HOUSE OF LORDS

EUROPEAN UNION COMMITTEE

Brexit: parliamentary scrutiny

Evidence Volume

Contents

Alliance EPP: European People's Party UK – Written evidence (BRU0003)

Scrutinising Brexit: the role of Parliament – Follow-Up Inquiry

1. We[1] are the British political party registered with the Electoral Commission and associated with Europe's largest political family, the centre-right European People's Party[2] ("EPP"). We support constitutional reform, the UK's membership of the EU and the Social Market. We contested the 2014 European Election in London, emerging as the top non-incumbent.

2. We welcome this Inquiry, particularly in the context of indications from HMG - some being tested in the Courts - that it is not minded to be particularly inclusive of Parliament in negotiating Brexit even though the constitutional status of a referendum is advisory but not binding on Parliament.

3. Our evidence is in part informed by our knowledge of reactions to the referendum of colleagues within the EPP, but is produced independently of the EPP and is UK EPP's exclusive responsibility.

4. We provided evidence[3] to the Public Administration and Constitutional Affairs Committee outlining our principal concerns regarding the referendum relevant to the terms of reference of their Inquiry *Lessons Learned from the EU Referendum*.

5. We regard conduct of the referendum to be have been sufficiently defective to cast doubt on its enduring political message. Even the Government of the day - months after its ill-conceived gamble - still offers no coherent view on what the alternative might be to EU membership.

6. If, for example, there had been a referendum on whether to sustain the Monarchy or to have an elected Head of State, those voting would presumably be mindful of a reasonably clear binary choice between alternatives and so the outcome of such a referendum could potentially give a clear steer to Parliament, especially if there was a very high turnout with a clear and consistent majority in all parts of the UK.

7. No such binary choice was available to voters in the recent referendum. Instead, a relatively tight advisory referendum, prematurely timed more to suit the Government's internal interests than that of the UK and our allies, had plumbed new depths of electoral deception and unpersuasive hyperbole. The referendum is not itself a reliable compass guiding the Government to the UK's future.

8. While we broadly agree with the Report of the Committee published on 22 July 2016, we are far less concerned than is the Committee even about

[1] http://www.4freedomsparty.eu
[2] http://www.epp.eu
[3] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/lessons-learned-from-the-eu-referendum/written/36616.html

confidentiality of the Government's commercial agreements during negotiation of Brexit.

9. Those potentially affected by such negotiations - those whose jobs and investment are at risk - are entitled to the fullest and most timely transparency and this can only be guaranteed if Parliament has immediate and full access to relevant information. Quite frankly, when the Prime Minister appears to be willing to discuss her thinking with Sinn Féin, there cannot be the slightest excuse for the Government to conceal anything from Parliament and the British people as a whole.

10. Indeed, it would be a most ominous start to the Brexiteers' compelling if essentially phony battle cry of *take back control* if the Government refused *a running commentary* and anything other than the fullest simultaneous Parliamentary oversight. If the Government were to find public scrutiny uncomfortably hot to handle, that is not even the slightest reason for it to be permitted by Parliament to evade such scrutiny: the Government has only itself to blame for a situation it has itself recklessly made possible.

11. Nor do we necessarily agree with the Committee's statement at paragraph 2 of its Report that the Government must now negotiate the UK's withdrawal from the EU.

12. We rather think that the Government's duty is more to form and then recommend within the UK a clear, reasoned and transparent view on its proposed destination. This would have the combined merit of both retaining more decision-making for longer within the UK and also sparing our EU allies avoidable difficulty at a time when plenty of other pressing issues legitimately demand their attention.

13. We believe that the Government - whatever brickbats the tabloids and its political opponents may throw - has more of a duty not recklessly to start a journey to destinations unknown than to be seen hastily to implement the unclear verdict of an imperfectly conceived and conducted referendum. If the Government cannot see this duty, Parliament must help it so to do.

14. In the referendum, just over a third of the electorate - 37% - voted to leave the EU compared to the rather stronger mandate of the 1975 referendum where 43% of the electorate, 67% of those voting, sustained the then much less entrenched constitutional *status quo* of EC/EU membership. The then leader of UKIP himself insisted on television on the night of the 2016 referendum that a 48%/52% split of those voting in the referendum would not settle the issue: that argument is stronger when applied to radical change to rather than maintenance of the established constitutional *status quo*.

15. In 2015, slightly less than one quarter of the electorate voted for the current Government but it nonetheless commands a small majority in the House of Commons. While the 2015 Conservative Party Manifesto pledged to hold a referendum and to be bound by its result, that Manifesto without limitation additionally - not alternatively - pledged to deepen the UK's integration within the Single Market: *We want to expand the Single Market, breaking down the*

remaining barriers to trade and ensuring that new sectors are opened up to British firms.

16. Again, however irritating *a running commentary* may be to an appointed Prime Minister, the Government's mandate is far more constrained than has been suggested by the *hard Brexit* rhetoric of some Ministers under this new Prime Minister. Parliament and others must consistently hold the Government to account and on matters European the House of Lords generally has the more credible record.

17. At paragraph 11 of its Report, the Committee correctly noted the acquired rights of EU citizens resident in the UK and of UK nationals resident in the EU. The wording of the Treaty, understandably, is clearer on one direction of travel - people acquiring rights associated with EU citizenship - than its reverse. Be that as it may, acquired rights - even if most British people most of the time still do not know what most of these rights are - in fact extend to the entire British population in our additional capacity as European citizens.

18. The Committee may feel that, given the now broad extent of acquired rights, this has particular importance in the context of Article XVIII of the Union with Scotland Act 1706 which imposes on Parliament the duty that *no alteration be made in Laws which concern private right Except for evident Utility of the Subjects within Scotland*. As the Committee will fully appreciate, Her Majesty's Scottish subjects made plain their views in the 2016 referendum.

19. Inadequate debate and disclosure during the referendum does not alter the fact that Brexit would in fact be a massive withdrawal of guaranteed rights from all British people[4].

20. In such circumstances, it would be a dereliction of duty by Parliament if there were anything other than the clearest possible audit trail evidencing rigorous parliamentary scrutiny of all aspects of all negotiations either removing or purporting domestically to substitute for all/any of these significant rights insofar as they relate to all/any of the British people. Every lost right must be amply and specifically justified before it is lost. Put another way, we believe Parliament has a solemn duty to ensure that the benefits of Article XVIII are shared by all British nationals and extended, by analogy, to non-private rights.

21. Whatever relevant Courts may decide that Article 50 means, we believe that at every stage of the process Parliament must be most intimately involved in public scrutiny and the objectives are both to interrogate the Government and to ensure that those likely to be affected by aspects of negotiations are able as effectively as possible to represent their own interests.

22. The EU Treaty framework is not merely an international treaty but for the entire lifetime of most British people has directly formed part of the government of the UK. Parliament must closely scrutinise all aspects of the fundamental

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4 https://www.bindmans.com/uploads/files/documents/PCIPs_Article_50_skeleton.pdf?utm_source=sendinblue&utm_campaign=_UPDATE_ON_PEOPLES_CHALLENGE_TO_THE_GOVERNMENT_ON_ART_50_A_PARLIAMENTARY_PREROGATIVE_27916&utm_medium=email

constitutional adjustment associated with re-negotiating the Treaties: otherwise it becomes a Parliament only in name.

23. We believe that, to the extent there was a protest vote in the referendum, it had at least as much to do with insufficient regional subsidiarity within the UK (which we believe has for decades exacerbated the effect of economic difficulty in some regions) as with issues directly relevant to membership of the EU.

