly in the field of First Readings and the rest of it. Really big rows go on about who really calls the shots.

Adam Cygan: Often the decisions have taken place at First Reading, before national Parliaments have had an opportunity to review the document that is being proposed. They are often working to the original proposal, what the Council mandate was, rather than the final version. Where I would say something about oversight, there are a couple of areas where I think there might be some imported role for Committees in this House.

One is where there are going to be amendments proposed to retain EU law. Retained EU law I describe as a pdf document, which is a snapshot photo of EU law as it exists on exit day. That is what we are going to be abiding by. That legislation, putting aside the politics of rightly or wrongly, contains a number of rights that individuals can continue to rely upon domestically. The cross-border element is gone but the domestic aspect is still going to be there.

What I don't think we would like to see is these rights being changed through secondary legislation. If they are going to be changed through secondary legislation, there needs to be a process whereby that is being reviewed. Be that through an equivalent of the European Statutory Instruments Committee that currently exists or a committee such as this, which will be looking at that.

If we amend retained EU law, that is potentially going to have an impact on our future relationship with the EU, where we are diverging. It makes a common rulebook in certain areas more difficult. I think it is also going to impact on the way in which the courts may apply this, putting judges in a very awkward position of having to consider what the application of this provision should be, where there is a lack of clarity behind the changes.

That is one. The second one is what will be replacing the current EU agencies. If the UK goes down having its own model of enforcement agencies, oversight of those is going to be particularly crucial. Again, looking into the application of retained EU law, ensuring that there is consistency and coherence across the United Kingdom. That is obviously going to be an issue of how that is going to be done in a number of areas.



HOUSE OF COMMONS

I am not going to talk about devolution but that is clearly going to raise that enforcement question quite significantly, as to where that is going to be taking place.

There is a role for Parliament in an oversight like this. It is going to be quite technical but the technical impact is potentially going to have a significant impact on the rights that individuals currently may exercise.

Q112 **Darren Jones:** Presumably, that will be quite resource intensive. We would have to rely on those either proposing amended legislation or the agencies to report to us, as opposed to us keeping an eye on everything that everyone is doing all of the time. Would that require primary legislation, in order to put those requirements on those organisations?

Adam Cygan: I think we would have to set up these agencies, from scratch in most cases, to do the sort of tasks we do.

Dr Fowler: Like in the Environment Bill; that is currently in the Environment Bill.

Q113 **Darren Jones:** You would have to include a provision in that says you would need to report, over a period of time, to this Committee, for example, when you propose to make changes to retained EU law. We would then be able to highlight that to the House in a way that we felt suitable.

Adam Cygan: That's right. It is important to single out retained EU law is because the withdrawal Act highlights that retained EU law has this status above domestic legislation. If we are going to be making changes, there has to be a process that recognises the significance of the changes being made.

Chair: But that also raises the question of the disapplication of Acts of Parliament, which is already embedded in sections 5 and 6 of the withdrawal Act itself, let alone what article 4 says about the disapplication of laws in the context of article 4.

We had better move on but it sounds very much to me—though I don't want to get too historical about this—that this is the kind of problem that they no doubt had to grapple with in their own fashion after the Norman conquest, when they merged French and English law. Because it is the same question: what kind of law do you want to be governed by? The question of who governs Britain or who governs the United Kingdom is at the heart of this. I will now move on to Philippa.

Q114 **Dr Whitford:** At the moment, the Government submits an explanatory memorandum with all the EU documents that it deposits. It is thinking about how we are going to be aware of documents, in that there is not going to be the same natural flow from EU actions through Government to such a Committee. How should the information from Government to Parliament change to reflect that altered relationship?



HOUSE OF COMMONS

Dr Fowler: You are right that this document deposit issue is one of the key ones. On my reading of the draft Withdrawal Agreement, I think this Parliament might still be entitled to get some documents straight from the Commission, but I have not seen that confirmed anywhere by the UK Government—I may have missed that, in which case I apologise. I think that kind of issue is exactly one of the ones that this and other Committees ought to try to nail down with the Government.

Q115 **Dr Whitford:** It is still the mechanism of it. Obviously, at the moment, the Government pools and deposits them. They might say, “Yeah, it’s all open and transparent and you can have it,” but it is about thinking about how it will actually come and how we would get that information from Government of its reaction. Transition is one phase and pooling is post Brexit.

Dr Fowler: Inasmuch as there is a transition and that carries on as it has been, that kind of consideration was one of the things that led us to say that something like this kind of Committee, or at least somebody doing this function, could basically just carry on, because those systems are at least already in place: the documents get deposited and you can find them on the website. Those ways of working are in place.

Chair: If it is any help to you, we have a staff that is absolutely superb. I happen to be able to say that, but I don’t want to embarrass them. To lose that degree of competence and knowledge, which I can assure you as Chairman of the Committee, is absolutely peerless. I can only say that I entirely agree with you, but we must pool the existing experience.

Q116 **Dr Whitford:** I think that is critical. The current Prime Minister is talking about a lot less alignment than the former Prime Minister. In actual fact, there will still be alignment. Either a Government align, and say, “We will do everything the way you do,” or businesses will have to align, if they are still planning to export. They may be doing both.

To me, it is probably quite important that we have a Committee that is looking at changes, particularly if the EU makes changes and moves forward. There will need to be decisions: are we going to follow them, are we going to change? Even just digesting it into English. How would we make that system work, from things that Europe are considering to come through this Committee, and then to highlight to the other Department Committees?

Maddy Thimont Jack: I keep repeating this, but it does depend on the nature of the future relationship. If the Government are choosing to align in certain areas, on the one hand, it is about this Committee, a different Committee, a departmental Committee—wherever this ends up—being aware of what choices the Government might be facing anyway in terms of what the EU is planning. It is a bit of forward looking. I also think that if the Government are making choices to align, they should share that information with the Committee before that choice is made, and justify why that choice has been made.



HOUSE OF COMMONS

We talked about formal veto in terms of the treaty, but if there is a choice to align with the EU or with other regulatory orbits, there is a justification in Ministers saying, "This is what we are choosing to do." You could seek documents justifying that and potentially have hearings. You may not need to have regular hearings with Ministers, but have hearings not as regularly but say, "What is your programme for engagement with the EU and which areas are you considering alignment in?" You might do something slightly less resource-intensive in that way, but it really depends on the future relationship as to how much resource you really need to put into that.

Q117 Dr Whitford: Do you not agree that even if there was a no deal or a deal but with a decision to utterly not align afterwards, which is obviously what some of the conversations are, businesses across the UK will be faced with that decision if they are exporters into the EU. For them to try to go and work out what things mean will be incredibly difficult. Therefore, even if the UK politically chooses not to align with a change of regulations, you require a degree of scrutiny to help translate that into English for businesses.

Maddy Thimont Jack: There is a question of whether that is the role of the Committee or of Government. That is a really big question. On the no-deal point, even if we leave without a deal shortly or at a slightly later point, there will still be a big question about what the future relationship with the UK is with the EU. At that stage, I would still say it is very important to monitor and engage with the decisions the EU makes, because we would still expect that, at some point, some kind of future relationship is agreed, a free trade agreement or whatever that is. The decisions that the EU has made in the interim will be really important to what the UK has to do next.

Definitely, with no deal, that is not an end point of engagement for the UK Government or Parliament. As I say, in terms of whether business has to follow different regulations, there is a question about whether that would necessarily be the role of the Committee.

Chair: It is certainly the role of the Committee while we are in transition because one of the questions that Philippa put was about during and after transition. Everything put forward by you all—very valuably, I may say—is really interesting and extremely important stuff, because it is about what kind of laws the British people and voters will have to obey and it is therefore central to the whole question of who governs this country.

Dr Whitford: I think that is quite specific in this Committee. I totally understand that when we would have a joint hearing, you were bringing in expertise, but what this Committee does is to drill into the black and white small print of the law side of things, whereas often, other Committees look at broader policy.

Q118 Mr David Jones: If I may contribute to this conversation, is the Chair not right that the question is on the one hand about the period during which we are in transition, but after transition, is it necessarily the role of



HOUSE OF COMMONS

this Parliament to continue scrutinising what happens in Europe? Presumably, a company that wants to sell to the European market will make its own decision on whether or not it wishes to align with regulations. If it wants to sell it will have to comply, just as it will have to comply with American regulations if it wants to sell to the American market. That is not an argument for a continuing role for this Committee.

Maddy Thimont Jack: It comes down to the choices that the Government makes on how much it wants to align with the EU. Part of what this Committee needs to do is scrutinising the choices that the Government makes on its relationship with the EU. Whether it should be this Committee or a broader European affairs Committee I do not know, but that question is why I have to keep couching my answers in terms of the future relationship. We do not know what the future relationship will be.

As I said, we know that Theresa May proposed a much closer alignment—a common rule book, for example, would require a different mechanism—while the current Government wants a more distant relationship. We still have not seen a political declaration from it and still do not quite know exactly what that relationship will look like, so it is really difficult to say exactly what role—if there should be a role—a specific Committee should have in monitoring that. It is good to have this discussion now because that is something to consider and, although we might have a transition in the future, there might be something further down the line.

