



# HOUSE OF LORDS

## EUROPEAN UNION COMMITTEE

### The process of withdrawing from the European Union

#### Evidence Volume

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**Sir David Edward KCMG, QC, PC, FRSE and Professor Derrick Wyatt QC—Oral Evidence (QQ 1-17)**

*Evidence Session No. 1*

*Heard in Public*

*Questions 1 - 17*

Members present

Lord Boswell of Aynho (Chairman)

Baroness Armstrong of Hill Top

Lord Borwick

Earl of Caithness

Lord Davies of Stamford

Baroness Falkner of Margravine

Baroness Kennedy of The Shaws

Lord Liddle

Lord Mawson

Baroness Prashar

Baroness Scott of Needham Market

Baroness Suttie

Lord Tugendhat

Lord Whitty

Baroness Wilcox

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**Examination of Witnesses**

**Sir David Edward KCMG, QC, PC, FRSE**, Former Judge of the Court of Justice of the European Union, and **Professor Derrick Wyatt QC**, Emeritus Professor of Law, Oxford University, Brick Court Chambers

**Q161 The Chairman:** Good afternoon, Sir David Edward and Professor Derrick Wyatt. We had dealings with you, Sir David, when we went up to a European Community UK mechanism in Holyrood, which we found stimulating. I cannot think of a better team to take us through this subject.

**Sir David Edward:** Wait until the end.

**The Chairman:** That is always wise. Indeed, who knows the outcome of anything these days, but we will not speculate further on that. In a sense, although I think it will spur other issues, this is a finite issue about how one might withdraw and what it means. We are incredibly grateful to you for coming. I remind you that this is a public evidence session. We will send you a transcript for any factual corrections. I am aware that one of you has already kindly offered your thoughts. This is a living evidence session, as far as I am concerned, and we will take into account any further comments, or indeed any questions that we have not been able to resolve. The only thing I would say to you—it is not military—is that we have a lot to get through and I am very anxious to keep it as tight as we can, although I am sure it

will be informative. In which respect, I have an indication from Derrick Wyatt that you would like to make a short opening statement. I do not know if Sir David would as well. You will have the right to reply. Self-evidently, it will not be seen as a dereliction of duty if you do not both comment, if you feel that an issue has been covered. Please feel that you can work as a team; that will help us. Professor Wyatt, would you like to remind us who you are and then proceed with your opening statement?

**Professor Derrick Wyatt:** My name is Derrick Wyatt. I am a retired law professor and an almost retired QC. If the UK voted to leave the EU in June, that departure would be a process rather than an event. The UK would follow the procedure in Article 50 of the Treaty on European Union. That would be the only exit route legally available. Negotiations would begin on two agreements: a withdrawal agreement and a trade agreement of some kind that would govern the future relations between the UK and the EU. Ideally, those two agreements would come into force at the same time, providing for a smooth transition from EU membership to the new relationship that had been negotiated. That new relationship would require cross-party support in the UK Parliament, otherwise it would lack credibility.

The UK would want a comprehensive trading agreement to follow on from EU membership, but a comprehensive agreement could require the consent of all 27 national Governments on the EU side and it would take time to negotiate. There would be no fixed inevitable deadline for those negotiations. The two-year period in Article 50 could be extended; it probably would be. In the meantime, the UK would remain a member of the EU. I think it likely that the UK would remain a member of the UK for the duration of the present Parliament. There would be no quick-fix trade agreement. There would be no quick-fix for immigration. In law, the UK could change its mind before withdrawal from the EU and decide to stay in after all, but the politics of the referendum result would be likely to rule out that option. Thank you, my Lord Chairman.

**The Chairman:** Thank you. Sir David, do you want to add anything?

**Sir David Edward:** I would just follow up on the question of Article 50. The English text envisages that “the Union shall negotiate and conclude an agreement with the withdrawing state setting out the arrangements for its withdrawal and taking account of the framework for its future relationship with the Union”. That is broadly the same as the French text. However, there is a difference in the German text, which I translate as follows: that they will “conclude the agreement whereby the framework for future relations will be taken into consideration”—or it might even be “will have been taken into consideration”. In other words, I think the German text envisages that the structure of future relations will already have been established at the point when withdrawal takes place.

**The Chairman:** It is almost a necessary condition of the withdrawal.

**Sir David Edward:** Yes. There is just one linguistic twist. The word “framework” in French is “cadre”. It has always been said in legal jargon that the EU treaties are “traités-cadres”. They are framework agreements, so I think that tends to suggest that the agreement as to withdrawal will comprehend the agreement as to future relations.

**Q162 The Chairman:** Arising from that, if I might kick off, I have a question for Professor Wyatt. I would be very diffident as a non-lawyer about getting into legal speak on this, but can I check it with you? My prior understanding was that there might have to be a possibility, albeit a relatively minor issue, of a third treaty, which would be an amending treaty for the Lisbon treaty. Whereas there is a provision in Lisbon for the accession of member states under Article 49, or conceivably under Article 48, there is no provision for the exit. There

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might have to be an unbundling of British participation: things like qualified majority voting and representation in the European Parliament, and some decision as to when that might lapse. When you said the Parliament, I think you were talking about the Parliament of the United Kingdom rather than the European Parliament.

**Professor Derrick Wyatt:** Yes.

**The Chairman:** I notice that Sir David was nodding.

**Sir David Edward:** Yes. It is clear that the remaining member states would have to enter into an agreement amending the treaties to give effect to the disappearance of the United Kingdom.

**The Chairman:** Is that agreed?

**Professor Derrick Wyatt:** I agree with that. The only thing I would add is that it would essentially be a housekeeping arrangement for the EU, because on the entry into force of the withdrawal agreement the treaties would cease to apply to the UK.

**Q163 The Chairman:** I have a substantive question, if I may. One would never really think about this unless one was party to the negotiations—I was not until after the event—but I have occasionally looked back at the record of the exchanges during the 1975 referendum. I would like to ask our witnesses whether there was or was not a right to withdraw from the EU before the entry into force of the Lisbon treaty, where it becomes explicit in Article 50. What is the significance, whether legal or political, of incorporating a right to withdraw? What was all that about, Sir David?

**Sir David Edward:** In international law, provided all the parties agree, you can withdraw from a treaty.

**The Chairman:** That is the Vienna convention.

**Sir David Edward:** That is basic international law. International treaties are international contracts, and it is a basic principle of the law of contract that if you want to withdraw from a contract you can do so if the others agree. That is where you start from. One can say that the purpose of Article 50 is essentially procedural. It is essentially setting out the machinery that would not otherwise be there. Professor Wyatt has something additional to say about the situation under the treaty of Nice.

**Professor Derrick Wyatt:** The position before the treaty came into force was that a member state was entitled to say to the other member states, “We want to leave”, and there would then be a duty on the other member states to co-operate to make that possible, although not necessarily on any particular set of terms or in accordance with any particular procedure.

**The Chairman:** Consent would not unreasonably be withheld.

**Professor Derrick Wyatt:** Indeed. It would have been politically inconceivable to take the view that all the member states but one could commit an unwilling member state to participate in such a close economic arrangement. The difficulty with the position before Article 50 was that the first thing that would happen in the event of, say, a referendum vote to leave the European project would be the building of an edifice to make that possible—the agreement of procedures and the rest of it. Article 50 solves that.

