

Written evidence submitted by George Peretz QC (FRE0037)

1. My response focuses on the issue of State aid, which is the area on which my expertise is most likely to be of assistance to the Committee.
 - What, if any, existing level playing field provisions are already included in the Withdrawal Agreement? What, if any, role is there for the Joint Committee to address any such provisions? What, if any, means is there for stakeholders to enforce any such provisions in domestic courts?
2. As far as State aid is concerned, the key aspect of the Withdrawal Agreement (WA) is Articles 10 and 12 of the Ireland/Northern Ireland Protocol (the Protocol), which applies the whole of EU State aid law, including current mechanisms of enforcement by the Commission, national courts, and the Court of Justice of the EU (ECJ) to the whole United Kingdom after transition, to the extent that UK measures have a potential effect on trade in goods between Northern Ireland and the EU (in particular, of course, Ireland). Those provisions will continue, after transition, to have direct effect in UK law under section 7A of the EU Withdrawal Act 2018 (as is required by Article 4 of the WA) – so will be directly enforceable against all UK public authorities in the UK courts – and their extent (and in particular the application of the “potential effect on trade in goods between Ireland and Northern Ireland” test) is a matter for the Commission or, if action is brought before the UK courts, the UK courts, subject in each case to the supervision of the ECJ.
3. Article 10 is enforceable by any person with standing (for example, a competitor of a business benefitting from a measure said to be State aid that falls under that Article) in the UK courts, which will be obliged to grant injunctions and award damages in accordance with the principles laid down by EU law. They will also be able, as now, to complain to the Commission, which will retain its current powers in relation to such measures (to approve or not approve them if notified, and if they are not notified to order their withdrawal and the recovery of aid already granted).

4. I refer the Committee to evidence I gave on this point to the House of Lords EU Internal Market Select Committee (the HOL Committee) in early March this year, where I said in oral evidence (<https://committees.parliament.uk/oralevidence/125/html/>: Q17) that: –

“The key provision of the protocol is Article 10, which provides that any UK measure that has an effect on trade in goods between Northern Ireland and the EU—and therefore Ireland in particular, obviously—is subject to the full panoply of the EU state aid regime from the end of transition onwards. I have no evidential basis for this, but I have a hunch that, when the UK Government signed up to that, they did not quite understand what they were signing up to. When a number of us in the state aid community saw that provision, there was a certain amount of jaw-dropping. I am not entirely certain that it was understood by the Government at the time. There was a certain amount of jaw-dropping, first, because it applies to any UK measure. It is not confined to things done by the Northern Ireland Administration or to Northern Irish measures; it potentially affects anything that the UK Government does. A UK measure is anything that any UK public authority does. That is point one. Secondly, the effect on trade criterion, a crucial jurisdictional hinge, in state aid is notoriously low. You do not need evidence to prove an effect on trade. If you look at a lot of Commission and European court decisions, analysis of the effect on trade is at an astonishingly superficial level. It does not involve panoplies of economic evidence; it is done on the basis of a couple of lines of generic reasoning and is notoriously low. It does not take much to prove an effect on trade.”

5. Essentially, the provisions agreed (by the current Government) in the Protocol leave the United Kingdom significantly bound by EU State aid rules after transition, subject only to a threshold (‘effect on trade’) which is notoriously low and imprecise, and which falls to be interpreted and applied by the Commission and, ultimately, the ECJ. I have no doubt, for example, that the vast amount of State aid being granted by the Government during the current Covid-19 crisis would have fallen within Article 10 – and have been subject to Commission clearance – had the current crisis fallen after transition. Similarly, a UK-wide tax measure such as the rules on the taxation of controlled foreign companies that were found to be a State aid last year would also, in my view, obviously be caught by Article 10 (and would therefore have to be disapplied as soon as found to be so by either the Commission or a national court).

6. I also share the concerns expressed by the HOL Committee in its letter to BEIS on 2 April (<http://uksala.org/wp-content/uploads/2020/04/Level-Playing-Field-and-state-aid-letter-to-BEIS-FINAL-002.pdf>) at §56, where it said that: *“It is troubling that no one we heard from thought that the UK Government had a clear understanding of what state aid provisions it had signed up to in the Protocol, and that the regions and devolved nations we heard from were not clear on how the Protocol might affect them. How is the UK Government working now to ensure that the UK-wide implications of the Protocol in a state aid context are fully understood?”* It is in my view regrettable that the Government failed to take the opportunity to set out its understanding of those provisions in its 20 May 2020 paper on the Protocol (<https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol/the-uks-approach-to-the-northern-ireland-protocol>), where at §40 it confined itself to the following pronouncement: -

The Protocol sets out that EU state aid rules will apply in certain cases where this is relevant to trade between Northern Ireland and the EU. This does not mean that state aid rules will apply to Northern Ireland as they do today. State aid provisions apply only to trade ‘subject to the Protocol’. The Protocol is limited in scope to the movement of goods and wholesale electricity markets. Northern Ireland will therefore enjoy new flexibilities with respect to support for its service industries. The Government will provide further information on how these provisions should be operated by public authorities before the end of the transition period.