24. To the extent that lack of subsidiarity is a problem in the UK, Westminster is overall a much greater culprit than is Brussels: indeed, Brexit could make matters even worse as it would remove a formal constitutional duty of subsidiarity.

25. It may not be wholly without significance that those parts of the UK with relatively more formal regional autonomy - Scotland, Northern Ireland and London - generally did not vote to leave the EU.

26. If there was, however, a sense of economically vulnerable people using the referendum to protest about being unheard and/or left behind, we would respectfully suggest that this presents a moment of truth for the House of Lords.

27. The House has correctly been sensitive about its role since arguably prioritising the financial interest of its own membership by confronting an elected Government on a core economic proposal, the 1909-10 People's Budget.

28. Whatever reforms may lie ahead for membership of the House, we strongly support the concept of a viable Upper House. We believe this concept must now prove its worth on the vital matter of the UK's relationship with European neighbours.

29. Further, we believe that the regionalised base of representation within the German Bundesrat and US Senate may offer a helpful pointer to an innovative but necessary way ahead for the House of Lords.

30. Parliament should scrutinise every aspect of a proposed Brexit, with a view to its ultimate legitimacy again being democratically tested against the *status quo* before the UK leaves the EU.

31. While MPs should engage within their Constituencies, we believe the House of Lords is now presented with a unique opportunity to modernise its role and constructively to reach out to - and visit - the UK's Nations, regions and cities.

32. Not only might this create a significantly improved template for enhanced future parliamentary engagement across all the UK but it might also help to avert the looming catastrophe of a misconceived Brexit that is perhaps now the UK's most likely route to fatally undermining both the confidence of the British people in our national institutions and the integrity of the UK as currently constituted.

33. Regardless of whether the British Parliament manages to interrogate the British Government, the European Parliament remains free to - and we have reason to believe it will - attempt to probe the European Commission on

negotiations once the Council has set its remit. National parliaments across the EU remain free to, and we believe will, probe their own governments.

34. All in all, the British Government's chances look very low of avoiding *a running commentary* on a matter of legitimate widespread interest across the EU and for the UK's allies elsewhere.

35. It would be intolerable and tend to promote instability to repeat the precedent of the 1936 Abdication Crisis where the British but not overseas Establishment and media were for too long silent on its prospective cause. This is another reason, in what is potentially a much more severe and sustained constitutional crisis for the UK, for Parliament now to be seen to rise to the challenge of effective, timely and transparent scrutiny and to make itself a source not of further alienation and shame but of shared identity and pride.

36. We are of course willing to be of further assistance to the Committee.

30 September 2016

Wilfred Aspinall – Written evidence (BRU0004)

SUBMISSION TO THE HOUSE OF LORDS EUROPEAN UNION COMMITTEE

1. Introduction

1.1
Learning from the past

In my submission, published in December 2015 [see link below], by the HoC EU Scrutiny Committee on the negotiations being conducted by Prime Minister David Cameron MP I set out what I felt needed to be on the agenda for discussion.

http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/inquiries/parliament-2015/renegotiation-eu-membership/publications/

One of the points made was the need for those negotiations to be transparent and that the Prime Minister, other Ministers and civil servants involved in those negotiations needed to have accountability by openness to the public at large but also answering to both the HoC and HoL. I did suggest that a new Committee of the Houses of Parliament should be formed consisting of members of the HoL and HoC.

Reason: To avoid duplication and not take up the time of the PM and others having to have a dialogue with both Chambers.

The process favoured and conducted by David Cameron was to keep his negotiating tactics within a small group. This did not allow him the flexibility and assistance of a UK sounding board with constructive ideas and criticism and this resulted in the government asking for nothing and receiving even less once the negotiations were concluded with EU Institutions and Member States. The impression given was one of a lack of knowledge of how the EU operated

Of course negotiating tactics should be confidential as they are being undertaken but having a dialogue with parliament, the representatives of the people, and by reporting back on progress enables a wider source of opinion.

I am still of that view.

2.
BREXIT NEGOTIATIONS FOLLOWING THE REFERENDUM

2.1
Involvement of Parliament

In the BREXIT negotiations Parliament should be involved. The decision to exit the EU was taken at referendum by the UK electorate and although not every voting member can be involved the parliamentary representative system should trust that in one way or another dialogue between those undertaking the

negotiations and Parliament takes place. In that way the electorate will be involved both directly and indirectly

I realise that some will say this gives those who continue with the REMAIN concept to argue their case but scrutiny does no harm and often results in a much better deal. This can be covered by a Code of Practice and Rules for debate.

3.
Adoption of a BREXIT Strategy

The first priority is for the government to adopt a clear strategy for BREXIT setting out the aims and objectives and giving a lead in what is required to fulfil the decision taken by the electorate of the UK in the June 2016 referendum

It is also important that the EU institutions and member states understand that the decision has been taken and will not be reversed. The negotiations are the means of fulfilling that instruction

4.
A Pathway to Exit the European Union

With the above in mind I have prepared a Pathway for those negotiations which is duly attached for your consideration.

5.
ROLE OF PARLIAMENT IN SCRUTINISING THE BREXIT NEGOTIATIONS

5.1
Actions by Parliament

You will see in my Pathway to the BREXIT Negotiations that certain actions will be required of Parliament involving specific legislative processes. Two immediate Acts of Parliament and within them explicit requirements to ensure:-

— That EU legislation that has been transposed into our laws and practices either by primary or secondary UK legislation is maintained until repealed [possibly at a later time]

— That where in these transposed legislative instruments there exists a role of the European Commission to receive reports and monitor for compliance of that instrument this is repealed from UK legislation with immediate effect on exit from the EU

— That reference to the European Court of Justice in respect of EU competence be immediately repealed

— That the UK should seek its rightful seat on the WTO to enable us to enter into free trade agreements on a global basis. That there is no gap between exit and taking up the seat. There is some argument even for this to be undertaken as an immediate action

— That international agreements entered into by the EU are continued or repealed

— That standards set by the decisions of the EU for developing access to the EU Internal Market be considered with a view to entering into a free trade agreement with the EU. A decision taken whether UK standards should be reintroduced

in order to exercise this process no Treaty of the EU will be required. It will be a decision of the UK to rescind the Act of Accession to the European Communities.

5.2
The UK to lead in these negotiations

The UK must take the lead in these negotiations and not be lead by the EU institutional process. It is the UK that is leaving not the EU that is forcing their views on us

5.3
Article 50 - Unchartered Territory

Remember no other member state of the EU has invoked Article 50 of the Lisbon Treaty and therefore we are in unchartered waters. The UK should not allow the EU to take the initiative in driving these negotiations nor allow the differences in our legal system - common law for the UK as against the system used in mainland Europe to influence these exit negotiations. As far as I can see the ECJ has no role to play in the Article 50 negotiations and that needs to be explicitly established

6.
The Role of Parliament

6.1
The job of Parliament

The job of Parliament will be to examine the activities of the BREXIT strategy and ensure that the overall objective of exiting the EU is upheld. In this respect it has a very responsible task to follow the decision taken in referendum in June 2016

Parliament can justify an enhanced role in scrutinising the BREXIT negotiations based on the recent failure of the government in not understanding the mood of the electorate and keeping their tactical strategy secret. It might even be questioned whether certain individuals involved in the negotiations were actually acquainted with the practices of EU institutional legal interpretations.

— There should be one message.

— In respect of the rationale for this role by Parliament it could only be on an advisory basis since the decision to exit the EU has been taken in a

referendum. It will not be whether or not we withdraw from the EU but the technicality of how. Parliaments role should act as the guardian for the result of the referendum decision being explicitly positive in that objective

— I see no need for a vote to be taken in Parliament nor the need for a referendum on the final result of the BREXIT negotiations. The decision has been taken

6.2
Challenges for Parliament in scrutinising the BREXIT negotiations

— Parliament should not be afraid of debating the negotiation process but it must be in context to the strategy set by the government to exit the EU. It cannot be used as an excuse to reopen the Leave v Remain debate.