The point I would have about the Nice treaty to which Sir David just referred is that it was a treaty, as is the present one, committed to democracy and to respecting national identity. How could one say that under such a treaty member states could just refuse to allow a

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member state to leave? Article 50 resolves it and provides a jolly good procedure to bring it about, and that is its advantage.

**The Chairman:** Do you recall where the pressure came from? Was it—dare I say it?—tidy-minded lawyers in the Council Legal Service, or was it member states who felt it was a lacuna that needed to be plugged?

**Professor Derrick Wyatt:** I do not know the answer to that.

**Sir David Edward:** Lord Kerr of Kinlochard claims credit for Article 50.

**The Chairman:** I will make no further comment on a former member of this Committee who is not present this afternoon.

**Sir David Edward:** He was the secretary-general of the convention.

**The Chairman:** Is that the only route now? Is there any other route for going, other than Article 50? Again, it is at the back of my mind that, if you specify something in a treaty as a route, you can still use other procedures if you want to,

**Professor Derrick Wyatt:** I think it is the only route. The reason I think that is that the alternative that might be mooted, which is the Vienna Convention on the Law of Treaties, 54(b), is premised on a circumstance where all the states party to a treaty can sidestep a specific withdrawal clause simply by amending the withdrawal clause. That will work in many cases but not in the case of the EU treaties because there are special procedures for amending them. It is not open to all the member states simply to sit down and agree the matter between themselves. The institutions are involved and the national parliaments are involved. I am certainly not disagreeing with the proposition that because there is a specific provision it excludes others, but quite apart from that, any alternative under public international law simply does not fly. In my view, Article 50 is the only route.

**The Chairman:** Do you concur with that, Sir David?

**Sir David Edward:** Yes. Picking up the last point, Article 50 comes out of the draft constitution, which never took effect. That is when Lord Kerr got it in.

**Baroness Scott of Needham Market:** I want to return to the question of a Government changing their mind. Setting aside the politics of it, in law do you both agree with the position that there is no provision in the treaty to change your mind? You can rejoin afterwards but it is silent on the question of changing your mind. Could you give us your perspective on that?

**Sir David Edward:** It is absolutely clear that you cannot be forced to go through with it if you do not want to: for example, if there is a change of Government. That said, I wonder what the other member states would say in that event. It does not seem to me that you can necessarily say, “Right; I have put you to all this trouble; we have negotiated for two years and now I do not actually like the terms you are offering so I want to go back to zero”. My hunch is that many of them might say, “Right, back to zero. No more opt-outs”. That is a pure hunch; it would entirely depend on the politics of the situation at the time. I do not think there would be enthusiasm for letting you back with all the existing opt-outs. I emphasise that the deal Mr Cameron struck in Brussels does not come into effect if Britain votes to withdraw.

**Baroness Scott of Needham Market:** Yes, indeed. It would fall.

**Sir David Edward:** You would not go back to that without agreement.

**The Chairman:** Professor Wyatt, do you want to comment specifically on that?

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**Professor Derrick Wyatt:** Yes, very briefly. I think law and politics might not go in the same direction. The reason I think it is possible in law to change the country's mind before withdrawal is that there is nothing in the wording to say that you cannot. It is in accord with the general aims of the treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a state withdraws, it has to apply to rejoin de novo. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind, but the politics of it would be completely different.

**Earl of Caithness:** If we changed our mind, would we go back in exactly where we left off, with our rebate as we are today? I was a little confused by Sir David, who said that there would be no more opt-outs.

**Sir David Edward:** I am saying that they might say, "We will let you change your mind, but there will be no more opt-outs".

**Earl of Caithness:** At the end of the day they have a veto.

**Sir David Edward:** It is political. Let us take two businessmen dealing with a contract. There is an agreement that provides the terms on which you can withdraw from the contract. They get into negotiations and then suddenly, after a lot of time and money have been spent, the one who wants to get out of the agreement says, "No, I have changed my mind". The other one might say, "Yes, all right; I will let you change your mind but I will insist on different terms".

**Lord Davies of Stamford:** But you cannot do that because the contract remains valid until it is actually changed.

**Sir David Edward:** It depends on the terms of the contract.

**Lord Davies of Stamford:** In this case the contract remains valid until it is actually changed.

**Sir David Edward:** I began by saying it is a matter of politics. I do not think that the politics are as easy as saying, "The negotiations are over and we are back where we started".

**The Chairman:** As if nothing had ever happened, as it were.

**Sir David Edward:** Yes, as if nothing had happened.

**Professor Derrick Wyatt:** That is the legal position. A member state remains a member of the European Union until the withdrawal agreement takes effect. In that way, my Lord Chairman, I see the point that Lord Davies was making by analogy with respect to contract. For example, the UK budgetary rebate is framed in law—in legal instruments.

**The Chairman:** And the justice and home affairs protocol is also a specific protocol in the treaty.

**Professor Derrick Wyatt:** Yes. Sir David is saying that this would be a politically stormy exercise. I completely agree with that technically in law.

**The Chairman:** And all this before we have even started negotiating a withdrawal agreement, which is the next line of questioning, led by Lord Liddle.

**Q164 Lord Liddle:** It is a question of who we are negotiating with. What are the respective roles of the Commission, the European Council and the Council of Ministers in their specific areas of concern?

**Professor Derrick Wyatt:** Article 50 spells out the procedure for the withdrawal agreement. The European Union lays down guidelines. Because we are talking about a framework for negotiating a treaty between the EU and a member state of the EU, there is a special procedure. Under guidelines from the European Council, the Council applies the ordinary rules and sets a negotiating mandate for the Commission. The Commission will negotiate the agreement on the EU side. We have guidelines from the European Council and we have the negotiating mandate from the Council. The Council can nominate a head negotiator if it wishes, or the head of a team of negotiators. The Council can nominate a special committee that will work in conjunction with the Commission. The result is that the Commission negotiates but the national Governments are in the driving seat, and that will be very political. They will call the important shots.

**Lord Liddle:** But on the national Governments point, the European Council normally proceeds by unanimity, by common accord, does it not?

**Professor Derrick Wyatt:** Yes.

**Lord Liddle:** And the Council of Ministers proceeds by majority voting. What would be the balance of those two things in determining the negotiating mandate within which the Commission worked?

**Sir David Edward:** It is not specified. It says that it shall be negotiated in accordance with Article 218(3) of the treaty but it is the European Council that sets the guidelines. That is the Heads of State or Government. They have no legislative power but they have political directory power. They set down the guidelines. I would envisage that, formally speaking, the Commission will do the negotiations, but in the way things work I strongly suspect that the Council's internal services will also be closely involved right the way through, as well as the other member states.

**The Chairman:** In the general scope of this, is it helpful to suggest that it is more or less like an accession process for a new member state in reverse? Conceptually, there is no huge difference, is there, in the way it would be handled?

**Sir David Edward:** I am not so sure. Leave aside interstate formal governmental relations. The complications of unravelling the enormous number of individual relationships that have been created as a result of the treaties are probably much greater than the complications of accession.