Dr Fowler: One precedent that the Committee is obviously well aware of is the JHA opt-in type process. If the UK were to enter a treaty with the EU where it has a formal opt-in option, the process for JHA opt-in at the moment might be one process that you could look at. I am well aware that it has not always worked particularly well, but that is one process that has been in operation so far.

In terms of the broader nature of the relationship with the EU—to go back to this central point—it depends entirely on what the nature of that relationship is. It would be entirely possible for the UK to have the same legal relationship with the EU as it has with Korea, and you do not have a Korea Committee. Those are political choices and institutional choices that will be made in this place.

Q119 **Chair:** Of course, boiling it down, one might say that the principle of an explanatory memorandum becomes paramount in the transition period because of the existence of EU law at the same time, so that information is actually supplied to us during that period. If we did not have it, we would not know what vital national interests we might want to protect.

Adam Cygan: Another potential issue that we have not mentioned is what happens with Northern Ireland and whether it remains in some sort of customs relationship or single market alignment for good. That would clearly raise issues for Parliament to consider and it would at least ask the question about whether, if there were single-market alignment for goods for Northern Ireland, the UK would want to adopt those rules voluntarily

itself as well. That might be something that the Committee would want to consider and it would potentially go with transition.

The final point I will say on this is that with transition you are going to have transition from the transition. I doubt very much that what we are going to end up with is suddenly this hard cliff edge and say, "Right—EU rules no longer apply. They're no longer going to be relevant in the same way, and we have this new international relationship." There is still going to be a consequence for a large number of businesses in the United Kingdom, which will still have a very strong relationship with the European Union.

Chair: But combining what David Jones said with what Brigid said just now in relation to Korea, for example, that is a state of affairs in the world at large. If you become a third country, you then have to adapt accordingly. The idea that you are still in the box of EU law is something that is part and parcel of the question of whether and how you leave. Therefore, to that extent this is something that is in the nature of the changes that will come about, just as when we came in we had to adapt to the laws that they then accepted. I may say that in the White Paper of 1971 it did quite categorically state that we would keep the veto, but I will keep that one in the box.

Q120 Kelvin Hopkins: One of the submissions to our inquiry suggested that Parliament's scrutiny of EU legislation should be of a more proactive, agenda-setting nature than is currently the case. Should the House of Commons maintain its current approach, or are there other ways to ensure effective scrutiny of new EU laws and policy?

Adam Cygan: The problem is going to be that, being outside of the European Union, many of the prerogatives that are open now will no longer be there to be proactive in the same way that Parliament can currently be. We are losing protocols 1 and 2, for example, on subsidiarity monitoring and the position of national Parliaments. The political dialogue will no longer be there, or being able to have a Minister who is sitting in the Council who this Committee is influencing. Those are all proactive mechanisms; they are mechanisms whereby this Parliament, or any other national Parliament, can take an initiative and use those mechanisms to try to increase accountability.

We mentioned earlier the Brussels representation. Ironically, the Brussels representation will have to increase once we leave, not decrease, because we are going to have to fill the gap, certainly during the transition period, to understand what is happening within those institutions, and having the presence there and having that relationship with the institutions, but in a different way.

I would say that the role of the United Kingdom Parliament is going to move from an actor which is trying to influence the process to one which is potentially going to be just a lobbyist, which is where we probably were in the 1980s, with the way in which Parliaments were functioning with respect to their scrutiny activities—so before Maastricht and before



HOUSE OF COMMONS

subsidiarity became an issue for Parliaments to consider. It is going to be a fundamental change, and the *modus operandi* is going to have to change. Until such time as Parliament is faced with those challenges, it is going to struggle to understand what it can do to get the information that it previously would have had given to it, to ensure Ministers provide the necessary information, and just to conduct any scrutiny that they want to within time to make a difference.

Q121 Kelvin Hopkins: We talk as if, if you don't mind me saying so, the implication is that we are going to be weaker outside rather than stronger, when actually the UK is a very large economy with a very large population, having a very, very close economic and personal relationship with the rest of the EU. We import vastly more from the EU than they import from us. We have over 3.3 million EU citizens, I think, in Britain, as opposed to 1.3 million British citizens in the rest of the EU. Indeed, most of those UK citizens are paying into local economies from incomes derived from Britain because many of them are retirees, and they are major parts of some parts of the economy of the EU. EU citizens in Britain are, of course, very valuable, particularly in public services, but they send vast sums of money back to their home countries, for their families and so on, so there is a net outflow of income from EU citizens in Britain, and a net inflow to the EU from UK citizens in the EU, so we are in a strong position.

If I can get back to my question, it might just be that we want to negotiate opt-outs from some arrangements that we have in the treaty. Denmark, as I mentioned earlier, has negotiated a lot of opt-outs, and they are very pleased to have done so. If we want to negotiate opt-outs from the treaty, it might be that they could be initiated by this Committee. We might suggest to the Government that this is what we ought to do, so we have this proactive agenda-setting nature. Is that not realistic?

Adam Cygan: It is certainly possible. It is a question of the Government still having to negotiate that with the EU and, as we have seen, when it comes to maintaining the integrity of the single market or protecting the customs union, the EU has its own red lines as well. It would obviously be looking at what the impact on the European Union's economy would be in that context. It is perfectly possible, but it would be subject to the challenges that exist in any negotiation process.

Q122 Kelvin Hopkins: But we could negotiate from a position of relative strength in many ways, so we could take this proactive position and start setting an agenda on certain issues that we want to clarify with the rest of the EU. We have not joined the euro, thank goodness, and several other countries have not joined the euro, and it looks as if many of them will stay outside the euro for the indefinite future, whatever the EU says, because currency flexibility is an enormously important component of managing one's economy. Had Greece stayed out of the euro, they would not be in the difficulties that they are in now. The suggestion is that we want a strong position for the British Parliament, and the Committee might have a role in strengthening the backbone of Government.



HOUSE OF COMMONS

Dr Fowler: If I can come in, I am not sure I have fully understood the question. During the transition period, if there is one, the UK will have a treaty obligation to apply all of EU law. At the end of transition, we will have opted out of everything, unless we put something in place to fill the gap. The concept of opting out of something we will not have opted into is a bit odd.

Kelvin Hopkins: But there will be some sort of treaty or agreement at the end of it.

Dr Fowler: We would assume so, but you would only opt out if you have a treaty commitment to be in.

Q123 **Chair:** If I might help on this—I think Kelvin is right on this—the reality is that during the transition period, if EU laws are being made and we are not engaged in the process, the question of how you deal with that could arise in terms of vital national interest, with the accelerated procedures, which we have agreed could occur, and if they did, could be quite damaging. There is no point in people trying to tell me that it will not happen quickly, because I believe that it can and it will, if they think it is necessary. The only answer to that would be to bring in a form of opt-out or veto, where it was in our vital national interests to say that we simply could not accept the laws made by 27 other member states, when we are effectively within the EU, but actually, to put it in broader language, at the mercy of our competitors. That is a real question. It has already been conceded on CDFSP, therefore why not in relation to other national interests? I think the notion of an opt-out within the framework of the EU from the transition period is a realistic and practical question.

Dr Fowler: My response would be that it needs to be in the withdrawal agreement, which is being negotiated this afternoon.

Chair: If I may say so, that is a very, very important question answered in a very simple manner.

Q124 **Kelvin Hopkins:** To be a bit more positive about this, there are many things that the EU has done with which we agree, and where it has sensible legislation, we will hopefully just adopt similar legislation, but we would be subject to our own Parliament, Government and laws, not subject to the European Court of Justice. We will imitate the good things about the EU without difficulty. We may want to make some suggestions about that, being proactive and agenda-setting, saying that we should adopt this law, because it is the good, common-sense thing to do.

Maddy Thimont Jack: There will be opportunities for the UK Government to partner with the EU in areas that make sense for it. In terms of Parliament scrutinising the choices that Government makes, it will be up to Parliament whether that is departmental Select Committees or a European committee. Climate change, for example, has been suggested as an area that the UK Government and the EU could work together on. It will not necessarily be within a formal treaty arrangement, but it is an area that you can co-operate in. The UK Parliament can play a role in identifying areas where it thinks that might be sensible.



HOUSE OF COMMONS

I don't think there is anything to stop that happening, and that reinforces Adam's point that having eyes and ears on the ground, knowing what is going on in Brussels, building those relationships with the EU institutions, including the European Parliament, are really important to be able to identify those areas, if that is what the UK Parliament wants to do. That comes quite neatly back around to what Adam said at the start: Parliament might need to act more as a lobbying organisation and will have to work to promote British interests in Brussels after we leave it, and it will probably be a step change in terms of how the UK Parliament has engaged to date. It will just be a different relationship.