7. As I have pointed out, the implication that Article 10 applies only “to Northern Ireland” is false: it potentially applies to any UK measure. Nor does the Government explain what it believes is the effect of the fact that Article 10 applies only to measures that potentially affect trade in goods and electricity between Northern Ireland and the EU. And the claim that Northern Ireland will enjoy “new flexibilities” in relation to support for its service industries ignores the point that aid for service industries may well have a potential effect on cross-border trade in goods and hence be caught by Article 10: take, for example, aid to freight transport.
8. In his evidence to this Committee on 11 March 2020, the Chancellor of the Duchy of Lancaster, in response to a question by Stephen Kinnock MP as to the implications of

Articles 10 and 12 of the Protocol (Q25), stated that “the effective working of the protocol is a matter for the Joint Committee to resolve”. However, if the Chancellor intended to suggest by that answer that the Joint Committee could substantially alter the aspects of Articles 10 and 12 that I have set out above, then he was not giving the Committee an accurate answer. It is true that the Joint Committee can, by agreement, amend Articles 10 and 12 so as to correct “omissions” or “deficiencies”: see Article 165(4)(d) of the WA. But, as is clear from that provision, it has no power to amend the essential aspect of any part of the WA – and the aspects of Article 10 that I have outlined above are the essence of how it works. In any event, any such decision by the Joint Committee would require the agreement of the EU.

9. In terms of the current negotiations between the United Kingdom and the EU, the fact that the United Kingdom has agreed Article 10 means that, unless Article 10 can be modified by agreement with the EU (see Article 13(8) of the Protocol), the UK anti-subsidy regime post-transition is going to involve parallel application of Article 10 and whatever anti-subsidy regime ends up being devised by the Government for UK measures generally. It is hard to see that anything but confusion will result from attempting to operate two regimes – enforced by different bodies, potentially applying different legal concepts – to a significant extent in parallel. I would therefore fully endorse the view of the HOL Committee at §57 of its 2 April letter: -

“We agree that it should be a key UK priority to renegotiate provisions on state aid in the Protocol as part of the future relationship agreement with the EU, or negotiate alternative arrangements for Northern Ireland-Republic of Ireland trade, as envisaged in the previous Withdrawal Agreement, which would replace the Protocol entirely.”

10. It has to be recognised, however, that the need to renegotiate Articles 10 and 12 means that, on State aid, the United Kingdom will be the *demandeur*: the EU is unlikely to agree to amend those provisions unless it is satisfied with the United Kingdom’s commitments on subsidies more generally – a point that leads into the next question.

- What are the current UK and the EU positions on the level playing field provisions in the negotiations on a Future Relationship? What is your assessment of the level of technical detail the negotiators have grappled with on these provisions to date? To what extent might either position impact either party's future plans to legislate?
- How does the EU's position on a level playing field with the UK compare to that which it held in negotiations on CETA with Canada and the EU-Japan FTA?
- How does the EU's position on dispute settlement in the level playing field compare to the role of dispute resolution in the level playing field provisions in CETA with Canada and the EU-Japan FTA? Have there been any disputes to date concerning the level playing field in either agreement and, if so, how have they been settled and enforced?
- How relevant are geographical proximity and economic interconnectedness to level playing field provisions?

11. These questions can be taken together.

12. The current UK Government position is, essentially, is that commitments on subsidies should be confined to those found in (for example) CETA. These amount to little more than an agreement to keep each other informed of subsidies every two years. The EU's position is, as explained below, different: for reasons I try to explain below.

13. The EU position is that the UK should continue to follow EU State aid rules, albeit applied by a domestic State aid authority – essentially the regime agreed in the “backstop” by the May Government in 2018. To that extent, the EU is seeking arrangements similar to those that it has with Turkey and Ukraine, which both agree to apply EU State aid rules domestically. The EU is also proposing, however, that UK courts would continue to be able to – and at the supreme appellate level required to

– refer questions of interpretation to the ECJ, a court on which the United Kingdom is no longer represented. That latter proposal has no equivalent in the EU’s agreements with Turkey or Ukraine: and it may be noted that even Norway, Iceland, and Liechtenstein are not subject to such a provision (the EFTA Court being independent of the ECJ and composed of judges from those countries). And it is correspondingly far removed from the provisions in CETA (which do not provide for dispute resolution in the area of subsidies at all).