**Professor Derrick Wyatt:** It might be helpful to focus on the nitty-gritty of the way it would go. The European Council is not going to be hands-on all the time. Who will be hands-on all the time will be the Committee of National Representatives, which is overlooking the Commission negotiations. The normal committee is the Trade Policy Committee, which I think meets once a month, but its deputies meet every week. One would be getting toing and froing between representatives from member states in the committee and its deputies. Changing of the negotiation mandate is possible and could, and would, happen. To some extent, we are in an exercise of guesstimating, but my guess is that the European Council would lay down its general guidelines, and after that the hands-on role would be the Council and the special committee liaising with the Commission.

**Lord Liddle:** Could I pursue that point for a moment? Would specific questions of market access—classic trade questions such as, “What would be the terms on which our car

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manufacturers exported to the single market in the case of our withdrawal”’?—be taken by the Council trade machinery and decided by a majority?

**Professor Derrick Wyatt:** My Lord Chairman, there is a technical point we have to take here. It relates to an earlier point made by Sir David. Article 50 deals specifically with a withdrawal agreement that takes into account the framework of a future relationship agreement. There is no specific provision for the future relationship agreement. I do not assume that the withdrawal agreement will accommodate all the details of the future trading relationship, not least because of the kind of arrangement we might have. Suppose it were a comprehensive trade agreement along the lines of the EEA agreement. The procedure for negotiating such a treaty is simply different; it is unanimity in the Council rather than a super-qualified majority in Article 50.

How would that be negotiated? My view is that it would be negotiated in parallel with the withdrawal agreement by analogy with the appropriate treaty base. What would have to happen would be that withdrawal agreement would be agreed along with the shadow future relationship agreement. The withdrawal agreement would come into force (bringin about withdrawal) but would take effect a few days later. In those few days, the Council and Parliament would endorse the shadow agreement that had already been agreed in draft by reference to the appropriate treaty base: that is, with the appropriate majorities in the Council and the Parliament. I am sorry to complicate it, but that is a feature that emerges from Article 50. On the substance of your question, my Lord Chairman, if I can respond to Lord Liddle, there would be deep involvement from the national Governments via the Council and the committee. Although the Commission would be negotiating and there would be input from the European Parliament—although I do not pre-empt further questions—it seems to me that the influence of the national Governments on the EU side would be enormous.

**Sir David Edward:** Let us look, for example, at an agreement on fisheries. It is plain that many of the member states would not have the least interest in that agreement, but Spain, Portugal, the Netherlands, Belgium and Denmark would have enormous interest in it. I suspect that the degree to which other national Governments took part in the negotiations would depend on what was being negotiated. One can see it in the various formations of the Council of Ministers.

**The Chairman:** The Fisheries Council would probably meet to deal with that.

**Sir David Edward:** Probably, yes.

**Professor Derrick Wyatt:** I want to come back on that very important point. If I am a hypothetical east European country, with a very obvious and genuine interest in both the position of my nationals resident in the United Kingdom and the future access of the UK, I might not be interested in fisheries as such but I might want to block a deal on fisheries unless I get what I want on transition and future access for my nationals.

**Q165 The Chairman:** As we begin to close this point, could I ask you briefly to comment on one other point—the role of the UK Parliament? As I understand it, that is not specified in Article 50 and we are outwith the process. There are two aspects. The first is accountability to Parliament, including scrutiny, because these are not Acts in which Her Majesty’s Government would be participant until, in effect, they had been concluded by an agreement, or not. The second is the question of whether there would also need to be an implementing British Act of Parliament and, if so, would that be a repeal of the EEC Act of 1972 or would it be something else?

**Sir David Edward:** On the first question, the negotiations are between the United Kingdom and the others. The UK Parliament is a constitutional organ of the United Kingdom. It is for the United Kingdom to determine what part the UK Parliament plays in this and what degree of say Parliament has over the acceptability or non-acceptability of the agreement. As to implementing legislation, I envisage that a great deal more would be required than simple repeal of the European Communities Act. You would need to enact in law everything that you wanted to keep in law, which is currently either the consequence of the direct effect of the treaties or, for example, the product of a directive. Under the current system of law, the courts are to interpret implementing legislation in light of the directive. If the directive no longer applies, you have to consider, “Do I have enough in the existing legislation for the courts to proceed without looking at the directive, or am I to instruct the courts to construe it in the light of the directive as if the directive applied?” There are many nitty-gritty legal complications; it is more than simply repealing the 1972 Act.

**Professor Derrick Wyatt:** Following on from that, the role of the UK Parliament would certainly come in at the level of implementing the withdrawal agreement. I agree with Sir David that in all probability there would be implementing to do—in all probability, inevitably—in respect of future relationships.

I would add another point. The future trading agreement would be one of the most important trading arrangements that the UK had made for many years, or would be making for many years. The credibility of that agreement, externally as well as internally, would depend on cross-party consensus within Parliament. The fact of that might encourage Parliament to be more flexible about the relationship between Parliament and the Executive in the negotiation of a treaty than it would normally be.

Finally, with respect to the fate of EU legislation, we tend to look at it as legislation that is imposed upon us. That is not accurate. Part of the way that British Governments have successively exercised their policies has been through the machinery of the European Union. If we look at legislation on equality in the workplace or on the environment, or we look at our company law, these are not all alien mechanisms to our detriment that have been forced upon us. Many of them are pieces of legislation that are regarded as currently important and still receive strong support. It would take years for Government and Parliament properly to review the corpus of European law, jettison what was not wanted and keep what would be wanted—in my view, the majority.

**The Chairman:** On that basis, the only thing I would say at this stage is that we will probably need to keep rigorously to the timetable. That has been invaluable in conceptualising this.

**Q166 Lord Whitty:** I want to focus on the role of the European Parliament in the process. As I understand it, the European Parliament has the power to veto the withdrawal agreement. I presume the trade agreement is somehow separate. It would be by a majority of votes cast rather than a majority of the MEPs. Is that right? What is the role of UK MEPs in that process? At what point does the UK cease to be a member of the Parliament and, therefore, UK MEPs cease to have a role in the Parliament? Is that only at the end of the process or during it?

**Professor Derrick Wyatt:** Only at the end of the process.

**Sir David Edward:** And the treaty makes it clear that, except as provided in the treaties, the European Parliament shall act by a majority of the votes cast.

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**Lord Whitty:** That is still a pretty substantial power. It could still veto the treaty at the end of all this process.

**Sir David Edward:** You used the word “veto”. Strictly speaking, it is withholding consent.

**Lord Whitty:** Can it propose amendments?

**Sir David Edward:** It can propose amendments. It can say, “We will consent if ...”. Again, that might involve the politics of the member states in specific interests.

**Lord Whitty:** And on very particular parts of it. In that sense, whatever we call it, given that the end of the process is quite an important role of the European Parliament, as a result, what influence do you think the European Parliament would have on the process if its opinion is in any sense at odds with the way the process is going? Presumably the Parliament could express it during the period of negotiation.

**Professor Derrick Wyatt:** Yes, it can. The way the Parliament participates in negotiation is via an inter-institutional agreement with the Commission. The inter-institutional agreement provides that the Commission keeps Parliament fully informed.