6.3
Rules and Code of Practice for Parliament to scrutinise the BREXIT negotiations

— Rules should be set that will prevent debate taking place during the scrutiny process to reopen the Leave v Remain debate from being developed by those parliamentarians who still harbour the opportunity to reverse the referendum result.

— These rules would have to be rigorously upheld in a specific Code underwritten by Parliament

6.4
Confidentiality in the BREXIT Negotiations

— Anyone who has had dealings with the EU Institutions will know that there are frequent leaks, especially if it is to the advantage of the leaking party. Often misleading or a license on interpretation will be used. It would be fair to say political sources and other interested bodies in the UK also use these tactics.

— There is therefore a serious need for the truth to be maintained by the UK negotiating team. There has been a decision by referendum of the people in the UK and that must be upheld. If a strategy is explicitly stated it can be maintained.

— Government confidentiality can be maintained within their terms of engagement during the "immediate" negotiation process but there comes a point when openness can follow in order to have that open debate and certainly when nearing a final decision. When a specific question is asked. Like " what is the reaction of the EU Institutions for the single market standards and rules to be maintained for a transition period " OR " what are the implications of any agreement for freedom of movement of people, as set out in the Maastricht Treaty, to be completely abandoned under the

BREXIT process but freedom of movement of workers to continue under strict control of and under the authority of the UK government". I consider that those involved in the negotiation should be able to give answers

7.
CONCLUSION

It is essential that no misleading statements are made or encouraged during the period of the final BREXIT process.

GREATER knowledge of the EU process, interpretations and differences in emphasis for instance in the " freedom of movement of people." Introduced under the Maastricht Treaty as against the "freedom of movement of workers " the latter being one of the four original pillars of the EEC as against that of the former.

GREATER knowledge of the concept of the Internal Market and the ability of any third country to trade with the EU member states

The BREXIT decision must be upheld without watering down the UK strategic path that we all concede must happen

29 September 2016

The Bingham Centre for the Rule of Law – Written evidence (BRU0002)

Brexit: Parliamentary Scrutiny

Evidence to the EU Committee's Inquiry — 29 September 2016

This is The Bingham Centre for the Rule of Law's submission to the Brexit: parliamentary scrutiny inquiry. It begins with short responses to specific inquiry questions. We elaborate on these matters and others that relate to Parliament's role in upholding the rule of law in the Brexit process in the Briefing Paper that follows.

Summary Responses to Present Inquiry

This submission is based on the following basic principles of government in the UK:

- The agreements for the UK's exit from and future relations with the EU will have fundamental consequences for UK law and law-making. The UK is a democracy in which Parliament is sovereign, although the Executive negotiates treaties under its prerogative powers.
- The rule of law requires compliance by the state with its obligations in international law as in national law.
- The Executive conducts international negotiations and enters into treaties, while Parliament has responsibility for passing UK laws as needed for the UK to comply with its international obligations.
- Both Parliament and the Executive must respect the rule of law in their activities.

What involvement should Parliament have in scrunitinising the negotiations? Should Parliament play an enhanced role in scrutinising the terms of Brexit negotiations? What would be the rationale for such an enhanced role? (paragraphs [16]-[21] and [87]-[90] of the Briefing Paper)

- Parliament plays an essential role at the intersection of domestic and international law, because it debates and passes legislation that gives effect to treaty obligations in UK law.
- The Government will need Parliament's support for the outcomes from its international negotiations.
- The rule of law would be enhanced by a process through which the Executive regularly engages with Parliament before and during negotiations to allow Parliament to scrutinise the negotiations, rather than presenting the agreements to Parliament as a finished product.

What should be the principal objectives of parliamentary scrutiny of negotiations? (paragraphs [2]-[6])

- Safeguarding the rule of law should be a principal objective, including to ensure that the Brexit agreements do not undermine Parliamentary law making (Appendix 1 discusses rule of law principles).

What practical challenges would Parliament face in scrutinising the negotiations? (paragraphs [26]-[27] and [36])

- Parliament has limited resources which will curtail its capacity to scrutinise negotiations.
- Recommendations 5 and 6 are directed at this challenge—Parliament should have greater resources to safeguard the rule of law; and all parliamentary committee members should have an opportunity to participate in a closed informal discussion of rule of law principles in the context of Brexit.

How can the need for negotiations to be conducted confidentially be reconciled with effective parliamentary scrutiny? (paragraphs [91]-[93])

- There are good reasons for international negotiations to be conducted in confidence including so that strategic advantage is not lost by allowing the opposing negotiators to know your vulnerabilities and so that parties have more flexibility.
- However, the international negotiations for Brexit will have such fundamental consequences for UK law a parliamentary mandate could strengthen the clarity of the negotiators' position. Otherwise, the Executive's decisions in the negotiations risk effectively dictating or foreclosing options for Parliament's law-making.
- As already noted by the House of Lords EU Committee, current parliamentary scrutiny can be highly flexible with respect to confidential matters.

Should parliamentary scrutiny of the negotiations be underpinned by a formal resolution or code of practice? If so, what should be the terms of engagement? (paragraph [94])

- The rate of decision making in the negotiations with the EU will almost certainly accelerate over the two years following notice under Article 50, with the last months and weeks being the most crucial.
- It would be prudent for Parliament to set processes for negotiations that take this acceleration into account.

Briefing Paper: Parliament and the Rule of Law in the Context of Brexit
29 September 2016

Executive Summary

The UK's departure from the EU raises many contentious issues, some of which are constitutional in nature. This paper focuses on procedural rule of law questions concerning how Parliament can safeguard the rule of law in the process of domestic and international law-making required to give effect to the outcome of the June referendum. The international negotiations and law reform process resulting from the UK's exiting from the EU will present an enormous challenge for the UK Government and Parliament because of the volume and complexity of work to be done.

In this context, Parliament has an important role to play to safeguard and apply rule of law standards when carrying out its activities of law-making and scrutiny of Government. Parliament can safeguard the rule of law in its law-making by ensuring fidelity to rule of law principles in the content of laws made to give effect to Brexit, and through transparent and stable processes for law-making in the context of Brexit. Parliament should guard against skeletal drafting of legislation and poorly defined Henry VIII clauses because they undermine Parliamentary sovereignty and the rule of law. Laws concerning the following areas warrant particular parliamentary scrutiny because they strengthen the rule of law: anti-discrimination law; freedom of information; and human rights.

The rule of law could be enhanced by a process through which the Executive regularly engages with Parliament before and during negotiation of the agreements for the UK's exit from and future relations with the EU that will have fundamental consequences for UK law, allowing Parliament to scrutinise and approve the negotiations.

Recommendation 1: Parliament and its committees can apply rule of law standards when scrutinising legislation to promote fidelity to rule of law principles.

Recommendation 2: Parliament should scrutinise particularly carefully Brexit-related reforms in anti-discrimination, freedom of information, and human rights.

Recommendation 3: Parliament should ensure that Henry VIII clauses are used sparingly and only in legislation drafted with sufficient detail for legal certainty.

Recommendation 4: Committees should explicitly refer to the rule of law in the terms of reference for inquiries on aspects of the Brexit law reform process as and when appropriate.

Recommendation 5: Parliament should have greater resources to safeguard the rule of law—e.g. the rule of law expertise of the Scrutiny Unit could be enhanced through training or additional staff to provide support to House of Commons select committees on rule of law questions as needed.