14. One immediate observation about that difference in positions is that it is not easy to see how the United Kingdom’s position is consistent with the Political Declaration agreed in October 2019, where the current Government agreed the following text at §77: -

To that end, the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition In so doing, they should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement.

15. But the fact that the UK Government’s current position resiles from its commitment to maintain a “robust and comprehensive framework for ... state aid control” with “appropriate mechanisms to ensure effective implementation domestically, enforcement, and dispute settlement” is not the main point (though it fails to engender trust on the EU side): the main point is to understand why the EU places such importance on that commitment. In that regard, the key thing to bear in mind is that there is a dramatic asymmetry between the position of the UK outside (but next to) the EU, and that of EU Member States. State aid control is in the structure of the EU treaties: it is a fundamental aspect of the regime binding all Member States. The State aid regime limits Member States’ ability to (for example) offer large grants to footloose multinationals in return for locating in their territory, or to subsidise their car exports so as to undercut other Member States’ car industries.

16. But – critically – compliance with those regimes does not just benefit other Member States: it also (incidentally but inevitably) helps a neighbouring state that has a very large volume of trade with the EU. If Germany cannot freely subsidise its production of manufactured goods, that benefits UK manufacturers as well as French ones. And if France cannot grant large incentives to banks that decide to re-locate in Paris, that benefits London as well as Frankfurt. In contrast, after the end of transition, the UK Government will—subject to the Northern Ireland protocol—be able to subsidise manufacturing production, or grant incentives to banks to locate in the United Kingdom, as it likes.
17. Put another way, the reason why the United Kingdom does not have as a major negotiating priority the demand that the EU avoid subsidising industries that compete with UK industry – something that would be a key UK concern given the extent to which our imports come from the EU and compete with our domestic industry – is that the United Kingdom can, in effect, free-ride on the EU State aid regime: and that ability to free-ride while refusing to accept any of its obligations is obviously intolerable for the EU (that is to say, it is an impossible sell to its voters).
18. That is why, in my view, the United Kingdom cannot hope to avoid offering legally-binding and enforceable commitments in this area if it genuinely wishes to reach agreement: “we will tell you at some point about what we do in the area of subsidies and in the meantime just trust us” is simply not going to be acceptable to the EU. Nor is it an adequate response to the EU’s concerns to point out that the EU is able, under WTO rules, to impose countervailing duties if it finds that UK subsidies are damaging its domestic industries: such duties take considerable time and effort to implement and monitor, and are inevitably reactive (putting the fire out rather than stopping it from starting). Moreover, countervailing duties cannot deal with services – such as the bank location example I gave above – at all: which is a critical point given the very large volume of UK services exports to the EU and the fact that the United Kingdom seeks agreement from the EU in the area of services access beyond anything previously agreed, for example in relation to freight haulage access,

business travel to provide services, mutual recognition of professional qualifications, and equivalence in the area of financial services.

19. That said, it is fair to point out that (as observed above) the EU's position goes beyond the position it has adopted in relation to Turkey and Ukraine and would be more appropriate for a State that is seeking to align with State aid rules than one which wishes to move away from them. The EU's legitimate interests are in protecting itself from the effects of subsidies – and from the free-riding I identified above – rather than in imposing every dot and tittle of the State aid rules on the United Kingdom. And it is also entirely fair to point out that the EU State aid rules are by no means perfect: indeed, they suffer from serious defects. They apply to all sorts of measures that do not obviously affect neighbouring countries, often require sometimes slow and intrusive Commission approval before obviously justifiable projects can proceed, and can be maddeningly formalistic, complex and draconian in their impact on often innocent beneficiaries. There is little doubt that the United Kingdom could do better. That is not to say that it will do better – though it is rather easier for the United Kingdom to adjust its rules than it is for the EU – but it would not even have the freedom to try to do better if it accepted the EU's proposals.

20. I deal with the implications of all this for the negotiations – and for a possible agreement – below.

- To what extent would agreeing to the EU's position on a level playing field restrict the UK's ability to reach a trade agreement with the US and other third countries? To what extent is the EU restricted by its existing agreements with third countries in what it can offer the UK on a level playing field?

21. These are not issues in the area of state aid/subsidies.

- Where an EU Directive has provided for minimum standards, has the UK tended to go for the minimum or to choose to set higher standards on the

areas covered by the level playing field? How does the UK's record on compliance to EU rules compare to EU Member States on the areas covered by the level playing field? What is your assessment of the level of trust on each side that either will maintain or enhance their standards and compliance in future?