**The Chairman:** It is a trilogue situation as regards their legislation.

**Professor Derrick Wyatt:** Forgive me, my Lord. The framework agreement on relations between the Commission and the Parliament provides that the Commission keeps the Parliament informed, and the Commission undertakes to take due account of what the Parliament says. The Commission undertakes to explain the extent to which it has incorporated the Parliament’s input in the texts that are being negotiated. I think our own Parliament would rather like to have that sort of input. The effect is that when you are having this bilateral between the Parliament and the Commission, knowing that the Parliament can at the end of the day block the agreement, it seems to me that the influence would be there and it would be ongoing.

**Q167 Baroness Falkner of Margravine:** Lord Chairman, at this point it is important for me to declare two interests. First, I am the co-owner of a property in another EU member state. My second interest is that a member of my family would be affected by transitional arrangements were what we are discussing to come about.

I would like to ask something slightly different on United Kingdom withdrawal and the implications for the EU. Would you turn your attention to international treaties negotiated by the EU on behalf of the member states: for example, the WTO? You mentioned the environment, which is why this came to my mind. Would our rights and obligations under those treaties stand nevertheless if we were negotiating withdrawal, or indeed after Article 50, or would we have to renegotiate all of them, one by one? My understanding is that they would stand because the member states have given the Commission negotiating rights. I wonder whether you could help to clarify that.

**Professor Derrick Wyatt:** Whenever somebody who is being questioned says what a good question it is, they are playing for time. The truth is that, in most of the agreements to which the EU is party, the member states are also party under a procedure known as mixity. In some cases, the mixity is more genuine than others. Mixity is a political device when it enables member states to keep on board in negotiations that are substantially the negotiations of the EU. In other cases, mixity is substantive. The participation of the member states is genuinely necessary from the legal point of view. One of the great problems is disentangling which is which. That is something that the EU and the member states do not do, partly for political reasons and partly to save time.

My Lord Chairman, the question put by Baroness Falkner is difficult to answer in general terms. One would have to look at the particular agreements and see how credible it was for the UK vis-à-vis a third party to say, “Look, this was a mixed agreement and we were in substance in the driving seat”, rather than, “In substance we were coat-tailing on the EU”. I cannot imagine that the WTO—this is where being a lawyer and being political sometimes completely overlap—would want to keep the UK out on technical grounds.<sup>1</sup> I can imagine circumstances in which in the case of other agreements the UK is “party to” via the EU, third countries might think they would offer a less good deal to the UK than the UK had secured when it was bargaining with the support of “little European countries” like Germany, France, Italy and the rest alongside. I am sorry I cannot be more precise than that.

**Sir David Edward:** There is one further point in this context. All such treaties are reciprocal. They involve reciprocal obligations. One of the considerations would be whether the United Kingdom, outside the EU, could perform the obligations that are the counterpart of the obligation on Canada, Singapore or whatever. In other words, “We want all the benefits that Singapore is giving the EU, but we cannot give Singapore all the benefits the EU can give”. To put it no higher, there would be a strong bargaining issue between the United Kingdom and the other party to an EU agreement.

**Baroness Armstrong of Hill Top:** I want to ask a supplementary question. I probably did not quite understand what you were saying earlier, Professor Wyatt. You said there would have to be political agreement in the UK Parliament. Would that be around the withdrawal agreement, and was it a political point or a legal point?

**Professor Derrick Wyatt:** It was more of a political point really.

**Baroness Armstrong of Hill Top:** I cannot see that happening.

**Professor Derrick Wyatt:** The only reason I made the point was that it bears upon the prospects of negotiating an agreement that will have become the most important trading agreement negotiated since we joined the European Community project.

**The Chairman:** We will proceed with some questions about the length of negotiations and transitional measures. I turn to Lord Tugendhat.

**Q168 Lord Tugendhat:** In the light of the answers you have given, I think my question is probably unanswerable. I was going to ask how long you think it would take for the withdrawal negotiations to conclude and if you could give a best guess. In the light of what you have said, I think it is probably impossible to do that. The Government have talked about up to a decade of uncertainty. What do you think?

**Professor Derrick Wyatt:** I began in my summary by saying that I thought that the UK, if it voted for Brexit, would still be in the European Union at the end of the current Parliament. I did not mean it would all be cut and dried by then. I just find it so difficult to extrapolate from the data that I have. The Open Europe think tank recently published some comparative information on how long it takes to negotiate various types of agreement. Agreements negotiated by the EU were taking between four and seven years. If one looks at agreements negotiated by countries between themselves outside the EU, they seem to take between four and nine years. All that shows one is that these things can take a long time.

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<sup>1</sup> Note by the witness: Professor Wyatt wishes to make a correction to his oral comment. The UK is a WTO member in its own right. There would be no obstacle to the UK trading with other countries within the framework of the WTO.

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If I said I think we would still be negotiating at the end of the current Parliament, it does not mean I am saying that the Government are wrong if they talk about a long period or that somebody else might be wrong if they thought we would get something more quickly. Can I qualify that very quickly? If the UK were to say, the day after Brexit, “We are going into the EEA but we do not want to pay as much as the Norwegians pay per capita”, that would be more like when we first negotiated to go into the Common Market, where there was a table d’hôte, we were buying in with a little bit of transition and, “How much are we going to pay?” That could be quick. But does anybody really think that we are simply going to do that? Once you get into aiming for a comprehensive trade agreement that would cover not only goods but banking services and insurance services, it is intensely controversial. It would be intensely controversial in Europe.

**Lord Tugendhat:** Do you think Greenland provides a precedent?

**Professor Derrick Wyatt:** Greenland shows that even mildly complicated issues can take quite a long time. The population of Greenland is 55,000. Its issues are mainly around fishing, and transitional rules took two years to negotiate. I suspect the UK negotiation will be longer rather than shorter.

**Q169 Baroness Scott of Needham Market:** I am not clear on the position of the UK with regard to the day-to-day business of the EU going forward. While all this negotiation is going on, it will be getting on with other things. What is the status of the UK during that period, which could be up to a decade?

**Sir David Edward:** The UK remains a member state. Strictly speaking, we become chairman of the Council. We have the presidency of the Council in 2017. Strictly speaking, it just continues. What is very difficult to imagine is how you can carry on normal business on two assumptions. What is the interest of the United Kingdom, particularly as President of the Council, in discussing the details of a directive that will not apply if we withdraw?

**The Chairman:** To be clear on that, during the two-year period, and for however long it is extended by agreement, the UK’s legal rights and obligations remain. That would include any post-notification of withdrawal under Article 50 that was an EU decision, which would be binding on us although we had indicated our preference to withdraw.

**Baroness Scott of Needham Market:** Yes, that is what I wanted to be sure about.

**Sir David Edward:** Subject to the provision that “the member of the European Council or the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council on or in decisions concerning it”. You have a rather vague provision that might mean, “You get out of here; this does not concern you”.

**Baroness Scott of Needham Market:** I think that is important. I am still not clear from that whether we would be barred from discussions relating to the withdrawal itself and its terms or from all business going forward.