Recommendation 6: All parliamentary committee members should have an opportunity to participate in a closed informal discussion of rule of law principles in the context of Brexit.

Recommendation 7: UK Parliament and Government must engage with devolved institutions, involving them in decisions on international negotiations and Brexit law reform.

The Bingham Centre stands ready to provide rule of law assistance to Parliament.

This paper contains the following sections:

About the Bingham Centre

I. Introduction

1. This paper aims to inform the work of Parliament by setting out preliminary rule of law issues relating to Brexit. The international negotiations and law reform process resulting from the UK's exiting the EU will present an enormous challenge for the UK Government and Parliament because of the volume and complexity of work to be done. The UK's departure from the EU raises many contentious issues, some of which are constitutional in nature.[5] This paper focuses on procedural rule of law questions concerning how Parliament can respect and safeguard the rule of law in the process of domestic and international law-making required to give effect to the outcome of the June referendum.

2. While there were many and varied reasons that motivated the vote to leave the EU, it is common ground that a core and dominating theme was the wish to restore power over law-making to the UK Parliament, thus putting control over UK law in the hands of those democratically elected

[5] See e.g. Nick Barber, Tom Hickman and Jeff King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', *UK Constitutional Law Blog* (27 June 2016) https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/; Professor Mark Elliott, 'On why, as a matter of law, triggering Article 50 does not require Parliament to legislate', *Public Law for Everyone* (30 June 2016).

by and accountable to the people.[6] Consistent with that goal, it is crucial that UK constitutional principles are protected, including the rule of law. The rule of law is not an abstract principle, rather, it is a practical concept by which proposed laws should be assessed. It is not the sole preserve of lawyers and courts, but a constitutional principle that Parliament has a role in safeguarding. As the sovereign law-making institution in the UK, Parliament has a vital role to play in applying the rule of law as part of its scrutiny of legislation and Government.

II. Parliament and the Rule of Law in the Context of Brexit

3. In general terms, the UK's exit from the EU will involve:
   a) Negotiation of agreements on the UK's exit from and future relationship with the EU, as well as negotiating trade agreements with non-EU countries (referred to generally as "*international negotiations*" in this submission); and

   b) Review of UK laws and an extensive law-making process to deal with EU laws that may otherwise no longer apply following the UK's exit to:
      i. Clarify which EU laws continue to apply in UK law and the implications of changes to those laws by the EU and future European Court of Justice decisions on those laws, as well as to ensure that any references to EU institutions or laws in UK laws do not render the UK laws ambiguous or unclear; and
      ii. Establish new UK laws to replace the EU laws that the UK wishes to change.
      (Referred to generally as "*Brexit law reform process*" in this submission).

4. There will be overlap in substance and process between the international negotiations and Brexit law reform process. In particular, there will likely be some EU frameworks that the UK will want to remain part of, for example, cooperation on national security. For these matters, the UK will want to negotiate to stay within the EU law and framework such that the law continues to operate in the UK after exit from the EU.

5. The international negotiations and Brexit law reform process will pose a difficult challenge in terms of scale and complexity for the UK Government and Parliament. Yet the Brexit law reform process also presents a significant opportunity to improve the clarity of UK law whether EU standards are incorporated or new UK laws made.

6. The rule of law is a recognised UK constitutional principle that must be respected and safeguarded in the processes and outcomes of the international negotiations and Brexit law reform process, and Parliament

[6] Boris Johnson, 'There is only one way to get the change we want – vote to leave the EU', *The Telegraph* (16 March 2016) http://www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/; Michael Gove, 'Why I'm backing Brexit', *The Spectator* (20 February 2016) http://blogs.spectator.co.uk/2016/02/michael-gove-why-im-backing-leave/; 'Taking Back Control from Brussels' *Vote Leave*, http://www.voteleavetakecontrol.org/briefing_control.html.

will play a key role in this context. We base this paper on the eight rule of law principles identified by Lord Bingham and note that the adoption of his formulation by the Venice Commission has given considerable influence to his articulation of the principles. The principles are explained in more detail in Appendix 1.

Protecting the Rule of Law in the Brexit Law Reform Process

7. Two narrow examples illustrate the complexity of decision making that the UK faces across a multitude of areas such as employment, health and medicines, environment, consumer protection, finance and banking, agriculture, and arts and culture:[7]
    a) The UK's Tobacco and Related Products Regulations 2016 were made by the Secretary of State under powers conferred by section 2(2) of the European Communities Act 1972 to implement Tobacco Products Directive (2014/40/EU). The Regulations rely on EU institutions and standards: for example, reg 5(3)(a) requires that a container pack of a tobacco product have a health warning that includes a text warning and colour photograph specified under the EU Directive. Does the UK wish to remain in the Directive and if so can the UK successfully negotiate this? If not does the UK wish to incorporate this EU Directive into UK law or make a new UK law? What would be the cost to UK businesses operating in the EU of complying with different standards if the UK sets its own law? If the UK continues to follow the EU Directive, what happens if the EU revises the Directive? The Court of Justice of the EU (CJEU) has already ruled that the Directive is valid, would the UK follow future decisions of the CJEU on the Directive?[8]
    b) Commission Regulation (EU) No 666/2013 of 8 July 2013 sets ecodesign requirements for vacuum cleaners and forms part of UK law because it is an EU regulation and therefore has direct effect in the UK. It is an example of many technical EU Regulations currently setting standards in the UK. When the UK leaves the EU, will we keep this Regulation by incorporating its standards into UK law, or set our own technical standards for the efficiency of vacuum cleaners? If the UK continues to follow this Regulation, what will be the effect in UK law if the EU amends or replaces the Regulation or the CJEU makes a decision on the Regulation?[9]

8. ***The following rule of law principles provide guidance for the Brexit law reform process*:**
    - The law must be accessible and so far as possible, intelligible, clear, and predictable.

[7] House of Commons Library, *Briefing Paper Number 07213: Brexit: impact across policy areas*, (26 August 2016).
[8] Tobacco and Related Products Regulations 2016 (UK); section 2(2) of the European Communities Act 1972; Tobacco Products Directive 2014/40/EU of the European Parliament and the Council; Court of Justice of the European Union Press Release No 48/16 (4 May 2016) http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-05/cp160048en.pdf.
[9] Commission Regulation (EU) No 666/2013 of 8 July 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for vacuum cleaners Text with EEA relevance.

- The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
- The law must afford adequate protection of fundamental human rights.

9. Parliament is charged with the responsibility of making laws. Accordingly, ***as part of Parliament's scrutiny of legislation, Parliament should consider the fidelity of new laws to these principles. The rule of law can be enhanced through a careful and robust Brexit law reform process that seizes the opportunity to make UK law as clear and accessible as possible.*** In order to promote fidelity to the rule of law, parliamentarians and committees can apply the rule of law standards set out in the *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee*. These rule of law standards are discussed and extracted in Appendix 2.

10. The ***rule of law principles outlined above also point to areas that warrant particular scrutiny in the legislative reform process necessitated by the UK's departure from the EU*****.** These areas include anti-discrimination law, human rights law, and freedom of information law, which are discussed in Appendix 3.
11. There is a further rule of law point concerning the process by which laws are made: the process for Brexit law reform ought to enable the law to be predictable and stable. The law can change, and the UK's exiting the EU will necessitate large-scale reforms to UK law. However, ***parliamentary processes for such changes to law that are transparent and clear will mean that the outcome will be relatively stable and predictable*****.**

12. There may be an inclination to pass as much law as quickly as possible to expedite the Brexit law reform process, but such haste would undermine parliamentary legislative scrutiny and the rule of law. For the purposes of legal certainty, it may be best to incorporate as much EU law as possible into UK law so that the Brexit law reform process can take place without undue haste. However, there would need to be clear rules on the effect of EU institutions' decisions on EU laws incorporated into UK law, otherwise the incorporation of EU law may lead to uncertainty with implications for all aspects of life in the UK including, especially, business.