22. The United Kingdom has a good record of compliance with EU State aid rules, with relatively few recovery orders made against it for recovery of unlawful (non-notified) State aid. The United Kingdom has also made less use than do other EU Member States of the EU regulations that permit the grant of aid that complies with various conditions without notification to the Commission (block exemptions) – provisions that usually cover over 90% of all subsidies granted in the EU (though that figure will be different in 2020 given the COVID-19 crisis).
23. The United Kingdom has generally been a keen advocate of strong State aid rules, and, across all governments, has consistently supported strong enforcement of those rules by the Commission. Indeed, one aspect of the United Kingdom's departure is that the State aid rules, without UK influence, may develop in a way that is less rigorous in their control of State support for industry. Since the way in which the EU State aid rules develop will remain a matter that inevitably affects the United Kingdom, the HOL Committee was in my view right, in its 2 April letter at §§48 and 62, to ask how the UK Government envisaged institutionalising consultation on developments in EU State aid law (though, of course, such a request is hard to make if the United Kingdom does not make an offer of reciprocal commitments to the EU).
24. As for the EU's level of trust in the UK Government in the area of State aid, my general impression is that it is low, largely because (from the EU perspective) the Government has resiled from its commitment in the Political Declaration to agree a legally-binding framework for subsidy control, a problem made worse by the Government's refusal to date to expand on its commitment to a robust domestic framework for anti-subsidy control. Part of the problem here is that – because there

are no models for such a framework outside the EU framework – the EU has some difficulty in seeing what such a framework would look like, let alone in placing any confidence in its robustness.

- How confident are you that it is possible to conduct negotiations on something as technical as the level playing field by videoconference? Given COVID-19 has the potential to fundamentally change some aspects of the economy and the way people live and work, is there a case for looking again at what the two sides are trying to negotiate? Is there a danger that the current negotiating aims and mandate will lead us to an outcome on the level playing field that is not fit for purpose in a post-pandemic economy?

25. The main impact of COVID-19 in the field of State aid is that it has caused a vast increase in the amount of State aid across the EU – an effect which is likely to last for some time.

26. That I think raises the following issues for the UK Government.

(a) As I noted above, the scale of subsidy likely to be needed to deal with the Covid-19 crisis is likely to call for a number of UK measures that will be found to meet the (low threshold) “effect on trade in goods between Northern Ireland and the EU” test laid down in Article 10 of the Protocol and will therefore be subject to EU State aid rules, and require Commission approval, even after transition. So the crisis accentuates the need to negotiate a revision to that Article if a coherent anti-subsidy regime in the United Kingdom is to be achieved.

(b) Correspondingly, the EU’s interest in seeing that such UK subsidies are controlled by effective anti-subsidy rules is accentuated by the crisis (and may prompt the Commission to take a harder line on the scope of Article 10).

27. The EU response to the crisis may well – if the proposal by France and Germany is implemented – involve a large centralised fund for assistance to industries affected by the crisis. Spending from that fund – since it is not spending by a Member State but by the EU itself – will not be subject to State aid rules. That increases the force of the HOL Committee’s point that there is a strong UK interest in maintaining a right to be consulted about EU subsidies – whether by Member State subject to State aid rules or by the EU itself.

Could you sketch out a possible compromise on the level playing field provisions and how it might be achieved? Would it be possible for such an outcome to not involve the CJEU? How united are EU Member States and the European Parliament in what the EU can offer the UK in the negotiations on the level playing field? To what extent might treating the areas of the level playing field separately help or hinder a compromise?

28. As I have explained above, the EU insistence on commitments in the area of subsidy control is a deep red line. I see no prospect of its insistence on such commitments wavering.

29. On the other hand, the UK Government has made it clear that it proposes to introduce a robust domestic anti-subsidy regime. Its concern is to move away from some of the more unattractive features of the EU State aid rules that I mentioned above – a concern with which, as I hope I made clear, I have some sympathy.

30. Bearing that in mind, it seems to me that a more realistic position for the Government to adopt, if it wishes to reach agreement with the EU – and one which would be consistent with its own policy of putting into place a robust anti-subsidy regime that avoided some of the problems with the EU State aid rules – would be to propose (in essence) that both sides commit to maintain robust domestic anti-subsidy rules, enforceable domestically and supervised by an independent regulator, and which avoid subsidies that have an adverse effect on the other. Such a commitment would permit the Government to implement its own domestic regime

while respecting the legitimate interests of the EU as expressed above. It would also offer some prospect of persuading the EU to revisit Article 10 of the Protocol.