**Sir David Edward:** I am not clear either.

**Professor Derrick Wyatt:** I do not think we would be barred from all business going forward.

**Sir David Edward:** No, certainly not.

**Professor Derrick Wyatt:** We would be barred from what Sir David has just drawn attention to, which is anything to do with the withdrawal agreement. Where I think we would have difficulties exercising our rights would be in maintaining credibility at a time

when we would shortly be leaving. That would start within days because of the trio system. Under the trio system, every presidency acts in conjunction with the next two in line. A few days after the Brexit referendum the UK would join the trio, with Slovakia and Malta. What does the trio do? Forward planning and continuity. We would be in that trio, we would be in the next trio and then we would have the presidency. Forward planning and continuity would be weaknesses for the UK. On the other hand, there would be some issues we would want to stay in on: for example, common foreign and security policy and sanctions against rogue states. The UK has an enormous influence, and our interests are served by that. We would not want to disengage politically from decisions such as that. Suppose there were a meeting on duties on imports of dumped Chinese steel. The UK would want to be involved with that.

**Lord Whitty:** But is it up to the UK?

**Professor Derrick Wyatt:** Yes, it would be up to the UK, but the UK would have to work hard to maintain political credibility. The other side of that would be some selective disengagement, because where it was not working the UK would have to say, “We can understand why this bit won’t work and we are not trying to undermine this organisation”.

**Q170 Lord Borwick:** What are the legal implications if, as you say, the withdrawal negotiations take more than two years, as we all expect they would, and no extension is given? It has to be given unanimously, as I understand it. I am not sure what the incentive is for all the other states to agree to that extension?

**Professor Derrick Wyatt:** It is £8 billion a year in net contributions, and access to the UK market for workers and for motor cars. All the member states in the EU believe they benefit from the internal market. They will continue to believe that and there will be a minor budgetary crisis the day that the UK financial net contribution ceases. I am not saying that people always act according to their best interests if their blood is up. This would be one of the huge risks. If, for example, the UK were to jump the gun and insist on imposing unilateral restrictions on immigration while negotiations were going on, the climate would disintegrate. We would not be able to carry on in the spirit of considered mutual self-interest.

**Lord Borwick:** I entirely agree with you, but as far as a lot of voters are concerned, after a decision on Brexit has been made, they will believe that is the point at which Brexit takes place. They will not understand the details of Article 50 or the two years, let alone the other implications that you have brought forward. Will they not demand some instant withdrawal politically?

**Professor Derrick Wyatt:** I do not think it is feasible for politicians now to have a plan B, but it is essential that our Civil Service has a procedural plan B. I put my cards on the table. I shall vote to remain. I am not wishing for this to happen. If it does happen, we shall all be in the same boat and there will be huge national self-interest in moving forward in a very considered way without jumping the gun in directions that could torpedo the negotiations before they start. There will be a major learning curve for some politicians, obviously—present company excepted—and the electorate as to what needs to be done to achieve British self-interest. This is not a question of concessions to others; it is how we achieve what we would want to achieve. I agree that the man or woman in the street might expect, on the day we vote out, that with one bound we are free.

**Lord Borwick:** Yes, together with the newspapers, the television and others. The first time that a directive comes through with which we disagree and on which we have had no comment but which we will be bound with, there will be a really big row, one presumes.

Sir David Edward KCMG, QC, PC, FRSE and Professor Derrick Wyatt QC—Oral Evidence (QQ 1-17)

**Professor Derrick Wyatt:** That is where the trick will be such a hard one—forging political consensus across the parties to move forward in a way that serves our best interests.

**Lord Borwick:** As you said, there has to be political consensus across the parties, including presumably the SNP, which has a different interest in this matter.

**Professor Derrick Wyatt:** Yes, but there will be the same interest in what the SNP might say is the short to medium term, because it has aspirations to leave the UK in the longer term.

**Sir David Edward:** I go back to about a month ago when I was giving a lecture in Germany organised jointly by a university and the German-British Friendship Society of that particular province or Land. The chairman of the German-British Friendship Society said, “Make no mistake about it: if there is a vote to leave, it will be a very, very nasty divorce”. Professor Wyatt has spoken about our interest. Remember that other member states have much higher priorities, such as refugees and so on. Their willingness to sit down, make concessions and go on and on beyond two years is not necessarily guaranteed. They may say, “Right, you want to go, so please go and let us get on”.

**The Chairman:** Would that happen after two years?

**Sir David Edward:** All I am saying is that each one of them has to consent to a continuation, and you cannot guarantee it. It might just be pure spite, but you cannot guarantee that that would not motivate them.

**Lord Tugendhat:** Like Professor Wyatt, I very much hope it does not happen, but it is important to be clear about the implications if it does. Going back to Sir David’s point, on the one hand, as he says, you would need unanimity among the member states over the terms that the UK receives, but, on the other hand, could I put this question to you? For as long as the United Kingdom remained a part of the EU, it would have the ability to veto almost everything that came up that was vetoable. There would also be the capacity to create disruption in the Council in other ways. Although I entirely agree with Sir David that the implication of what he says is that it is going to be very difficult to get an agreement, and that other member states will have other priorities to which they may attach more importance than reaching an agreement with the UK, if the UK puts its mind to it, its scope for generally screwing up business would be quite considerable.

**Sir David Edward:** That is absolutely correct. It is a matter of diplomacy. Whether we would be in the mood for that kind of diplomacy is another matter.

**Lord Davies of Stamford:** What happens if there is no agreement at the end of two years and no agreement to extend the negotiations either?

**Sir David Edward:** Then we are out. We cease to be a member state.

**The Chairman:** Do we know what terms we would be out under?

**Sir David Edward:** No.

**Professor Derrick Wyatt:** My best guesstimate is that we would go on to WTO terms. One way or another, we would formalise in a very short time our participation in the WTO as the UK. We would impose tariffs on goods almost certainly at the same level as the common external tariff. That is the tariff we impose to the outside world currently. We leave the EU; we impose those tariffs on goods coming to us. The EU would be a third country; the EU would be imposing those tariffs on us.

Sir David Edward KCMG, QC, PC, FRSE and Professor Derrick Wyatt QC—Oral Evidence (QQ 1-17)

Of course, that would cost customers; it would cost people in the shops. We cannot disarm in tariff terms, because that is our ammunition in negotiating trade in goods. We also want to negotiate trade in services, where the WTO is not very good for us. The answer, my Lord Chairman, is that we would almost certainly deal on WTO terms. There would be tariffs between the UK and the EU, many of them not very high but some of them—as the Government pointed out—would be 10% on cars and 35% on dairy products.

**The Chairman:** I would like to come back on one specific point. Under WTO terms, in the absence of a separate trade agreement, we would not be able to differentiate the EU as one group and other members of the WTO to whom we exported.

**Professor Derrick Wyatt:** I do not think so. We would be on MFN terms—most favoured nation terms.

**The Chairman:** There is a follow-up point—forgive us—which is the question of acquired rights under EU law. In a sense, trade might be simple because there is a machinery. I am not aware of any machinery for safeguarding acquired rights. Do either of you have a comment on that?