Dr Fowler: You might also want to think about how the UK engages with any number of other countries around the world—how it engages in Washington, in Tokyo or wherever else—and think about how much diplomatic reporting and advance knowledge you get, and how much influence you actually have in those large, highly complex capitals, where lots of people are trying to influence what is going on and find out the latest information. It is a big operation.

Chair: There is another point on top of that, which is the international standards, which are devised by rules that are created that are supranational-supranational. They are above the EU, but they end up by being translated downwards. What you are really describing is probably the reality of the modern world, which is that we live in a much broader world. The European Union happens to be a territory or a number of countries that have come together for a degree of co-operation, but it does not mean to say that there is not other stuff going on all over the world.

I am chairman of all sorts of committees—the all-party parliamentary group for Malaysia and so on. We interact with other countries in relation to these matters; they, for example, have had a lot of difficulties with the EU on issues such as palm oil. I am also vice-chairman of the ASEAN markets committee, and we had a meeting with them. They were very clear that they did not think that the way the EU operates is as conducive to good trade as what they had thought they would be able to have with the UK after we left. I am not laying down any prescriptions, but I am saying that there is a global world out there, and what you have said is highly relevant to that issue. It is not just based on law and regulation, because there are other things that come into play.

Q125 **Mr David Jones:** I think you have largely dealt with this question of international engagement with the EU institutions, but what about engagement with the Parliaments of other EU member states? Do you think that is still important post Brexit?

Adam Cygan: There might be some reason to do that, particularly if we consider that there are potentially issues around citizens' rights, if we look at some of the member states where there may be a large number of UK nationals living. That might be one area. In terms of all the other relationships, the EU will always negotiate everything as a bloc, and national Parliaments will be scrutinising that common position and trying



HOUSE OF COMMONS

to influence their Government in that process. The extent to which this Parliament could influence any one of those Parliaments to influence its own Government is quite small by comparison.

Dr Fowler: If I could jump in, trying to engage with 27 other Parliaments is, again, quite a big ask. I will mention the various forums and bodies that bring EU national Parliaments together, because potentially you can go to one meeting or one body and interact with colleagues from all the EU national Parliaments. I am not sure whether anything has been done thinking about the participation of the UK Parliament in those bodies—COSAC and those kinds of bodies—because my understanding is that their current rule—

Q126 **Chair:** I can give you an answer to that question. You refer in particular to COSAC, which I have been attending for the last 10 years. I am well aware—to answer your question directly—that there are some very, very interesting and interested observers from other Parliaments at every COSAC meeting, so for practical purposes, there is a great deal of interaction. It tends not to be outside what I call the European continental zone, by which I mean that I have not yet seen anybody from America there. Maybe they should come occasionally to see how things are going. But those meetings have in the past been extremely helpful; you also build up personal relationships.

Dr Fowler: Sure. I think it would be a matter of the rules of each of those kinds of bodies about whom they are able to invite as observers, who is able to have observer status, or who is able to be invited. Those kinds of issues will come up—

Chair: It does not have any legislative authority, but there have been moves to increase co-ordination—let's put it that way.

Q127 **Mr David Jones:** You clearly think that more international engagement is necessary. Again, looking to the post-Brexit world, if, for example, we were to secure a free trade agreement with the United States or if we were to enter into some arrangement with the Trans-Pacific Partnership, would these also be areas where you would think that the British Parliament should be seeking to have more engagement—in Washington and with the CPTPP?

Dr Fowler: There is always scope for such things, and it can be very, very helpful. Obviously, at some point, there will start to be resource questions, not only about the staffing and travel costs for all these things, but in terms of Members' time. You are all extremely busy as it is. Flying off to international meetings is another thing that you will need to add on top of all your other responsibilities. But obviously, in principle, it is a good thing and it can be very useful.

Maddy Thimont Jack: I think the key point is prioritisation. Of course there are opportunities for Parliament to engage with different bodies and with different Parliaments as well. That relates to Brigid's point—inter-parliamentary groups perhaps being a better way to engage with other member states' Parliaments. But I think it's worth saying that whatever



HOUSE OF COMMONS

happens, over the next few years the UK is going to be preoccupied with its relationship with the EU. That is why, maybe for the short term, that should be Parliament's priority. For the longer term, I don't know; I don't think anyone knows quite how things are going to pan out. It might be that in five or 10 years, engagement in Washington, for example, does become more important, but I think that at the moment—given that if we leave with a withdrawal agreement, there will be a transition period and there will be future relationship negotiations going on with the EU—Parliament's engagement with Brussels, the European Parliament and other member states' Parliaments will continue to be very important. Actually, in terms of negotiations, member states are going to be quite important in the next phase of negotiations, so engaging with national Parliaments to understand how member states are approaching this and what their priorities are is probably quite sensible. Potentially, this whole issue has to be broken down into the short-term, medium-term and long-term questions. We can't necessarily answer all of them at this point, and a lot of the answers to the medium and long-term questions are still very, very uncertain.

That was a slightly waffly answer, but in terms of the priority, I think it would still be very important to engage with member states' Parliaments and with the European Parliament. In the longer term, maybe that will become not quite as important. That will be a question for Parliament to decide, in terms of where it wants to focus its resources, as Brigid says.

Q128 Chair: I have one further point on that. Of course, if you look at it in political terms, that is one form of relationship. In economic terms, look at the Office for National Statistics for the relationship between us and the EU and the extent to which our trading has diminished with the EU. They say that 90% of all the future trade in the world, in terms of GDP, will be outside the EU. That is an interesting question and comes back to the question of international engagement. Our surplus with the rest of the world is significant and growing. Our deficit with the EU is huge—£90 billion a year, in round figures—and going up. The deficit is going up with the EU, so in terms of our trading relationships, there is a really good reason for us to be looking elsewhere as well. So everything that you are saying on this is very important.

Adam Cygan: Could I add something on that? One issue, of course, is that there could be as well some sort of WTO Committee in the House that is looking specifically at what is happening within the World Trade Organisation. If that is where the UK is going to be looking at placing its trade policy in the future, we should have an understanding particularly of the dispute resolution mechanisms of the WTO, which raise a number of questions around enforcement and application. I think that is something that could be monitored, in not too dissimilar a way from the European scrutiny activities that go on.

Chair: David?

Mr David Jones: I have finished, Chairman.

Chair: If nobody else has any further questions, thank you very much for coming. It has been very interesting.

Examination of Witness

Witness: Sir Ivan Rogers.

Q129 **Chair:** Sir Ivan, welcome to the Committee. We have known of you, of course, as our ambassador to the EU for several years in the past, and we also are well aware of your trenchant comments, which have been made periodically and sometimes quite frequently, including in an article in *The Spectator* in the last few weeks. I thought it would be helpful to kick off with this question. You heard, because you were in the room, some of the very interesting questions and answers that were deployed with the first witnesses regarding the withdrawal agreement and the transition period, with which I am sure you are more than familiar. Were you actually dealing with the withdrawal agreement itself in its early stages?

Sir Ivan Rogers: No.

Q130 **Chair:** That was after your time.

Sir Ivan Rogers: It was after my time, yes.

Q131 **Chair:** Because you resigned somewhat abruptly in the circumstances—is that right?

Sir Ivan Rogers: It was certainly abrupt, yes.

Q132 **Chair:** Yes. If the withdrawal agreement were to be ratified, do you foresee a continuing need for Parliament to scrutinise the development of new EU laws and policies during a post-exit transition period? If so, which areas of policy should it focus on in particular, and which do you think might be less important?

Sir Ivan Rogers: The short answer is yes, clearly, during any transitional period. Obviously, we will have to see what is in any withdrawal agreement and whether it is ratified, but assuming there is a withdrawal agreement and it is ratified, there will be a transitional period, which, as you said in the previous session, could always be prolonged. Over that transitional period, as you also said, we will be subject to laws made when no British representative, either in the Council or in the Parliament, was in the room. As you say, that is a rather unprecedented situation. Scrutiny will have a different purpose; you will not have a scrutiny reserve, because there will not be UK officials, UK Ministers or, indeed, UK MEPs involved, but there will be a need to scrutinise what is emerging from the pipeline—the sausage factory—in Brussels, yes.

Q133 **Chair:** Did you not agree with the previous witnesses, distinguished as they were, who all agreed with my suggestion that there would be a problem if, in the withdrawal agreement, we were to find that there were either accelerated procedures or laws passed behind closed doors—if we did not have any influence, and laws that we were expected to obey were



HOUSE OF COMMONS

made over our heads? In such circumstances, there ought to be a mechanism, through the processes that hopefully we will witness and consider over the next few weeks or perhaps even days, that gave us a means to protect our vital national interests. In case something were to happen, it would be a matter of considerable prudence to make sure that we were not actually left stranded on the beach by laws that would cause us economic damage. Would you not agree?