31. It would though be necessary for the Government to spell out in more detail what its proposed UK domestic regime will look like. The Conservative Party proposals in 2019 left critical issues – such as enforcement, remedies, the role of an independent authority, the existence and administration of exemptions – entirely at large. Those issues need spelling out. And it has to be accepted that there is at the moment no example of any robust domestic anti-subsidy regime outside the EU (unlike the area of competition policy, where there are many models apart from the EU's that the EU accepts are effective, such as those of the US and Australia).
32. As to dispute resolution, I would suggest (broadly) that each party should be able to take to an arbitration panel cases where subsidies by the other adversely affect that party's interests, or actions by the other party in relation to its domestic regime that will lead to such subsidies. Importantly, since that panel would not be adjudicating on EU law concepts, the EU would not be obliged to require that questions of interpretation be decided by the ECJ. And I note in passing that that position would remain even if the UK Government decided to employ EU concepts in its new anti-subsidy regime – a choice that would make sense given the extensive case-law and experience in applying the EU concept of "State aid" (compared to the comparatively thin experience of interpreting the WTO concept of "subsidy"): provided that it was made clear that the UK concept was autonomous (just as Australian common law concepts inherited from English common law are now autonomous of English law, giving Australia the freedom to develop and adapt those concepts while retaining the benefit of centuries of interpretation), there would be no need to refer questions of their interpretation to the ECJ.

What international commitments do the UK and the EU have on the areas covered by the negotiations on a level playing field? If an agreement is not reached before the end of the Transition Period, what would be the WTO and international legal baseline as regards the policy areas being negotiated on a level playing field?

33. In the area of subsidies, both the United Kingdom and the EU are parties to the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). Those provisions are briefly summarised at https://www.wto.org/english/tratop_e/scm_e/subs_e.htm. The SCM Agreement extends only to subsidies on goods.

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Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

Email: freucom@parliament.uk Website: <https://committees.parliament.uk/committee/366/committee-on-the-future-relationship-with-the-european-union/>

21 May 2020

George Peretz QC
Monckton Chambers

Dear Mr Peretz,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our call for evidence, which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

In the questions below, we take the level playing field provisions to include state aid, competition, social and employment standards, environment, climate change, and relevant tax matters, as set out in the Political Declaration. We welcome contributions that address one, some or all of these areas and in your submission you can choose to group them together as level playing field provisions or to break out issues where you feel it is important to draw the Committee's attention to them. Please do not feel you need to address all of these policy areas.

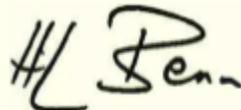
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- What are the current UK and the EU positions on the level playing field provisions in the negotiations on a Future Relationship? What is your assessment of the level of technical detail the negotiators have grappled with on these provisions to date? To what extent might either position impact either party's future plans to legislate?
- How does the EU's position on a level playing field with the UK compare to that which it held in negotiations on CETA with Canada and the EU-Japan FTA?
- How does the EU's position on dispute settlement in the level playing field compare to the role of dispute resolution in the level playing field provisions in CETA with Canada and the EU-Japan FTA? Have there been any disputes to date concerning the level playing field in either agreement and, if so, how have they been settled and enforced?
- How relevant are geographical proximity and economic interconnectedness to level playing field provisions?
- To what extent would agreeing to the EU's position on a level playing field restrict the UK's ability to reach a trade agreement with the US and other third countries? To what extent is the

EU restricted by its existing agreements with third countries in what it can offer the UK on a level playing field?

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- How confident are you that it is possible to conduct negotiations on something as technical as the level playing field by videoconference? Given COVID-19 has the potential to fundamentally change some aspects of the economy and the way people live and work, is there a case for looking again at what the two sides are trying to negotiate? Is there a danger that the current negotiating aims and mandate will lead us to an outcome on the level playing field that is not fit for purpose in a post-pandemic economy?
- Could you sketch out a possible compromise on the level playing field provisions and how it might be achieved? Would it be possible for such an outcome to not involve the CJEU? How united are EU Member States and the European Parliament in what the EU can offer the UK in the negotiations on the level playing field? To what extent might treating the areas of the level playing field separately help or hinder a compromise?
- What international commitments do the UK and the EU have on the areas covered by the negotiations on a level playing field? If an agreement is not reached before the end of the Transition Period, what would be the WTO and international legal baseline as regards the policy areas being negotiated on a level playing field?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freucom@parliament.uk.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'H. Benn'.

Hilary Benn
Chair of the Committee