13. ***The rule of law also includes principles concerning the exercise of legal power, particularly the exercise of power by the Executive*****:**
    - Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
    - Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

14. These rule of law principles are intrinsically related to the UK constitutional principles of the separation of powers and the sovereignty of Parliament. Parliament makes laws that are implemented by the Executive, and those laws define the scope and limits of power conferred on the Executive. Poorly defined Henry VIII clauses in legislation that is

drafted in skeletal form undermine these principles, especially the sovereignty of Parliament,[10] by enabling the Executive to make laws that define the scope and limits of the Executive's power. A Henry VIII clause enables primary legislation to be amended or repealed by delegated legislation with or without further parliamentary scrutiny.

15. In rule of law terms, ***unnecessarily broad Henry VIII clauses in skeletal legislation threaten these two rule of law principles because such clauses give the Executive almost absolute discretion on questions of legal right and liability rather than defining in law the criteria for resolving the questions***. Overly broad Henry VIII clauses threaten the latter rule of law principle by conferring power without limits on the Executive that can be exercised unreasonably since the power may be established and defined by the Executive itself. This problem is compounded by the trend towards skeletal drafting of primary legislation that lacks substance and detail for the delegated legislation that it authorises.

Enhancing the Rule of Law through Parliamentary Scrutiny of International Negotiations

16. As argued by Lord Bingham, the rule of law requires compliance by the state with its obligations in international law as in national law. The Executive conducts international negotiations and enters into treaties, while Parliament has responsibility for passing UK laws as needed for the UK to comply with its international obligations.

17. ***The agreements for the UK's exit from and future relations with the EU will have fundamental consequences for UK law and law-making. The UK is a democracy in which Parliament is sovereign, including over the Executive, although the Executive negotiates treaties under its prerogative powers.***[11] Both Parliament and the Executive must respect the rule of law aspects of these activities.

18. ***The rule of law could be enhanced by a process through which the Executive regularly engages with Parliament before and during negotiations to allow Parliament to scrutinise and approve the negotiations***. The impetus for such engagement is not only political, but also has a legal dimension because Parliament will need to amend or repeal the European Communities Act 1972 in line with the agreements reached with the EU.[12]

19. The question of the Government's power to send notice under Article 50 is the subject of multiple legal challenges concerning the nature and extent of the Executive's prerogative power, whether prior authorisation by

[10] The Rt. Hon Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII', (12 April 2016, King's College London), https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf.
[11] House of Commons Library, 'Brexit: how does the Article 50 process work?' (30 June 2016).
[12] House of Commons Library, 'Brexit: how does the Article 50 process work?' (30 June 2016), 30.

Parliament is required, and requirements that may arise from the unique constitutional arrangements of Northern Ireland.[13]

20. The need for Parliament's scrutiny of international negotiations is discussed in relation to rule of law principles in more detail in Appendix 4, without concluding on the legal questions raised in these cases.

21. Ultimately, concluding an agreement on the UK's future relationship with the EU prior to the UK's leaving the EU is crucial to provide certainty and stability for UK law and policy. Without such an agreement, there will be extreme uncertainty across UK law and policy from trade to national security; from financial regulation to environmental law.

Recommendations

22. **Recommendation 1:** When scrutinising legislation, Parliament and its committees can apply rule of law standards from the *Code of Constitutional Standards* — derived from the work of the House of Lords Constitution Committee and produced by the Constitution Unit — to promote fidelity to rule of law principles. Appendix 2 introduces the Code and extracts the standards that relate to rule of law principles.

23. **Recommendation 2:** Parliament should scrutinise particularly carefully Brexit-related reforms in areas of anti-discrimination, freedom of information, and human rights.

24. **Recommendation 3:** Parliament should ensure that Henry VIII clauses are used sparingly, and when used, are carefully drafted and only used in primary legislation that provides appropriate detail and substance for legal certainty.

25. **Recommendation 4:** Committees should explicitly refer to the rule of law in the terms of reference for inquiries on aspects of the Brexit law reform process as and when appropriate. For example, any inquiry on anti-discrimination laws by the Women and Equalities Committee should refer to the rule of law principles of equality before the law and equal protection of the law in the inquiry's terms of reference.

26. **Recommendation 5:** Parliament and its committees should have greater resources to safeguard the rule of law.[14] For example, the rule of law expertise of the Scrutiny Unit could be enhanced through training or additional staff to provide support to House of Commons select committees on rule of law questions as needed.

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[13] Owen Bowcott, 'Theresa May does not intend to trigger article 50 this year, court told', *The Guardian* (19 July 2016) http://www.theguardian.com/politics/2016/jul/19/government-awaits-first-legal-opposition-to-brexit-in-high-court; Steven McCaffery, 'Brexit set to face legal challenge in Northern Ireland', *The Detail* (25 July 2016) http://www.thedetail.tv/articles/brexit-set-to-face-legal-challenge-in-northern-ireland; Jones Cassidy Brett Solicitors, Press Statement (19 August 2016) http://www.mlex.com//Attachments/2016-08-23_8U59768CT7N27FL6/Press%20Statement%20-%20Legal%20challenge%20to%20Triggering%20Article%2050%20-%20Update.pdf.

[14] House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [32].

27. **Recommendation 6:** Many parliamentary committees will very likely have Brexit as part of their work,[15] so all committee members should have an opportunity to participate in a closed informal discussion of rule of law principles in the context of Brexit. The Bingham Centre acts as the secretariat for the APPG on the Rule of Law, which regularly holds meetings to discuss rule of law questions that arise in the work of Parliament, and could provide a briefing session drawing on expertise such as Founding Director Professor Sir Jeffrey Jowell KCMG QC.

28. **Recommendation 7:** UK Parliament and Government must engage with devolved institutions, involving them in decisions on international negotiations and Brexit law reform.

29. The Bingham Centre stands ready to provide assistance to Parliament on rule of law questions including, for example, to give oral evidence or facilitate a closed informal session for MPs and Lords on committees to meet and discuss the relevance and application of rule of law principles for their work in the context of Brexit.

III. Skeletal Legislative Drafting, Delegated Legislation, and Henry VIII Clauses

30. This section explains the problems of skeletal legislative drafting and inappropriately broad delegated legislative powers in rule of law terms, and the risk that Brexit will exacerbate these issues. To address this threat to the rule of law, Parliament can use relevant standards in the *Code of Constitutional Standards* and build on the work of the Delegated Powers and Regulatory Reform Committee.

31. There is a trend of skeletal drafting of primary legislation to merely outline the law and Parliament's intention without details. The Constitution Committee has rightly criticised the trend of 'vaguely-worded legislation that left much to the discretion of ministers'[16] for its erosion of the principle that the law should be clear and certain.[17]

32. Delegated legislation, also known as secondary or subsidiary legislation, is legislation made by the Executive using power that has been delegated by Parliament in primary legislation. Delegated legislation is necessary because Parliament does not have the time or resources to address detailed administrative matters in primary legislation. Delegated legislation does not receive the same level of parliamentary scrutiny as

[15] Ruth Fox, 'It's Brexit… So What Now for Parliament?', *Hansard Society* (24 June 2016), http://blog.hansardsociety.org.uk/its-brexit-so-what-now-for-parliament/; Hannah White, 'Parliament's role in the Brexit negotiations', *Institute for Government* (21 July 2016), http://www.instituteforgovernment.org.uk/blog/14358/parliaments-role-in-the-brexit-negotiations/.