Sir Ivan Rogers: I would, and I agree with the witness who said that in the absence of a provision in the withdrawal agreement that gives us a veto right, which I do not expect to be present—it certainly is not in the draft agreement, and as far as I can see the UK authorities are not seeking it and presumably do not have an expectation that they would get it if they did—you are right that we may face this situation on vital dossiers. Under the current set-up, there is nothing that can be done, presumably other than UK Ministers in the Joint Committee making vehement representations about this being of vital national interest and the draft legislation that was being imposed on us being a problem for those national interests.

Q134 **Chair:** We are very fortunate to have you here, because you are a former ambassador to the EU. Given your experience, and looking at the manner in which the withdrawal agreement was put together—we do not really know at this juncture whether it has complete symmetry with the previous one in certain respects, but leaving that aside—you have given us a cautionary warning that it could be a real problem in terms of democracy, accountability and law making. How would you—if I may put it this way—reconcile that position with the fact that under article 129 there is a very specific provision in relation to vital stated national policy reasons why we could exempt ourselves from the common foreign security policy, but not in relation to any other area within this monumental number of competencies that the EU presents? What do you think about that? They knew it was coming, because otherwise they would not have put it in 129, would they?

Sir Ivan Rogers: Clearly. I think I would have to leave you to ask those who are responsible for negotiating the agreement; as I say, this is all after my time.

Chair: I can assure you that it is being done.

Sir Ivan Rogers: All I would say is that, as you know—it is a subject of public record, and indeed some of my ex-colleagues said it about me in autumn 2016—I was extremely preoccupied by the issue of transition. Let us not go too much over the history of why, what I said at the time, or the reasons I said it, but I was focused on the reality, which I think has been borne out: that in practice we would not have a trade agreement or anything like a trade agreement. I hoped that we would have a thin, non-legally binding framework agreement in operation by about spring 2019, and we are already several months after that. I said openly, both internally and then ultimately at the time of my resignation, that there would then be a period of years between the formal leaving of the



HOUSE OF COMMONS

European Union and the arrival and entry into force of a new, hopefully decent preferential agreement, of whatever status that is—whether that is Canada, Canada-plus-plus or—

Q135 **Chair:** But you are talking in general terms about a free trade agreement, which Donald Tusk—

Sir Ivan Rogers: Yes, but the point I was making—obviously unsuccessfully—to Ministers at the time was that there was going to be a sustained transitional period between, say, 2019 and 2023 or '24. The preoccupation that I had, which colleagues could evidently see, was that we might emerge in a state where we were voiceless and choiceless over a sustained period. As I say, let us not rehearse the history, but that was one of my biggest preoccupations in autumn 2016: that we were heading into a transitional arrangement that might end up in the so-called vassal state. So you would be in the worst of all worlds, where in principle you could be subject to legislation that you had had no part in formulating.

That is why I was preoccupied by Ministers telling me, "Don't worry, Ivan; you don't understand." They said to me repeatedly, "You don't understand; we are going to have a trade deal in place with the European Union on the day after exit." I said, "With the greatest respect, we are not"—I think I am proven right—"and because we are not, there is going to be a hiatus, potentially of several years, during which we can be subject to the whims and vagaries of EU policy making and policy makers in a room with no Brit representation to raise the flag, or indeed to raise a veto in those areas where we would have had one." That is why I was so preoccupied by this issue in the autumn of 2016.

Q136 **Chair:** Of course, we wouldn't have had a veto, because it was whittled away almost to extinction since 1971.

Sir Ivan Rogers: Sure. As you know, I don't disagree with you on that.

Q137 **Chair:** I actually took the trouble to read the White Paper of 1971, and it is crystal clear. I know the competences have increased over the years, up to and including Lisbon, but the reality is that we have increasingly been affected. As you know, we took evidence on this a few years ago in relation to the consensus and majority voting. I mentioned in the earlier session that Simon Hix has done some incredibly interesting work to demonstrate the number of times we were out-voted, and by whom. These are things that are familiar to you, but to anyone who reads the transcript of this sitting it might be interesting to ask you to expand on that a little, because it seems to be a question that has barely received the degree of public interest that it should have.

Sir Ivan Rogers: As you know, Chair, we agree on the data and the facts behind this. It was the choice of successive British Governments over successive intergovernmental conferences to allow a progressive broadening of the use of qualified majority voting which, on balance, successive Ministers and Prime Ministers concluded, rightly or wrongly, was in the UK's interest because they wanted to push forward single market completion and thought that others, primarily on the other side of



HOUSE OF COMMONS

the channel, were the obstacle to the completion of the single market. Therefore, on balance, the further extension of QM voting was in our interest, with the exception of certain areas such as direct taxation, where we retained a veto.

That has happened through successive intergovernmental conferences under successive Prime Ministers of both colours over a 25-year period. Do I as an ex-Treasury official have qualms about the further extension of qualified majority voting? In certain areas, yes. Do I have concerns about the extension of co-decision, which has now become universal? Again, you know that the Lisbon treaty was a fundamental extension, which changed the institutional balance in favour of the European Parliament and to the detriment overall of the Council. I have reservations about lots of these things, but it is simply a statement of fact that Ministers of the Crown agreed to that.

Q138 Chair: This is particularly interesting, not least because in June 1986 I put down an amendment on the single market that I was not even allowed to debate, despite my representations. It said, effectively, that nothing in this Act shall derogate from the sovereignty of the United Kingdom Parliament, by which I meant that there would need to be a provision, notwithstanding any declaration or treaty, the effect of which would be that we would be able to exercise a veto if it was in our vital national interest. In other words, we wanted to co-operate, but we did not want to do it at their behest.

Sir Ivan Rogers: I totally understand that—we had better not rehearse 1980s history. The reality is that if you ever did have such provision, others would have to have it, too. The French and the Germans would have to have it, and, by definition, they would use it. Then the question is: can you make progress on the delivery of the single market? That is the judgment, to be clear.

Q139 Chair: That is understood, but the problem is now, as we leave the European Union. We had a veto when we came in, in 1972. As we go out, what you have described is completely accurate: others would have wanted it, but they are not leaving and we are. The case for having some degree of protection in relation to our vital national interest seems to be quite clear as we go out in the transition period, in case we were to be hijacked by something.

Sir Ivan Rogers: Well, we will have to see whether that has any place in the withdrawal agreement. I very much doubt it from everything I hear.

Q140 Mr Fysh: We obviously have to see what ends up in the withdrawal agreement or treaty that comes out. Some say that, almost whatever it says, the condition will have changed. We will be out. Practically speaking, in terms of insidious legislation being promulgated purposefully to damage us, there are things that we could do and ways we could behave that mean that, in practice, they would not want to do that. To what extent to do you think that is realistic? Does the sincere co-operation clause in the draft withdrawal agreement make it impossible for



us to conceive that?

Sir Ivan Rogers: “Impossible” is overstating it, I think. We won’t know until we get there whether people might deliberately produce legislation in certain areas that is clearly inimical to our interests and create that as the status quo ante during the period in which we are in transition and trying to negotiate a trade deal. It is possible; I certainly wouldn’t rule anything out. I start with the belief that it is perfectly possible that the 27, on their own, will take different directions on certain key dossiers, where we used to have a vital national interest within the European Union, but we are no longer there.

Yes, there will be some self-denying ordinances, I would have thought, on both sides of the table, not to go there, because you are trying to negotiate a trade agreement, if we are in a withdrawal-agreement followed by a trade-agreement world. Then the question will become—you are already seeing it this week—the depth of that trade agreement, the breadth of it, how far you want to go, what Canada-dry, Canada-plus or Canada-minus mean, and will that then have conditionality attached to it? I suppose my point is that behaviours will very much depend on people’s incentives and what they think they lose by behaving badly.

Will there be an appetite on the part of certain players in certain domains to take European policy making in a different direction now that the Brits are no longer there? Incidentally, we should be relatively grown up and relaxed about that. If we want to be outside, it’s because we want to be a competitor and to go in a different direction, isn’t it? What is the point of Brexit unless you want to diverge at least in some respects in some areas? I have never really understood this argument, and we can come to the alignment argument more full. My problem is with the withdrawal agreement. But you are going to diverge at least to some appreciable extent in some areas, and you are presumably doing so deliberately because you wish to compete from outside. Then we cannot really object if they wish to compete from inside, and I am afraid that may mean taking some actions that will be deliberately damaging to the UK economy.

Q141 **Chair:** Sir Ivan, you wouldn’t allow yourself in those circumstances to put yourself into the position of—as you described it earlier—a vassal state, where they have incentives possibly to do things that you didn’t particularly want done to you, but actually they would have the power to do it, and you would be deeply powerless to prevent it if you did not put into place some form of protection for your national interests.

Sir Ivan Rogers: My concern about this, which is why I go back to what I was trying to say to people in 2016, is that once you are in that position, you then of course have an incentive to get on with it in order to emerge from the other side of the transition—who knows what the election timings will be—but then you are up against the clock again. Surely, if we have learned anything over the past three years, it is that the EU is really rather good at using the clock in negotiations, and the pressure of time, in order to maximise the substantive concessions it gets out of you. They are quite good negotiators, these people, and they have worked out the



HOUSE OF COMMONS

methodology for article 50. My strong sense from viewing the dynamics that are in play now is that they will use a substantially similar methodology in the next phase over the next two to three years, and the British desire to get out of the transitional arrangement, which you are expressing, may be helpful in squeezing further substantive concessions out of the then UK Prime Minister.