**Sir David Edward:** Could I give you some examples of what would need to be negotiated? A businessman in two different member states has a contract for the supply of components at a fixed price over a period of years that extends beyond the two-year period. What happens if there is an immediate exit? Is customs duty then payable and does that disrupt the contract? What are the consequences? A university has an EU research funding package with provision for cross-frontier movement of research scientists, and that has a life beyond two years. What happens to that? What happens to Erasmus students? When does participation in Erasmus end? A divorced couple live in the UK and another member state with special arrangements for access to children, and particularly cross-border payment of family maintenance. What happens to that? There are cross-border investments and tax treatment of capital and revenue. There are agricultural support payments and fishing quotas. Those are just examples.

**Baroness Kennedy of The Shaws:** What about health?

**Sir David Edward:** Yes. That is an example of the things that are not coped with by simple state-against-state negotiations.

**The Chairman:** In a sense, that has been useful in clarifying things. I ought perhaps to make it clear on the record that the Committee will not take a position on yes or no. There will be individual members who will do so—one or two have indicated their preferences, as indeed one of you has—but we are anxious just to get the legal implications and, in fairness, the political ones of these complex issues.

**Q171 Lord Mawson:** I think you have dealt with the first part of my question. Will all three of the agreements have to enter into force simultaneously? Has anyone considered practically, given the process you are describing, how many zeros there will be on the legal bill for all of this?

**Sir David Edward:** I echo the feeling of one of my contemporaries, an EU lawyer, who said, “I thank God for my mortality”. The long-term ghastliness of the legal complications is almost unimaginable. Certainly, there will be people who will make a great deal of money out of it.

**Professor Derrick Wyatt:** On the question of the agreements entering into force at the same time, in a way, the tidying up of the EU treaties does not matter to the UK once we

have withdrawn. Co-ordination between the withdrawal treaty on the one hand and the future relations treaty on the other would be important. The UK's aim would be to have a smooth transition between the past in the EU and the future in the new arrangement.

May I add one example to Sir David's transitional examples? It concerns residency and people's right to work. It is estimated that 2 million Brits live in other EU countries. I read the other day that there are about 2 million people from other EU countries who live in the UK. Take elderly people who have lived for 10 years in Spain. After five years, they acquired a right of permanent residence as citizens of the Union and that includes access to the Spanish healthcare system. If we leave, what do we do about vested rights? Do we recognise rights to permanent residents that have arisen? What transitional rights do we give somebody who has been working for four years in the UK and has children at school and so forth? Let us not forget that for every example in the UK there is an example of a UK citizen elsewhere. We would want to tidy that up. My guess is that the inclination of Government and Parliament would be to be generous as regards those who had already made their lives in the UK, knowing that it would be likely to be reciprocated.

**Baroness Suttie:** I have a supplementary question. On the earlier point that you were making about our leaving after two years if it all goes horribly sour, you said you suspected that it would be on WTO terms. Who would decide that?

**Sir David Edward:** The WTO is the fallback situation. In other words, you would probably become a separate member state of the WTO.

**Professor Derrick Wyatt:** As Sir David said, it would be between the UK and the WTO. There would be no reason at all why the WTO would not be extremely co-operative in a situation that had become a crisis. I was going to say that crisis was too strong a word, but I do not think it is. If the UK left the EU, on what basis would it trade with countries around the world? The answer is that the WTO would accept us<sup>2</sup> and would accept our position, and we would act accordingly.

**Sir David Edward:** Professor Wyatt mentioned the EEA. We do not have the option, as our own choice, of joining EFTA. It is not obvious to me. Norway is a relatively small state. Iceland is a very small state. Liechtenstein is a mini-state. I am not sure that they would particularly welcome us in EFTA. It is often expressed that that is one of our choices, but I am not sure that it is.

**Q172 Earl of Caithness:** I want to probe a bit more on ratification. As I understand it from what you said, the exit agreement could be ratified either by qualified majority or by unanimity, depending on the legal base. The new agreement, which could be quite complicated, is more likely to be done on unanimity. Do those agreements have to be ratified by national parliaments of member states? If those agreements become mixed agreements, thus involving EU competencies, they certainly have to be ratified by member states. How long do member states take to ratify those sorts of agreements?

**Professor Derrick Wyatt:** I do not know how long, but I know it is a long time. It is unlikely to matter as much as it sounds as if it should. That is because of a provision in the treaty of Lisbon for provisional application. This has become common. When mixed agreements are adopted by the Council, there is provision in the agreement for provisional application. That is strictly provisional application only as regards the EU-competent elements. Since the EU-competent elements predominate, and in some cases it is quite difficult to discern the

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<sup>2</sup> Note by witness: Professor Wyatt adds that the WTO would accept the UK because the UK is a member of the WTO in its own right.

detailed profile of the national elements, that provisional application would minimise the problems in practice of the feature you mentioned. In all probability, both of the agreements would be mixed agreements.

**Earl of Caithness:** We still have the potential of being held hostage by member states.

**Professor Derrick Wyatt:** I think it is very unlikely, because they would sign up to provisional application for the EU. The problem of being held hostage would be if the treaty base for the future relations treaty required unanimity. One cannot really sit here and say what the position would be, because obviously we do not know the content of future relations.

**The Chairman:** There is not an obvious treaty base, is there?

**Professor Derrick Wyatt:** My suspicion is that it would actually be an association agreement of some kind, because we would end up with a fairly complex comprehensive agreement that would involve co-operative machinery of some sort. I remark again that the EEA agreement is an association agreement. If we were signing up to that, it would require unanimity. There seems at least a jolly good chance that any agreement we were signing up to would require unanimity from the other 27 member states.

**Earl of Caithness:** I have one final quick question. There will have to be amendments to the EU treaties, which obviously will not include us because we will be out of it. Would those necessitate having referendums in places such as France and Ireland?

**Sir David Edward:** If their constitutions require it. I am not personally clear as to what the trigger is, but if their constitutions require a referendum on that, it would apply. It is their constitution, not an EU provision.

**Q173 Baroness Wilcox:** I was getting quite excited. I am going to ask a question about the agreement on the UK's future relationship with the EU. Given that the UK would become a "neighbouring country"—I was just asking our expert which are the neighbouring countries because they do not sound particularly big or exciting, I must say, and I do not think I fancy being a neighbouring country—under Article 8 TEU on withdrawal, does the article have any influence on how the EU might approach the negotiations, or the type of relationship the UK could have with the EU?

**Professor Derrick Wyatt:** It is cosmetic. Article 8 was described by the author of a recent book on external relations as "startling in its ambiguity and lack of clarity".<sup>3</sup> It has been suggested that the way it could be used—I am not saying I think it would be—is as the chapeau for a special relationship with Turkey. That has been floated by individuals. In theory, it could also be a label for a new special relationship between the UK and the EU. The key thing for the UK and the EU is what the content of that agreement would be. Article 8 does not tell us anything. Calling something a neighbourhood agreement would not make any difference. That is why I used the word "cosmetic".

**Baroness Wilcox:** Thank you very much; that is a good answer.

**The Chairman:** I think Baroness Armstrong's question has largely been covered. I am wondering whether we should draw a distinction between the withdrawal agreement and the future association agreement. It may be worth asking a question on that specific point.

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<sup>3</sup> Note by witness: Professor Wyatt adds that the precise description of Article 8 agreements was that they are "shrouded in ambiguity both in terms of their position in TEU and in their scope and implications," see Panos Koutrakos, *EU International Relations Law*, page 384.