[16] House of Lords Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, (23 March 2016), [37].

[17] See e.g. House of Lords Select Committee on the Constitution, *Cities and Local Government Devolution Bill [HL]; Psychoactive Substances Bill [HL]; Charities (Protection and Social Investment) Bill [HL]* (22 June 2015), [2]-[3]; see also, House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review*, (23 March 2016), [33]-[38].

primary legislation, and is very rarely rejected by either House (Parliament generally does not have the power to amend delegated legislation).[18] Accordingly, provisions in primary legislation that delegate legislative power to the Executive must be carefully drafted and defined for clarity and certainty as to the purpose and scope of the power.

33. The distinguishing feature of Henry VIII clauses is that they give the Executive power to make delegated legislation that includes provisions amending or repealing the primary legislation. Such clauses may sometimes be necessary and appropriate, but there are many instances where they are not.[19]

34. Skeletal drafting of primary legislation and use of poorly defined Henry VIII clauses work in opposition to the rule of law principles that legal rights and liability should be determined by application of the law and not the exercise of discretion, and the Government (ministers and public officers) must exercise their powers properly. These principles require that the decision making power of Government should be defined and limited by the laws made by Parliament. Poorly defined Henry VIII clauses in skeletal legislation allow Government almost unfettered ability to set their own rules for their decisions, and thus wield power that looks more like arbitrary discretion than accountable decisions according to law.

35. The enormous task of Brexit law reform will give rise to an understandable temptation to delegate large swathes of legislative power to the Executive by passing skeletal primary legislation that includes broadly drafted provisions that delegate law-making to the Executive, sometimes using Henry VIII clauses. This temptation arises from the scale of the Brexit law reform process, which involves each area that has been affected by EU law, so that delegating large swathes of legislative power to the Executive may appear the easiest and most efficient approach in the extraordinary circumstances. Yet, the pressure from the extraordinary circumstances of Brexit ought not result in fundamental UK constitutional principles being eroded or disregarded entirely. Rather, constitutional principles should be respected by Parliament and the Government in their response to Brexit.

36. There is also a risk of pressure on the limited resources of institutions responsible for primary legislation encouraging inappropriate reliance on

[18] The Rt. Hon Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII', (12 April 2016, King's College London), https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf, 9-11. In fact, legislation made under the European Communities Act 1972 implementing EU law in the UK has been secondary legislation, however the House of Commons EU Scrutiny Committee scrutinises draft EU legislation, and the House of Lords Secondary Legislation Scrutiny Committee scrutinises such implementing legislation and can draw legislation to the attention of the House if it inappropriately implements EU law: http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/.

[19] See e.g. the list of inappropriate Henry VIII clauses in House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review*, (23 March 2016), [39]; see also The Rt. Hon Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII', (12 April 2016, King's College London), https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf.

delegated legislation. Government proposals for law are translated into Bills by the specialised lawyers in the Office of Parliamentary Counsel. However, the Office of Parliamentary Counsel only has a team of around 50 lawyers and Parliament only has around 20 lawyers to advise its work, whereas Government as a whole is estimated to have around 2,000.[20] It has been reported that the Government will need additional lawyers to cope with Brexit.[21] The relatively small number of lawyers working in Parliament and the Office of Parliamentary Counsel indicates the limited resources available in the institutions that are responsible for drafting and scrutinising primary legislation.

37. The rule of law standards in the *Code of Constitutional Standards* extracted in Appendix 2 include standards for delegated powers, delegated legislation, and Henry VIII clauses. These standards can assist Parliament's legislative scrutiny concerning the delegation of legislative power.

38. Furthermore, Parliament can build on the work of the House of Lords Delegated Powers and Regulatory Reform Committee, which scrutinises the delegation of powers in Bills as they pass through Parliament and ensures that such delegation is clearly drafted, necessary and appropriate. The Committee's *Guidance for Departments: on the role and requirements of the Committee* is an important and practical resource to promote proper legislative drafting and delegation of powers. The Guidance's principles concerning Henry VIII powers are undoubtedly concordant with rule of law principles, and a sensible process for managing the use of Henry VIII powers is set out the principle:

> *Every Henry VIII power … should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases, where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the [delegated powers] memorandum*.[22]

39. Application of this principle allows Parliament to retain proper control over the exercise of powers to change primary legislation.

IV. Engagement with the Devolved Institutions

[20] 'About us', Office of the Parliamentary Counsel, https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel/about#who-we-are accessed 7 September 2016; Robert Orchard, 'Is Parliament Ready for Brexit?', *Hansard Society* (20 July 2016) http://blog.hansardsociety.org.uk/is-parliament-ready-for-brexit/.
[21] Rosamund Urwin, 'Brexit: Why the government is recruiting hordes of experts to help Britain leave the EU', *The Evening Standard* (19 July 2016), http://www.standard.co.uk/lifestyle/london-life/brexit-why-the-government-is-recruiting-hordes-of-experts-to-help-britain-leave-the-eu-a3299186.html; Deborah Haynes and Jill Sherman, 'Hiring Brexit experts will 'cost billions'', *The Times* (20 July 2016) http://www.thetimes.co.uk/article/hiring-brexit-experts-will-cost-billions-khn6mw3j2.
[22] House of Lords Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee* (July 2014), [35].

40. In light of the Sewel Convention, the devolution settlements, and the UK constitution, it is important that the devolved institutions are involved in the decision making on international negotiations as well as consequential adjustments to the devolution settlements.

41. The competences of the devolved legislatures and governments are defined with reference to the EU. Accordingly the reserved and devolved matters will be affected by changes to the application of EU law in the UK, and ought to be revisited and recast to ensure clarity after the UK leaves the EU. Such change will likely need the legislative consent of the devolved legislatures.

42. The need for legislative consent by the devolved legislatures for changes to devolved matters arises from a constitutional convention: the Sewel Convention. The Convention has been incorporated into legislation for Scotland under the Scotland Act 1998, which was amended by the Scotland Act 2016 to state: 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.'[23] The Wales Bill that is currently making its way through the UK Parliament similarly incorporates the Sewel Convention in the same terms.[24]

43. Legal experts differ on the application and effect of the Sewel Convention as incorporated in the Scotland Act in the current circumstances of Brexit. Some argue that there is no legally enforceable constraint imposed on Westminster by the legislative recognition of the convention, others point to comments from the UK Supreme Court that parliamentary sovereignty may possibly be subject to limited constitutional constraints, and there is uncertainty as to the effect of the word 'normally'.[25] These questions may fall to the courts to be resolved in due course. For present purposes it is sufficient to observe that the Sewel Convention reflects the strong political imperative for Westminster and Whitehall to engage with the devolved nations, as recognised by Prime Minister Theresa May.

44. Whilst the constitutional and legal arrangements are different for each of the devolved nations, as are the politics and political will in each devolved nation, there are unique issues in relation to Northern Ireland. These

[23] Section 2 of the Scotland Act 2016; The Sewel Convention is also included in the Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive (2001) available at: http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf.

[24] Section 2 of the Wales Bill 2016-17 as introduced into the House of Lords on 13 September 2016.