Chair: That is interesting.

Q142 **Kelvin Hopkins:** What you are implying is that there will be a dose of realpolitik in all these negotiations—

Sir Ivan Rogers: Trade policy negotiations are not a seminar between economic liberals; they are a fairly mercantilist fist fight on occasion, and they can be quite unpleasant.

Q143 **Kelvin Hopkins:** Indeed, but it is possible that the EU won't want to be unnecessarily provocative, any more than we will. I have been to many meetings—at COSAC, for example—and what is very obvious is the dominance of the German interest in the EU. Is it not the case that Germany would be less likely to be provocative towards us because of their big trade relationship with us? They sell vastly more to us than we sell to them—four times more cars than we sell to them—and they won't want to upset those relationships. They depend very strongly on their manufacturing sector and their exports to us. They would not want to be provocative.

Sir Ivan Rogers: Yes, up to a point. Again, the history of the last three years does not suggest that. We've had endless repetitions that the German car manufacturers would sweep into Chancellor Merkel's office and change the German position for the better, because of the extent of their trade surplus in the car sector. It hasn't happened, and I have talked to the German car industry and other German industrialists even since exiting. I have had several trips to Germany and, actually, they broadcast essentially a very German Government line about the integrity of the single market being paramount and relations with Britain being secondary.

Yes, there is an interest and, yes, there is also an appetite in Berlin—who knows what they think about the history of the last several years?—to think, "We're losing a partner within the European Union that is pro-free trade, pro-competition, northern, liberal, Atlanticist and a reliable security partner, and this will be a source of some regret." I have seen Frau Merkel and others close up for many years in various capacities, and I wouldn't overstate the direct and immediate mercantile interest in the UK market when it comes to fundamental questions of European policy, because it doesn't actually come through.

Kelvin Hopkins: I'd love to pursue this debate, but not now.

Sir Ivan Rogers: I'd be very happy to.

Q144 **Mr David Jones:** Sir Ivan, you touched on the issue of the sequencing of the negotiations. Do you believe that the British Government were right



to accept that sequencing, particularly given that—if I remember rightly—article 50 provides that the negotiation should take into account the future relationship between the EU and the departing member state? So far as I can see, that particular aspect of article 50 has not been addressed at all in the negotiations that we have had so far.

Sir Ivan Rogers: I don't want to rewrite history or imply wisdom after the event. A number of us were saying—I hope quite loudly—that we should be careful about promising to invoke article 50 by a date certain without knowing, first of all, where we were going. At that stage we didn't. That is no criticism of anybody, incidentally. We had a new Prime Minister working at tremendous speed to get up a learning curve herself as to what this was all about and what her negotiating objectives should be, and huge political pressures from everybody to get on with it and demonstrate that we were getting on with it and invoking article 50. Of course, as a negotiator—I hope with some experience of negotiations and how to do it—you are saying, "These guys are desperately keen for you to guarantee a date by which you invoke article 50, but once you are on those tram lines and have guaranteed by a certain date to invoke, they will refuse to talk to you." You remember that we were working together at the time they were doing the "no negotiation without notification" mantra—in other words, "We are not even going to open preliminary discussions with you about where we can get to until you have invoked article 50." You would say that if you were them, because you are maximising your leverage against the British, but then, once she had guaranteed a date by which she would invoke article 50, she lost her leverage to have the sequencing negotiation and to have crystal-clear discussions with the key other leaders about where we all needed to have reached by the end of the two-year process.

I would have wanted to do that and was arguing for doing that, and I think it was very important to do that. In other words, I don't sign on the dotted line of going down an article 50 process until I know much more clearly what I want, but I also know the running order and how we are going to run this article 50 process. That would have entailed some pretty brutal conversations very early on. I'm not saying it would have been easy. There would have been a lot of push-back and, "You have to invoke. We don't want to talk to you until you have invoked." But it would have been, in my view, preferable to say to, above all, French and German leaders and the Presidents of the Council and the Commission, "I'm not walking into this game until we can define together the shared ambition for where we will reach at the end of it." That was really my only point.

Q145 **Chair:** You may be interested, if you hadn't noticed already, that we did a report a year last March—I confess to having quite a hand in the writing of it—on the question of whether or not we should have accepted the terms and conditions that were prescribed by the European Union on us as the basis for our moving forward. It struck me that we left lawfully—we had a referendum, we passed Acts of Parliament, and Members of Parliament, including, in fact, every Member of the Conservative party, were signed up to the withdrawal Act, which said that we repeal the 1972



HOUSE OF COMMONS

Act—yet we seem to have got ourselves into a position in which we allowed the European Union to determine the terms and conditions on which things went, including the sequencing. Given those circumstances—

Sir Ivan Rogers: I had left, obviously, by January—

Chair: But your reflections on this at the time you were there, and what you said subsequently, seem to bear out the fact that certain things could have been done quite differently.

Sir Ivan Rogers: Well, I would say that, wouldn't I? I had obviously left by very early on in January 2017. I thought we were making mistakes on the handling and the strategy. I do think I know how the European Union negotiates, both internally and externally, with partners—both third countries and existing members. They negotiate very well and hard-ball, and they use process and their control of the process to dictate the play. You do have to understand that. I am not being hostile there to perfectly good friends and colleagues and people I have known for a very long time; they are very good at it.

I also worry, from a European Union angle—I have been publicly critical of what I have called the strategic myopia—that you set up a technocratic process that is quite good at grinding people into the dust, but the danger is that it is a technocratic process that runs on its own tram lines. Are leaders seriously thinking about where this is going with the British, and where we want to be with the British over a 10 or 20-year perspective? The answer is no, in my view. However, they are very good at setting up processes, and you have to be extremely clear-eyed about what process they are going to set up, with what purpose.

Then you have to, as I say—I think it could have been done, but it would have been very difficult, and I appreciate entirely the domestic political pressures on the Prime Minister at the time of the party conference and subsequently to say, "There is a certain date by which I am invoking." However, having done that, she gave up quite a lot of her negotiating leverage, and I am afraid that, by the time I resigned, I was very pessimistic, both about her own prospects of survival and about this negotiation going anywhere. I am not being wise after the event; I was saying it to people at the time: "I think we have set this off in a way where it is pretty much bound to fail."

Q146 **Chair:** Did you read Paul Lever's book "Berlin Rules"?

Sir Ivan Rogers: Yes, absolutely.

Q147 **Chair:** And did you find a lot of it accurate, interesting and perceptive?

Sir Ivan Rogers: Yes. Paul is a very good and very experienced diplomat of a different generation from me, and knows a lot about Berlin. I share the view, obviously, that Berlin has become a much more critical and central player post the fall of the Berlin wall and post-Maastricht than it was before.



HOUSE OF COMMONS

Sometimes, British politicians—I am not saying this is you, Mr Chairman; you were around during that time you are alluding to, and before that time, but Maastricht and monetary union were, in part, if not wholly, a geostrategic response as much as an economic response to the German question returning to the table in Europe. The German question has, after all, troubled Europe for about 300 to 500 years, frequently with deadly effect, and three times in the period up until 1945. You can understand, from the point of view of French and other elites, the need at the point of German reunification to move forward on the monetary union project.

I was in the Treasury at that time, and then in the Treasury subsequently doing the analysis of EMU and whether we thought it was a good idea at all, and whether the UK should be in it. The Treasury view on this is pretty clear. The point is that, for others, rightly or wrongly—obviously, this led to many foundational problems with the eurozone that they are still grappling with—it is essentially a geostrategic response to the fall of the Berlin wall and German reunification, and therefore the risk for the French that, once again, you have a hegemonic Germany dominating the European scene. We should understand that. Margaret Thatcher understood that very well—that that was what it was all about. She had many occasions at Chequers to discuss precisely that question.

Chair: That is why they got rid of her, actually.

Q148 **Kelvin Hopkins:** Actually, setting up the euro was to Germany's advantage, because all the other nations attached themselves to the euro at what are now obvious overvaluations of their currencies, which holds down the value of the euro—which is essentially the deutschmark in disguise—and gives Germany a massive competitive advantage with all the other members of the European Union, including ourselves, and the rest of the world. If the euro was dissolved tomorrow, the deutschmark would immediately appreciate, and we would get into a more sensible and balanced trading arrangement.

Sir Ivan Rogers: It is a huge set of discussions, probably going beyond the purpose of this session. My point is that—I do say it publicly to audiences—you can argue that Brexit started in 1973. You can certainly argue that post-Maastricht and the arrival of monetary union, we are on divergent tracks despite the subsequent treaties, the further introduction of more qualified majority voting, Lisbon, and so on. We negotiated, very like the Danes, a whole series of opt-outs, some of which worked better than others. Obviously, the opt-out from monetary union was a unique opt-out; we did several others, and I spent a lot of my career doing them.