**Q174 Baroness Armstrong of Hill Top:** You said that the withdrawal agreement would be a framework agreement and, therefore, the nitty-gritty would be in the detail outside that agreement. I wanted to ask about the role of the institutions—the European Council, the European Parliament and the UK Parliament. Is there anything else on that point that you think you could usefully say?

**Professor Derrick Wyatt:** In case it was not clear from the way we bounced between some of the issues, I think there would be two agreements. The essential bones of the negotiation would be the same. The Council would lay down a negotiating mandate to the Commission, which would get on with the job. Whatever the treaty base, there would be a special committee working alongside. There would also be toing and froing between the European Parliament and the Commission. The withdrawal agreement has to know what the future relations agreement looks like, because one of its functions is going to be transition between the present and the future. I am not trying to make a controversial political point, but if the UK were to enter into a future relations treaty in which there were substantially the same provisions for the free movement of persons as in the EU, it would be important to know that, because the transition for rights of individuals as employees and the like would be a simple continuity clause. If there was a big divergence, you would have very complicated transitional provisions.

**Sir David Edward:** I do not have anything to add.

**The Chairman:** We then look at what we might call the disentanglement questions.

**Q175 Baroness Kennedy of The Shaws:** You hinted at this a bit earlier on. As a matter of domestic law there would have to be further steps taken so that European Union law would cease to apply in the UK. Sir David, you said that there would be very many nitty-gritty legal consequences, and that is what I want to ask you about. Disentanglement domestically from EU law would be far from straightforward; thousands of pieces of EU legislation are currently part of UK law. What measures do you think the Government would have to take to extinguish directly effective EU law, and EU law that has been implemented through Acts of our Parliament or through secondary legislation in the UK?

**Sir David Edward:** There are two positions taken here. I am clear that as a matter of EU law the directly effective provisions of the treaty have direct effect in law and must be applied by the UK courts irrespective of the European Communities Act. It is not the European Communities Act that gives them legal effect to be applied by the courts. The European Communities Act gives effect to anything that does not have direct effect under the treaties. You then have to do one of those exercises of going through the regulations—the statutory instruments—step by step to see which are effective. Which give effect to EU law? Can that stand alone without being amended and so on? It is a highly technical exercise, which would require armies of Civil Service lawyers.

**The Chairman:** Would one need some kind of safeguard procedure? Using slang, it is what I might call a whoopsie procedure, so that if something had been omitted it would stay valid unless and until amended.

**Sir David Edward:** That would be a sensible solution.

**Baroness Kennedy of The Shaws:** I want to move beyond the mere technical. Can all the rights that we have acquired under EU law be extinguished through domestic legislative measures?

**Sir David Edward:** No, I do not think they can. Once withdrawal has taken effect, we are no longer a member state and our nationals are no longer nationals of a member state. That

is clear. They do not have rights. It is not clear what the rights are of nationals of other member states who have acquired rights here. It is not clear in UK law nowadays whether the courts would say, “Oh well, too bad. You are no longer a national of a member state so we are not going to recognise any of your acquired rights”. I am not sure that the current trend of the courts would be towards taking such a formalistic position, but in a sense that is speculation. I am not sure that I can go further than drawing attention to the nature of the human and business problems that would need to be resolved.

**Baroness Kennedy of The Shaws:** I would be interested to hear what Professor Wyatt has to say on the rights issues. You mentioned acquired rights; there are things that people like—equality in the workplace and the stuff done under environmental law and company law. There is a whole load of stuff that people rather take enjoyment from.

**Professor Derrick Wyatt:** Yes. First, there is the question of transitions and acquired rights. It is very likely that there would be an agreement that dealt with those. It is very likely because it would affect so many people from other EU countries, as well as people from the UK. There would be strong mutual interest in doing it. It would affect questions such as what your position would be if you had lived and worked in the UK for three years and were going out. One would expect some sort of reciprocity. We would make an arrangement with the rest of the EU so that our legislation would implement the withdrawal agreement—the national provisions in the UK on the one hand, and in the EU on the other; they would be a reflection of each other and would respect acquired rights in the same way.

If there was not a withdrawal agreement, there would be a strong British incentive to respect acquired rights at the level we hoped to see them respected reciprocally on the other side. Let us assume there is a withdrawal agreement that deals with acquired rights. What about other European law that has either been directly applicable or is in directives transposed by primary or secondary legislation? Again, I think it is highly likely that the UK would want to retain that, and the normal ongoing process of review by Government of legislation in force would lead to some legislation being dropped and some not.

I really am not trying to choose a politically controversial example, but everybody has heard of the working time directive. Those who object to it object to the fact that it is being done at European level and feel that it should be left to the UK. That does not mean the rules in it are generally regarded as damaging or that it is positively a bad thing that people do not have to work more than 48 hours a week unless they are willing to do it. It seems to me that that is legislation that would only be removed by primary or secondary legislation as a result of a positive political decision that it is something we do not want any more. There are many examples. There is no pressure for the UK to address that broad issue in the immediate aftermath of withdrawal.

**Lord Whitty:** That particular provision was introduced under the provisions of the European Communities Act. If you kept the European Communities Act on the statute book, everything would remain. If, however, you repealed it, everything would fall and you would therefore have to decide whether to reinstate things as UK law one by one, and there are thousands of different regulations.

**Sir David Edward:** It is not clear that everything would fall. That is what I was trying to explain.

**Baroness Kennedy of The Shaws:** That is what Sir David said; it would not fall.

**Sir David Edward:** It is things that have a direct effect under the treaty. I am just being pedantic.

Sir David Edward KCMG, QC, PC, FRSE and Professor Derrick Wyatt QC—Oral Evidence (QQ 1-17)

**Lord Whitty:** Things that require the UK to implement them under the European Communities Act.

**The Chairman:** The regulations fall, but the directives as enacted by the UK would stand.

**Sir David Edward:** On the idea that regulations would fall, there might be an argument as to whether they had direct effect as opposed to direct application, but it would clearly be necessary for the UK to decide whether it wanted to maintain at least some of those regulations in force.

**The Chairman:** On this point, because I realise it is highly technical, if either of the witnesses would like to reflect and drop us a line it would be particularly helpful. Lord Davies has to go in a moment, so he might like to ask his question now.

**Q176 Lord Davies of Stamford:** Thank you, Chairman. You will both have read, of course, the three White Papers that the Government have produced on this subject over the last two weeks, particularly the White Paper on the process of withdrawal, which is the subject of today's discussion. That White Paper has been denounced by supporters of Brexit as a piece of baseless scaremongering. What is your assessment of that judgment?

**Sir David Edward:** My position is that the Government have a duty to state their position and what they believe the position to be. It does not seem to me that it is necessarily scaremongering unless you believe not only that there is no obligation to state the position but that, if you state the position and it does not agree with what the Brexiteers would like, it becomes scaremongering. That does not seem to be a logical consequence.

**Lord Davies of Stamford:** Perhaps I can put the same question the other way round. Do you think that the Government's assessment of the risks, uncertainties and potential costs of withdrawal are overstated, understated or reasonably stated?