[25] See e.g. Sionaidh Douglas-Scott, 'Removing references to EU law from the devolution legislation would require the consent of the devolved assemblies', *The Constitution Unit Blog* (13 June 2016) https://constitution-unit.com/2016/06/13/removing-references-to-eu-law-from-the-devolution-legislation-would-invoke-the-sewel-convention/ ; Kenneth Campbell QC, 'The draft Scotland Bill and limits in constitutional statutes', *UK Constitutional Law Blog* (2 February 2015), https://ukconstitutionallaw.org/2015/02/02/kenneth-campbell-qc-the-draft-scotland-bill-and-limits-in-constitutional-statutes/; Mark Elliott, 'The Draft Scotland Bill and the sovereignty of the UK Parliament', *Public Law for Everyone* (22 January 2015), https://publiclawforeveryone.com/2015/01/22/the-draft-scotland-bill-and-the-sovereignty-of-the-uk-parliament/.

include the Belfast or Good Friday Agreement, in which the rights from EU law are arguably embedded,[26] and the land border that Northern Ireland shares with the Republic of Ireland. The deep political implications of Brexit for Northern Ireland require special attention, as Secretary of State for Exiting the European Union, The Right Honourable David Davis, has already recognised.[27]

45. We note that the House of Commons Standing Order 137A already provides that select committees can communicate evidence to the devolved legislatures, and empowers the Welsh Affairs Committee to invite members of National Assembly for Wales committees to attend and participate in its proceedings (but not vote).[28] The House of Commons could consider expanding this latter power to all of the House of Commons select committees, not only those concerned with the devolved nations.

46. We further note that relations between UK parliamentary committees and the devolved legislatures vary,[29] and observe that expanded powers for inter-parliamentary cooperation under the Standing Orders will also need goodwill and mutual respect in order to be used effectively.

47. We believe that the UK Parliament and Government should continue to engage with the legislatures and governments of the devolved nations in relation to both international negotiations and Brexit law reform process.

V. Conclusion: Moving towards Brexit

48. There are already several parliamentary inquiries on foot concerning Brexit. This paper will inform written evidence submitted to a number of inquiries including:
    - House of Lords Constitution Committee inquiry: Legislative Process inquiry
    - House of Lords EU Committee follow-up inquiry: Scrutinising Brexit: the role of Parliament
    - Joint Committee on Human Rights inquiry: What are the human rights implications of Brexit?

49. This paper is also being submitted as unsolicited evidence to:
    - House of Lords Delegated Powers and Regulatory Reform Committee
    - House of Commons Liaison Committee
    - House of Lords Liaison Committee
    - House of Commons Justice Committee

[26] Kenneth Campbell QC, 'Sand in the Gearbox: Devolution and Brexit', *UK Constitutional Law Blog* (5 September 2016) https://ukconstitutionallaw.org/2016/09/05/kenneth-campbell-qc-sand-in-the-gearbox-devolution-and-brexit/.
[27] 'David Davis Op-Ed: I will ensure that Northern Ireland's voice is heard in negotiations' (1 September 2016) https://www.gov.uk/government/speeches/david-davis-op-ed-i-will-ensure-that-northern-irelands-voice-is-heard .
[28] Standing Orders of the House of Commons (10 February 2016).
[29] House of Lords Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom* (27 March 2015), [197].

- House of Commons Public Administration and Constitutional Affairs Committee
- House of Commons Women and Equalities Committee

50. Many more specific rule of law questions will arise for the UK and EU as the Brexit process unfolds. The Bingham Centre will remain engaged to promote the rule of law in the process.

Appendix 1. What is the Rule of Law? An Explanation of Rule of Law Principles

51. The rule of law principles that are relevant for present purposes are outlined above. This Appendix explains rule of law principles more fully.[30]

The law must be accessible, intelligible, clear, and predictable

52. When the law meets this requirement, people are able to understand what activity is prohibited and therefore discouraged, and what their rights are so that they are able to claim those rights.

53. Uncertainty on the law discourages business and financial activity, as well as the good operation of UK law generally.

54. Parliamentary processes for legislative scrutiny and law-making can help to alleviate uncertainty by providing clarity on the timetable for the establishment of new laws and on the likely content of those laws.

Laws should apply equally to all

55. This principle means that the law should not have discriminatory provisions, and that the law should not tolerate discrimination. A key example is slavery: equality before the law necessitated the abolition of slavery and explicit legal decision that the law would not recognise a distinction between enslaved and free people. Anti-discrimination law implements this rule of law principle.

56. At the same time, there are categories of people whom the law should treat differently because their position is different. For example, children cannot be prosecuted for crime below a certain age, because children are less mature than adults.

The law must afford adequate protection of fundamental human rights

57. As Lord Bingham said:

> *A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed*.[31]

58. It is not sufficient that laws meet the formal and procedural requirements of being duly enacted, clear and so on. In terms of content, the law must provide protection for fundamental human rights such as the prohibitions of torture and slavery, freedom of expression, freedom of religion, and right to family life. Whatever proposals may be brought forward for a Bill

[30] Drawn from Tom Bingham, *The Rule of Law* (2010, Penguin Books).
[31] Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 67.

of Rights for the UK, these fundamental human rights remain matters that should be protected across all areas of UK law.

Legal right and liability determined by application of the law and not the exercise of discretion

59. The rule of law can be understood in contrast with the 'rule of man', meaning a society in which one or more individuals rules arbitrarily exercising power unconstrained by law where the ruler(s) are above the law.

60. The entitlement of citizens to Government grants such as welfare and the legal obligations of citizens must be sufficiently defined in law, and not subject to the arbitrary exercise of power. By way of a simple example, 'We expect the taxes we pay to be governed by detailed statutory rules, not by the decision of our local tax inspector. He has the duty to apply the rules laid down, but cannot invent new rules of his own.'[32]

61. Government decision-makers and officials will inevitably need to exercise discretion when making decisions, but the rule of law requires that such discretion should not be unconstrained and, in effect, arbitrary.

The Government (ministers and public officers) must exercise their powers properly

62. In the UK, Parliament makes laws and the Executive (the Government) applies those laws.

63. Lord Bingham rightly said:

> *This is important. When Parliament, by statute or statutory regulations, empowers a specific officer (such as a secretary of state or the Director of Public Prosecutions or the Director of the Serious Fraud Office) or a specific body (such as a housing authority, a social services department, a county council, a health authority, a harbour board or the managers of a mental hospital) to make a particular decision, it does not empower anyone else. It expects that officer or body to follow any guidelines on policy that may have been laid down, but expects that the officer or body will exercise his or its own judgment, having regard to any relevant experience and the availability of resources. It does not expect, or intend, that the decision should be made by some judge who may think that he or she knows better. But there is a presumption that the decision made will be in accordance with the law.*[33]

64. The accepted tests for judicial review of Government decisions reflect this principle by enabling courts to overturn a Government decision where it is unlawful and has therefore departed from the intention of Parliament. The court does not substitute its decision for the Government official's

[32] Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 50.
[33] Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 61.

decision, rather, the court sets the decision aside if, for example, the decision-maker exceeded their power.

65. This rule of law principle supports and reinforces parliamentary sovereignty by articulating the need for the Executive to act in accordance with the intentions of Parliament.

Dispute resolution

66. Given that everyone is subject to and entitled to protection by the law, a consequential rule of law principle is that 'Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.'[34]

67. Cost and delay of court proceedings are enemies to the rule of law. Legal aid serves an important role by enabling poor litigants to have access to the legal system.

68. The more affordable and expeditious dispute resolution is, the better the rule of law is served, albeit that this goal may remain elusive.

Adjudicative procedures provided by the state should be fair

69. This principle may be described as the right to a fair trial, however, the rule of law principle extends beyond the context of criminal law to all public and civil law trials.

70. The independence of the judiciary and legal profession are necessary requirements for trials to be fair.

71. Various rules serve to protect the fairness of trials. In the criminal law context, these rules include that trials should be conducted in public, and an accused is to be presumed innocent until proven guilty,

The rule of law in the international legal order

72. In order to realise a rules-based international order, it is important that states comply with their obligations under international law. Lord Bingham explained that

> *although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so*.[35]

[34] Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 85.
[35] Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 110.