My point is that very clearly, the core eurozone players and the UK had different conceptions after 1992 of what this thing was about. My own view is that the Cameron deal and renegotiation was essentially the last attempt to remain the outer perimeter fence of the European Union but with loads of special deals from within. What we are grappling with now—again, I do not want to sound wise after the event—is the opposite problem. We want to go outside the outer perimeter fence, but at the moment cannot totally define where and how far out. To a degree, again



HOUSE OF COMMONS

without disrespect to any of the politicians arguing for it, we want the best of both worlds; so we want close integration and continuity where it suits us—electricity and gas, and lots of other areas of the single market where we basically rather like the status quo—but we don't want the European Court of Justice and the other political and juridical impediments. But in some areas we want to be free and sovereign and autonomous and go a long way out in order to do our own thing.

What we are getting from the European Union, rather understandably, is, "Well, you can't have it both ways. You can have divergence across the board or you can have ongoing convergence and alignment. There are various models we can offer you"—hence the Barnier staircase graph of "There are the following types of models: please choose one" and de facto, "Your red lines—you did choose one and it is over here." In my view, the whole negotiating history of the last three years has been bedevilled by this, I am afraid, continuing lack of clarity about what destinations are available after Brexit and what the trade-offs between sovereignty and market access really are.

Q149 Stephen Kinnock: Thank you very much, Sir Ivan. Just thinking about the lessons that have been learned from this period since the summer of 2016, and projecting those lessons on to where we go from here, and assuming that Brexit does go ahead and that we have this transition period: you talked about process and you are talking about two things, really. I think you are talking about the need for strategic vision of what is actually the destination we are looking for. That has been lacking—at least there has been the lack of a coherent sense of that, even within our own Government. Then the other is process.

What advice would you give, if you were in No. 10 now, or in the Brexit Department? What would you be saying to Ministers about how do we start to position for this transition period? How do we position for turning the political declaration into a negotiating mandate? How do we engage with other member states? Because, of course, if it is a mixed agreement you are going to need ratification by national Parliaments. That is potentially an opportunity for us that we haven't had until now, because we will have a more diverse range of stakeholders. How do you set up a process that is at least the equal of the highly efficient and streamlined process that we know we will be facing on the other side of the channel? What advice would you be giving in terms of lessons learned, and what is the best practice for these types of negotiations?

Sir Ivan Rogers: It is a huge question and merits a session or more in its own right. I would centralise it around the Prime Minister's Office and a team beneath the Prime Minister. My views are, again, well known. I wouldn't have set up DExEU in the first place. I understand why we did but I don't think it was the right answer. I don't think it's given us the right answer. I wouldn't give it to DExEU in the next phase; I would give it to a sort of Chancellor of the Duchy of Lancaster figure, beneath the Prime Minister, with political authority, because the Prime Minister is going to spend his entire working life on the trade negotiation, but he is going to have to be across every aspect of it, and the politics of every aspect of it.



HOUSE OF COMMONS

I think it needs to be centralised in Whitehall, speaking as a kind of old Whitehall warrior, because Departments have to believe that they are reporting in both through officials and through senior Ministers, to a single boss, and it is a unitary process; and that their words vis-à-vis their own Secretaries of State's key preoccupations are going to be listened to, but they are part of a collective process which is run pretty transparently by the centre, which brings together the kind of big beasts across the key Departments in Whitehall, and brings together a collective—because the difficulty here is very obvious.

The system will presumably have its own views across Departments, but Departments can be very siloed, let's be honest, and horizontality in Whitehall is often very difficult. Secretaries of State will have their own views, but in the end you can only have a single negotiating position, and it's got to be extremely disciplined when you've got it; and that has to be thought through by Ministers and blessed by Ministers, and ultimately endorsed by the Prime Minister, and "This is where we're going and we regard these objectives as more important than those objectives." So without working through every aspect of your bottom line you do have to know: what are your priorities; why are they your priorities; what is the endgame; where are you trying to get? Then there has to be iron discipline across Whitehall.

The Commission, contrary to its reputation, is really rather good at that. It's had a lot of practice with third countries and a lot of practice with—as we saw with taskforce 50—discipline on message and transparency. They also dominated the debate, in my view, by putting out documents at the right time, which then our own media and everybody else's media congregates around, saying, "That's the agenda," and the Brits were, for their own reasons—again, I understand the politics of this—really playing catch-up and being very passive and being very quiet. And if you are very quiet in a negotiation, the other side is very often dictating the play.

So I think there are lots of things you can get right. Lots of thought will be going on and is going on in Whitehall about this, but it does need a very sober examination of the trade-offs of what counts and why does it count, because the politics and the economics will not always point the same way. We may say that the fisheries industry is a minor exporting industry, but it has huge politics around it from the referendum onwards, which may mean it has much greater salience for politicians and for this House, perfectly legitimately, than, say, the mushroom industry. I don't know.

Officials have to produce the analytical work in every Department and bring it all together for Ministers and then Ministers beneath the Prime Minister have to have a collective decision about what matters, why it matters, where we are going and what we are seeking to negotiate. Then, of course, in any negotiation, you are going to get thrown by various things that come from individual players; people are not just going to give you the first set of objectives that you wanted. You need a very clear negotiating strategy as well, driven from the centre, about what we are saying, at which point and how we are doing.



Q150 Stephen Kinnock: I have a quick follow-up on that. There is that crucial period between the withdrawal agreement and the political declaration being ratified, and turning that into a negotiating mandate. That will be the first step—there will be negotiating guidelines, just as we had for the article 50 process. I think what you are saying is that it is vital that we are out of the blocks quickly—that we have our negotiating guidelines and we don't just allow the EU to dictate the negotiating guidelines. But that does require clarity on a strategic vision or, in your analogy of the perimeter fence, where do we want to sit? That needs to be pretty clear in the political declaration. I suppose my question is, to what extent do we need to have a political declaration that really does give a solid basis for a negotiating mandate? Or is there substantial scope for a shift between the political declaration and the negotiating mandate?

Sir Ivan Rogers: There must be some scope because the political declaration may or may not change. Obviously, the big issue this week or next week, or whenever this thing gets settled, if it gets settled, will be on level playing field conditions and whether the Prime Minister wants to insist on taking some of what was in the original political declaration out of the political declaration, and then how individual member states, above all Germany and France but also Belgium and others, react to that. Do they think, "Well, we can be relaxed about that because we can put that in our negotiating mandate at 27 and specify in our instructions to the Commission that unless we get the following on level playing field conditions, there is never going to be a deal with the UK"? I suspect they won't think that, because the difficulty with this process now is that they have a legacy effect; the thing they have signed off in their Parliaments is the Theresa May withdrawal agreement and political declaration—so going backwards on a political declaration that already exists is politically more difficult for them than had it never existed. Is there going to be a row about that, even in the next few hours and few days? That is perfectly possible. That is one sticking point I see for the next few days.

I do think there is time in the UK system, but not much, to get a grip on what we really mean, because you have got to go in much deeper than that. We have got to have a much more worked-up set of propositions about what matters to us and why it matters.

Q151 Martyn Day: Do you foresee the need for a new and bespoke scrutiny arrangement for the EU-UK Joint Committee, and if so, what form should that take?

Sir Ivan Rogers: Yes, I think I do. I should add that I am not an expert on the Joint Committee or what could be set up beneath it, but during that period when the Joint Committee is in operation, it seems to me that you do need scrutiny arrangements that are analogous to the kinds of arrangements that operated when we were within, and scrutiny of what Ministers were saying in the Council. You want at least one Minister to be accountable for what is being said in the Joint Committee and for that to be politically driven, and for you to be all over what positions are being taken and why in the Joint Committee. So, yes.



HOUSE OF COMMONS

There are several different elements. What are we trying to scrutinise? First, there is this limbo transition period, which may or may not be extended, during which we are voiceless and choiceless and there is a risk of things being done to us that we find deeply damaging. You can't scrutinise that because you don't have a scrutiny reserve, but you do need a process within Whitehall where you know that all key Whitehall Departments and UKRep are on it and spotting what might be coming down the pipe. Whether that is you or Select Committees, and how that fits, I do not know; but there are separate processes. The work of the Joint Committee is scrutinisable in its own domain. There is what might be coming down the pipe—horizon-scanning. What are the dangers to us? What are the opportunities to us? Where is the European Union going under von der Leyen's leadership in the Commission? What is the legislative programme? What are the big-ticket items that we ought to care about? Then there is scrutiny of the trade negotiations, which has to be a different beast. Is that a different Committee? What is the UK saying, and what is it prioritising in those trade negotiations? That seems identifiably separate from the Joint Committee work.