**Sir David Edward:** I think potentially they are understated. You should be apprehensive.

**Professor Derrick Wyatt:** I prefer not to comment on the Government's proposals. In the Government's White Paper, they say a number of things, but I would rather confine myself to specific issues. On the specific issues, it seems to me that there is a considerable level of uncertainty and the immediate effect of Brexit would be that the pound would go down, the Stock Exchange would go down and the cost of public sector borrowing would go up, which is why the Bank of England at the moment is making contingency plans to bail out the banks. I find those things worrying.

**Lord Davies of Stamford:** You do not think that the Government have overstated the hazards of withdrawal.

**Professor Derrick Wyatt:** I do not want to take a position on what the Government say. I would rather indicate precisely what my concerns are and give a reason as to why I am concerned. Those are my concerns, but if there is Brexit we are all in the same boat and we would have to make the very best of it that we could. That would mean coming together in a strong cross-party consensus to show the EU that we could negotiate a long-term agreement that would stick, and that we would not be running backwards and forwards trying to renegotiate things. We would have to do that or business would lose confidence in the future. If that is scaremongering, I am guilty of scaremongering. I think that is a sober assessment, but it is mine and not the Government's.

**The Chairman:** We will not lead our witnesses further. Baroness Suttie has a question.

Sir David Edward KCMG, QC, PC, FRSE and Professor Derrick Wyatt QC—Oral Evidence (QQ 1-17)

**Q177 Baroness Suttie:** I turn to the devolved Administrations. What legislative measures would be necessary to extinguish the application of EU law in the devolved nations? I have a specific question to Sir David, if I may. Do you think that the Scottish Parliament would be likely to grant legislative consent? If they did not, what would be the consequences?

**Sir David Edward:** The formal consequence is this. Under Section 29 of the Scotland Act 1998 the Scottish Parliament is bound by EU law, and, ditto, under Section 57(2) the Scottish Government are bound by EU law. Under the Scotland Bill that is going through Parliament at the moment, the Sewel convention will be recognised in Section 2 if it becomes an Act. Therefore, as I see it, you would have to amend the Scotland Act and, therefore, you would have to have legislative consent from the Scottish Parliament. I can envisage certain political advantages being drawn from not acceding to the legislative consent—creating difficulties about it. The basis of Clauses 1 and 2 of the new Scotland Bill is to embed power for the Scottish Parliament and the Sewel convention as part of the British constitution. You can say, “All right, maybe so, but we are going ahead anyway”.

**The Chairman:** Professor Wyatt, do you want to comment at all with an English voice or would you rather not?

**Professor Derrick Wyatt:** I would rather not.

**The Chairman:** Colleagues, we have come to the end of our question session. It would be remiss and entirely outwith my own personal feelings if I did not express, on behalf of all the Committee, our intense thanks to you. I see Sir David signalling that there is an afterthought which may be of value.

**Sir David Edward:** Chairman, very briefly. At an early stage I mentioned the idea of no more opt-outs. I meant no new opt-outs.

**The Chairman:** I understand that; it is useful clarification. I started my valedictory, but I will restart it because I feel it very strongly. The Committee is very much in your debt, Professor Wyatt and Sir David, for the evidence you have given us and for the attention and expertise you have brought to this subject, for which we could ask no higher, in both legal interpretation on matters that are to some extent not entirely clear—you have walked us through it very helpfully—and in some of the political and other related insights you have brought. We are very grateful. As I indicated, we will send you a transcript for any detailed corrections. If you want to communicate with the Committee further, we will take that into account and will then decide whether to publish a brief report to inform the general public rather than to make up their mind for them. You will understand the distinction. At all events, whatever side people take individually, we can take it that the Committee, and I hope eventually a wider audience, have been very well served and well informed by tonight’s session. Thank you very much.

## **Professor Derrick Wyatt QC—Supplementary written evidence (PLE0001)**

1. What measures would the Government have to take to extinguish directly effective EU law, and EU law implemented through Acts of Parliament and secondary legislation, in the UK?

DWQC: Repeal of sections 2 and 3 of the European Communities Act would extinguish directly applicable EU. Repeal of UK statutes or Statutory Instruments or any other UK secondary legislation transposing EU rules which are not directly applicable, could be achieved by statute or rules made under statutory authority.

BUT in all probability, no immediate action would need to be taken. EU membership would continue until the UK withdraws from the EU. This would happen when a withdrawal agreement came into force, and this might well be and ideally would be synchronised with the coming into force of an agreement on future relations.

The UK clearly would wish to amend the European Communities Act so that sections 2 and 3 ceased to give effect to directly applicable EU law adopted after the date of UK withdrawal.

But it cannot be assumed that the UK would wish to repeal all existing directly applicable EU law or non directly applicable EU law transposed into UK law via statutes or statutory instruments. *Some* directly applicable and non directly applicable rules would no doubt be repealed as soon as the UK withdrew from the EU, but the rest could be left in force until reviewed, and either maintained, or repealed. In many cases, EU legislation has been adopted with the active support of the UK, because it accorded with UK policy, and might indeed continue to do so. For example, company law in the UK has over the years absorbed a corpus of EU harmonised rules which has become part and parcel of company law in the UK, and with which lawyers and business have become familiar. There is no rational reason for repealing it all because of its EU origin. Again, mandatory purity standards for drinking water, bathing water, and other measures of environmental protection might be left in force, pending review, and pending a decision that a particular rule or regime should be repealed because not in accord with the policy of the government of the day. Much of the law relating to equality and other rights in the workplace (equal pay, gay rights, limits on working hours etc) is based on EU Directives. It is unlikely a government would wish to repeal the UK rules transposing all these EU rules, simply because of their EU law origin, though everything could of course be reviewed in due course.

- Can all rights acquired under EU law be extinguished through domestic legislative measures, or are other approaches, such as transitional periods, necessary?

DWQC: A formalistic reply would be that there are no limits on the authority of Parliament to change the law, and the powers of Parliament are not limited by any doctrine of legitimate expectation. But the handling of rights acquired under EU law prior to withdrawal would be likely to be dealt with in the withdrawal agreement, and lead to legislation in the UK which mirrored reciprocal legislation at EU level applicable in other Member States. As I note above, the need for detailed provisions in respect of acquired rights and transitional periods would only arise were there to be a divergence between the EU legal position and the legal position in the future relationship between the UK and the EU. In the event of divergence, some rights might be respected permanently, other rights might be maintained only for a transitional period. In principle, an EU migrant who has lived and worked in the UK for 5 years (and a UK citizen who has lived and worked in another EU country) has acquired a right of permanent residence, subject to one or two exceptions. That right might be respected in full. What about years of residence between notice of intention to withdraw and entry into force of a withdrawal agreement? Those years might be treated less favourably. And shorter terms of residence might lead to a further transitional period of residence to allow individuals to re-plan their lives, and so on. Respect for acquired rights might affect not only individuals but also companies. Perhaps companies incorporated in the UK under the European Company Statute, would be allowed a transitional period to reorganise their affairs, or allowed to maintain their status as SEs indefinitely, if they have been incorporated as such for, say 5 years. And so on.

2. What legislative measures would be necessary to extinguish the application of EU law in the devolved nations, and, in your opinion, would Legislative Consent Motions be required?
  - Is such consent likely to be given by the Scottish Parliament?

DWQC OFFERS NO RESPONSE TO THIS QUESTION

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