After we have reached the nirvana state of whatever deal has been struck, and a free trade agreement with Europe, we are in a different world altogether. I agree with what the previous witness has said, which is that it depends how thin it is. If it is very thin and just an ordinary FTA, you will still need the horizon-scanning bit. The external environment, what the European Union is doing, and how far we want to diverge from it and why, is still a very material question for this House, and I don't think it would be were it about divergence from Japan or even from the US. However, that is not remotely the same as what you have been doing in recent years. I think you have to carve it up into identifiably different chunks and tasks.

Q152 Martyn Day: On the joint EU-UK Committee, what level of transparency do you think would be appropriate for those activities? That obviously leads into what level of scrutiny there will be.

Sir Ivan Rogers: You may have to do restricted sessions and closed sessions—that is more your business. Perhaps it is just because I left the civil service, but I am more in favour of transparency, including on trade negotiations—it is more rather than less. I think the withdrawal agreement process was too secretive and dominated by keeping everything under wraps, which I don't think is sustainable or desirable for the country and Parliament.

We have to be sensible. If your negotiating position is completely known in every detail by the other side and it emerges, that is a problem, so there may have to be green-room-type arrangements where parliamentarians can go and read documents. The European Parliament is worth looking at—for example, how did it try to negotiate TTIP with the US? How does it negotiate sensitive trade deals? The European Parliament Committee is saying, "We have a right to know what is being said, how it is being said, and what the negotiating dynamics are in quite some detail." Of course, European Commission negotiators are saying, "If we divulge all that to you, we might as well tell all our tabloid newspapers across the European



HOUSE OF COMMONS

Union, and then our negotiating opposite numbers will know our full position.” There has to be some sensitivity—negotiators must be able to keep something up their sleeve, but I would err more on the side of parliamentarians knowing in some detail what the negotiating dynamics and position are, what our priorities are, and what the other side has been saying so far.

This will involve multiple rounds of incredibly boring trade negotiations on every issue from financial services to fish and phytosanitary products. It will be inordinately complex and produce a voluminous legal text. You will have individual experts who are obsessed with bits of it and couldn’t care less about other bits. Just to close it all off from parliamentarians and say, “It’s none of your business; we’ll tell you when we get to the end”—I don’t think that really works.

Q153 Dr Whitford: I am coming to the thorny issue of Northern Ireland—I accept it is hard to discuss as it is changing while we are sitting in this room. We had the December 2017 Northern Ireland-only backstop, then the UK-wide one. Since we have had a new Prime Minister, we have Northern Ireland in the single market but not in the European customs union, and now it could end up in two customs unions. Of course, we don’t know what the deal is that is being echoed around. What are your views on that, particularly if the final version does not envisage alignment in Northern Ireland with things like customs VAT excise duty?

Sir Ivan Rogers: I would want to see a text. The mood music and vibes seem to be better than they were this time last week, when, if you had had to predict it, you would have said the whole process was about to collapse and end in tears. I haven’t seen any text, and neither has anybody else, so I don’t know. I think I am aware of all the ideas that have ever been in play and circulation, and frankly I have always struggled—that is one of my reasons for being cautious about whether there would ever be an outcome, and whether I could find a sweet spot in the negotiation that both sides could agree on. There may just be one, and we may have located it. There is now definite political appetite, I think, on both sides to try and nail it.

(In the absence of the Chair, Mr David Jones was called to the Chair.)

I was very sceptical, very openly and publicly, about the PCA idea—the Schrödinger’s customs union for the whole of the UK. My own view is that it was completely inoperable, but also that there was absolutely no reason why anybody else should agree it. I thought it was a nonsense of an idea, in all honesty. Again, I am not saying that as new; I was saying that in the system in late 2016. I don’t agree with the idea.

For Northern Ireland specifically, it is a much different proposition. Can you make something like that work, and can you make it operable by the end of the transition? I don’t know, and I don’t know how far the UK has got with its ideas on that. Can you allay all the concerns that the other side of the table will have? But it is, of course, a clever way of trying to reconcile fundamentally different objectives, and for everybody to go



HOUSE OF COMMONS

home saying, "I have achieved my core negotiating objectives", so you can see why that has emerged.

Something between there and the original February 2018 "backstop 1.0" is presumably the landing zone, but I want to see the document and I want to go through the document when we get it—if we get it.

Q154 **Dr Whitford:** So you think the talk of breakthrough might be that there has been a further move to a Northern Ireland-only single market and customs union?

Sir Ivan Rogers: It sounds uncannily close to bits of February 2018 to me, but I don't want to be unkind. I want to see it in print, because you need to see these things in print to work out where people have landed and why they think that's an answer.

Q155 **Dr Whitford:** Obviously, some of the interim versions were talking about having access to the European VAT system and customs and excise system, without much recognition that that is actually part of a much bigger fiscal set-up. Do you think that it would be at all likely that Europe would allow that if Northern Ireland and the UK are completely outside those systems?

Sir Ivan Rogers: I would pass on that at the moment. As I say, what does seem to have changed in recent days is that there is a genuine sense that we might be able to get somewhere and there might be a push for the line, and whether you do so at the Council tomorrow or at a subsequent Council, there is political momentum behind this process, which has been absent until the last few days.

I don't agree with those in the UK debate saying that others want to prolong the agony and keep the UK in, in the hope of reversal. I don't think they do. I think they want to get it done and get it over with, if possible. Then, if they can nail something that they think has a very serious chance of flying in the House of Commons, they will go for it.

However, they won't sacrifice core principles on integrity of the single market, fraud risks and whatever. You cannot have any completely risk-free option; we have all known that forever on the Irish border question. So there will be a weighing-up of risks, and I think leaders will have to go through this in person both tomorrow night and later—usually it takes two goes on these things—and leaders have to knock it around themselves, and really go through it. They will have some real reservations and some of those will surface in the room, and you will probably need some process after that. That is difficult, I know, with parliamentary timing, because I find it quite difficult to imagine that we will have a nailed-down, clear legal text by the 19th.

However, I think leaders will probably have to go through this in person in some depth and understand it in the room at 27, and work it through. But it seems to me now that there is a bit of a momentum behind things; we are in the sort of right space.



Q156 **Dr Whitford:** Obviously, there has been quite a focus on alternative arrangements and technology. Do you think there has been a lack of understanding in the Parliament here about what the border in Ireland actually means? The solution to it is not lorries moving quicker than between Norway and Sweden. It is actually the fact that the border for one community is a symbol of forced partition, and therefore it doesn't matter what it looks like and it doesn't matter how clever it is; it is an issue.

Sir Ivan Rogers: Candidly, yes, I do. I have worked for four different Prime Ministers, who in different ways were heavily engaged—pretty obsessed—with the Irish question, and the peace process and entrenching it. They probably spent more of their lives in No. 10 on it than on any other foreign policy issue, if you class this as a foreign policy issue, which I don't think we should, really. And therefore they were across it in quite some detail and they had people inside No. 10 who were across it.

That has changed a bit, because we succeeded. But if you think back to John Major, Tony Blair, Gordon Brown and David Cameron, they all spent a great deal of time on this issue and they were all extremely acute to the sensitivities of it, and at least a sufficient number of senior Ministers were. I think that is a bit less true over the last three or four years, and people have been a bit too sanguine about, "Oh, well there must be some technological resolutions to this. It's sortable. It can't be any more difficult than this."

The sadness I have on alternative arrangements is: could you have got somewhere with a different approach from autumn 2016? Again, I do not want to say that any of this would be easy; it would be extremely difficult, because you can imagine what Dublin's first preference would be and was under Enda Kenny. But if you had broached this and approached it in a completely different way and said, "Over a period of years, we recognise this is an existential security issue, and not just an economic issue, for you, which raises massive problems for you as well as us, but we have to find a resolution that enables us calmly and smoothly to leave both the single market and the customs union,"—I was clear from that autumn 2016 it was inevitable that we would leave both the single market and customs union, so you knew you would face this problem—could you have set up a process involving the Irish much more closely and intimately, with the elaboration of alternative arrangements, saying, "We need to co-design these", as well as things we know, between our revenue authorities and interior ministries, would work? Again, this sounds like a pipe dream now.

Three years have gone by, which have made all that more difficult. Mercifully, we may now be getting to an environment in which people are collaborating, but could we have kicked off an alternative arrangements examination process which culminated somewhere rather happier than where we have been in recent weeks? Possibly, I think. But it veered down the course of the party conference speech and the Lancaster House speech. I am afraid the shutters rather went up from Dublin—not under Leo Varadkar; it was under Enda Kenny—of thinking, "Okay, if that is



HOUSE OF COMMONS

basically how London is choosing to play this, then our interests inevitably are to turn this into a phase 1 issue in the withdrawal agreement and nail down a backstop agreement.” They brilliantly got it into phase 1 of the withdrawal agreement, and that is why it ended up in the backstop agreement of December 2017.

I have to say that when I first looked at that agreement from outside—obviously I was not inside, so I do not know the origins of it and how we got there—you think, “Well, that ain’t going to be deliverable through the House of Commons, so The Prime Minister’s only resort after that is to go for an all-UK backstop, because that is the only politically viable way through. And that isn’t going to be politically viable either, because it will not sell in her own party, so this process is going to end badly.” That is why, I am afraid, I have been saying that it is going to end badly. Because until the last few days, it has been blindingly obvious that you have not got a solution set that can work.

Q157 **Dr Whitford:** But is it not the case that even if Enda Kenny and the Irish Government had come up with alternative arrangements, should they have involved any infrastructure, any symbols, joint border patrol—

Sir Ivan Rogers: Yes, it is tremendously difficult. It is a big, big problem.

Q158 **Dr Whitford:** The border was very much a focus when the troubles broke out in 1969. People are actually frightened, and the island has changed itself. Health set-ups are totally different now, with a lot more cross-border. So even if the Irish Government went, “Oh, we are okay with that”, I am not sure whether the—

Sir Ivan Rogers: I think if you had made it a shared problem and said, “We recognise it will take several years to resolve, but we are leaving the customs union and single market”—bear in mind that a lot of Europeans for a long time, though not now, in my view, did think, “Maybe all this will go away or is reversible. There will be a second referendum or something else, so we do not have to think about the problem.”

If we had been clear from the outset that we were leaving the customs union and the single market—the single market for the juridical reasons I gave earlier on, the European Courts of Justice and political integration, plus wanting to control our own borders, and the customs union because, in the end, do we want to contract out our trade policy like the Turks do to the European Union? Maybe we do, and maybe after an election we will have a Government that wants to do that. I do not think it is sustainable, which again is nothing I have not said publicly before. If that is the case and you are leaving both the single market and the customs union, you are going further out than Norway or Switzerland or even Turkey, so you need to have a very clear set of discussions with the Irish and others about what that means.

Q159 **Dr Whitford:** Obviously that has changed between Prime Minister May and Prime Minister Johnson, who envisages much more of a free trade agreement rather than a close alignment—



HOUSE OF COMMONS

Sir Ivan Rogers: And that is why the backstop question has bubbled up as absolutely central. If you want a Canadian-type destination—there can be a separate discussion on the economics of that—and that is where you are going, the Irish border question becomes the central impediment to you going there.

Q160 **Dr Whitford:** Obviously, we have no idea what is envisaged for Northern Ireland, but does that not create a requirement for some form of ongoing scrutiny? I mentioned earlier that there will be Government alignment or business alignment, but actually there will be aspects of Northern Ireland that will be aligning. Either that will have to be devolved completely to Stormont, if we ever get it open again, or there will have to be some form of specific scrutiny.

Sir Ivan Rogers: You will want some scrutiny and oversight here anyway, even if Stormont is open again, it seems to me. Because there will be implications then for the UK political and economic order anyway.

Dr Whitford: I mean, obviously—

Chair: Philippa, sorry to interrupt but we are rather pressed for time. Are you happy to leave it there?

Dr Whitford: Well, there was just one final thing but it doesn't matter.

Q161 **Chair:** Are you sure? Thank you very much. If we could just pass on. You have said previously—and I'm quoting—"In taking back control over our laws, we are privileging notional autonomy over law-making over real power to set the rules by which in practice we shall be governed." Why do you say that? What do you see as the implications for the role of parliamentary scrutiny of EU laws and policies, and their impact on the UK after Brexit?

Sir Ivan Rogers: The point I am trying to make is not a point in favour of any particular destination or model, because they all have their problems. We should come on to the problems of Norwegian and Swiss models.

There is no clear-cut definition of sovereignty that is independent of when you would exercise it. Sovereignty is partly about your power to influence the state of the world and the environment that you want to live in. It is partly a juridical question for this House: Do we actually make our own laws? I understand that.

You could argue—and I would—that the Norwegians make more of their own laws than the Swedes in the European Union, but in certain areas, which would be hugely problematic were we to adopt a Norwegian model, they are manifestly and in practice rule takers. I don't want to be unfair to the Norwegians. It is a fantastic country. I have just come back from there and discussed with jurists, policymakers, Ministers and energy experts how their model works.

I don't think it is applicable here, but how their model works is really via the EEA processes and via the EFTA court and EFTA surveillance



HOUSE OF COMMONS

authority—but essentially guaranteeing that anything which the Joint Committee concludes will be translated into the EEA, they have to put on their statute book.

Of course, the Storting—the Norwegian Parliament—has formal sovereignty and can decide not to do it. It had a big debate about the third energy package: are we going to introduce the third energy package or not? I am not saying that they don't have formal sovereignty. In practice, all the cards are stacked one way, aren't they? Because, if they don't implement exactly what they have been asked to implement via the Joint Committee, then they are screwed on market access.

Again, I don't want to be at all unkind in my depiction of the Norwegian model but, having not joined the European Union by 52% to 48% in 1992, they did join the European Economic Area, which at that stage had a significant number of legislative instruments, which has rocketed up in the past 25 years. I think they call it five a day in Norway because five legislative instruments a day when the Storting is meeting are imported from Europe into their statute book. There is a huge process of Europeanisation going on. You could say that the public never voted for that; they just had the EEA because joining the EU fell apart.

My point is that sovereignty is a bit more complex than our own debate is making out. If you want divergence in certain areas, there are very good reasons for that, including on things such as free movement of people. You could perfectly well make that argument—fine.

There are certain other areas, where eventually surely Theresa May came back to her industrial goods alignment. Why did she want voluntary and complete alignment from outside? Essentially, because key industrial interests were saying to her, "We don't want divergence. That's the last thing we want. We want a single rulebook. We don't want two different rulebooks, one for our domestic market and one for the European market. That screws the economics of our firms. Your sovereignty is all very fine but we don't want your sovereignty, because your sovereignty is going to damage our interests. What we want is market access."

My hope, which may be vain, is that some time over the next few years we have a serious, rational debate. There are some genuine choices and trade-offs on the spectrum between full autonomy and control of our law making, and then not actually wanting to exercise that full control in certain areas because it's pointless.

Q162 Chair: But that in itself is exercising control.

Sir Ivan Rogers: I know. I understand the difference between formal, juridical and parliamentary sovereignty, but we make a decision each time on whether that is the case. I totally understand that, but there is a difference between your conception of sovereignty and a bureaucrat's conception like mine. If part of sovereignty and control is taking back control over things where you can change your economic regime, there are bits of your economic regime that you can definitely change and will



HOUSE OF COMMONS

want to. There are bits where, if you change them, you are completely screwed, because in practice you are, come what may, in the orbit of a much larger player, and if you diverge from them your firms will just decamp into their jurisdiction. You may say, "That is a decision. They can decamp into that jurisdiction if they want to." I talk to firms all the time about the implications of Brexit and people say to me, "But if they go and do that, we're outta here." Very senior multinational executive people say, "if we end up with no deal or with a deal that takes us completely outside the customs union and single market and doesn't replicate key features of it, then I ain't putting any future investment into the UK. I'm going to go to Slovakia or Spain." That is why I come back to this as a scrutiny point.

When you survey the scene on what is happening in Europe, how far do we want to diverge and why do we want to diverge? Somehow in this House you will have to think across multiple sectors, from financial services to data protection to aviation. How far do we want to diverge and why do we want to diverge? What is the benefit of diverging and what is the disbenefit? That is my only point.

Q163 Chair: Sadly, Sir Ivan, I have to wrap this session up fairly shortly, but there is one matter that I want to raise with you. As you know, the Government made the decision to reduce attendance at EU meetings by over half from 1 September this year. First, was that a good decision? Secondly, what impact do you think that that has had on Parliament's ability to scrutinise?

Sir Ivan Rogers: Again, when you are outside it is very difficult to judge whether it is a good decision. I don't see why, before you left the European Union, particularly if you think you might be moving into a transition period where laws might be imposed on you from within, you would leave the room. The anecdotal stuff that I hear from officials is not remotely scientific, but desk officers who are not allowed to go to the working group that they would previously have attended then spend their time ringing round former colleagues from other member states to find out what happened in the room so that it can be reported back to London. Is this an optimal use of time? It doesn't strike me as terribly sensible.

It might be a matter of a few weeks before you leave, so it is not that the world ends as a consequence, but after you leave you are in this transition, which, as we have discussed, might last a year or two or three years. You are still hugely impacted by everything that is going on in those rooms. Why leave those rooms before you have to? As for the idea that those people who are in those rooms, who used to work for me in those working groups—the UKRep staffers and the class-act people who are there—are liberated from that and go and work on exciting new deals, no, they are not; they are still living in Brussels and are either attending the working group they used to be in or they are doing some other business. As I say, some of the other business is finding out what the hell happened in the room when they weren't there. It doesn't strike me as a terribly sensible thing to do, no.

Chair: On that note, Sir Ivan, may I thank you for attending today? It has



HOUSE OF COMMONS

been an excellent session. I am glad to see that you are in such good heart since you left Government. No doubt you will appear before this Committee again.

Sir Ivan Rogers: I would be happy to.

Chair: I am sure that there will be a continuing role for this Committee, at least for the next few months. Thank you so much.