Appendix 2. How Parliament Can Use Rule of Law Standards: Code of Constitutional Standards

73. Rule of law principles provide broad high level guidance for law-making, but need a systematic tool for implementation. In order to promote the fidelity of legislation to the rule of law, parliamentarians and parliamentary committees should use the *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee*[36] produced by the Constitution Unit when undertaking legislative scrutiny.[37] Many of the Code's standards translate broad rule of law principles into specific standards — the standards from the Code that concern rule of law principles are extracted below.

74. The Code was produced through analysis of reports by the House of Lords Constitution Committee and the principles contained in the Code are drawn directly from the Committee's work. Accordingly, the Code contains 'parliamentary constitutional standards' which have the following advantages that make them well-suited for legislative scrutiny:

> *First, they are parliamentary in the sense that they are articulated by a parliamentary actor and not, for example, by judges or government or other outside bodies. Second, they are 'constitutional' because they are based on principles or norms relating to the working of constitutional relationships and procedures. Third, they are not politically partisan*.[38]

75. In our view, the Code is not a complete list of rule of law principles, for example there are no standards relating to non-discrimination. Nonetheless, the rule of law standards in the Code are a ready tool to promote fidelity to the rule of law in the Brexit law reform process.

Rule of Law Standards from the Code of Constitutional Standards[39]

1) The rule of law

1.1 Retrospective legislation

1.1.1 Enacting legislation with retrospective effect should be avoided.
1.1.2 Provisions that have retrospective effect should be drafted as narrowly as possible.
1.1.3 Individuals should not be punished or penalised for contravening what was at the time a valid legal requirement.

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[36] Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of The House of Lords Select Committee on the Constitution Available* (2nd Edition, August 2015) at: https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/164.

[37] The Bingham Centre's recommendation for rule of law standards to be used in legislative scrutiny echoes recommendations for the use of scrutiny standards by the House of Lords Constitution Committee, Political and Constitutional Reform Committee, Professor Robert Hazell, Professor Dawn Oliver, and the Hansard Society: Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards', in Alexander Horne and Andrew Le Suer Eds, *Parliament: Legislation and Accountability* (2016), 71-75.

[38] Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards', in Alexander Horne and Andrew Le Suer Eds, *Parliament: Legislation and Accountability* (2016), 61-62.

[39] We have extracted all of the standards in the Code that relate to Lord Bingham's rule of law principles, including those not explicitly categorised as 'rule of law' standards in the Code.

1.1.4 Laws should not retrospectively interfere with obligations when the liberty or criminal liability of the citizen is at stake.
1.1.5 Laws should not deprive someone of the benefit of a judgment already obtained.
1.1.6 Laws should not prevent a court from deciding pending litigation according to its merits on the basis of the law in force at the time when the proceedings were commenced.
1.1.7 Retrospective legislation should only be used when there is a compelling reason to do so.
1.1.8 A legislative power to make a provision which has retrospective effect should be justified on the basis of 'necessity', and not of 'desirability'.

1.2 Legal certainty

1.2.1 The rule of law requires laws to be reasonably certain and accessible.
1.2.2 General warrants should be avoided.
1.2.3 Laws that include a variable monetary penalty should include an upper limit.

2) Delegated powers, delegated legislation and Henry VIII powers

2.1 Defining the power

2.1.1 Delegations of legislative power should be framed as narrowly as possible.
2.1.2 The policy aims of a ministerial power should be included in the bill itself.
2.1.3 The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure.
2.1.4 The use of Henry VIII powers should only be permitted if specific purposes are provided for in the bill.
2.1.5 Ministerial powers should be defined objectively.
2.1.6 Ministerial powers to make secondary legislation should be restricted by effective legal boundaries.

2.2 Safeguards in delegation of legislative powers

2.2.1 Laws that contain delegated powers should strike a balance between the desire for effectiveness and the safeguards needed to ensure constitutional propriety.
2.2.2 If constitutional safeguards can be added to a delegated ministerial legislative power without undermining the policy goals of a bill then they should be included.
2.2.3 Henry VIII powers should be accompanied by adequate procedural and legal safeguards.

4) Individual rights

4.1 General principles

4.1.1 The restriction of individual rights should be proportionate.
4.1.2 Provisions that restrict the liberty of the individual should be drafted as narrowly as possible.
4.1.3 Provisions that restrict the liberty of the individual should be accompanied by sufficient limits and protections.
4.1.4 Severe restrictions on the liberty of the subject should only be the result of a criminal conviction.
4.1.5 Statutory powers that allow a minister to impose significant constraints on the liberty of the individual should be subject to direct judicial oversight.

4.1.6 Voluntary assurances should not be regarded as a satisfactory substitute for legally enforceable rights.
4.1.7 Interferences with the fundamental common law right to freedom of expression should be justified appropriately.

4.2 Access to justice

4.2.1 Laws should respect the constitutional right of access to justice.
4.2.2 A bill should not interfere with the common law right of access to justice when it is not necessary to meet the bill's stated purpose.
4.2.3 A statutory power granted to a public body to deprive an individual of a significant right should be subject to a reference by the public body to a court.
4.2.4 Laws should respect the constitutional principle that individual liberty is to be protected by the courts.

4.3 Due process and procedural fairness

4.3.1 Laws that create a power to make administrative decisions that affect individuals should meet the minimum standards of procedural fairness.
4.3.2 The common law principle of natural justice: audi alteram partem (hear both sides before making a decision) should be respected.
4.3.3 The right to a fair trial should be respected.
4.3.4 Laws that confer upon the executive coercive sanction powers should include safeguards for ensuring that fair procedures are followed and that there is an effective appeal to the courts to ensure judicial oversight.
4.3.5 Laws that create a public decision-making process should ensure that affected citizens have recourse to an effective appeal system.
4.3.6 Laws which impose restriction on the freedom of individuals backed by sanctions should include basic due process safeguards.
4.3.7 Laws should respect the right of an individual detained in a police station to free legal advice.

Appendix 3. Policy areas that protect the rule of law

Non-discrimination

76. UK equality and anti-discrimination laws have benefited from and been enhanced by the influence of EU law. These laws on equality and anti-discrimination help to safeguard the rule of law principles that everyone should be equal before the law and receive equal protection under the law. The below discussion is not exhaustive, and merely illustrates by a selection of examples the influence of EU law on UK equality and anti-discrimination laws.

77. A key example of EU law's influence is the Equality Act 2010 that implements the following EU Directives:
    a) 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,
    b) 2000/78/EC establishing a general framework for equal treatment in employment and occupation,
    c) 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast),
    d) 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.[40]

78. EU law has enhanced disability rights in the UK including extending employment protection to all employers, requiring assistance for disabled people when travelling, and requiring that Braille labelling is included on packaging for medicinal products.[41]

79. Protection from employment discrimination for people on the grounds of religion or belief, sexual orientation and age was established under the EU Equal Treatment Directive 2000/78/EC, whereas such protection had not previously existed under UK law.[42]

80. Furthermore, UK anti-discrimination law has been developed by decisions of the Court of Justice of the EU that reinforced and strengthened anti-discrimination law.[43]

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[40] Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 *The Equal Rights Review* 11 http://www.equalrightstrust.org/ertdocumentbank/bob%20hepple.pdf.
[41] 'Impact of EU membership on equality and human rights' Equality and Human Rights Commission, https://www.equalityhumanrights.com/en/our-human-rights-work/impact-eu-membership-equality-and-human-rights.
[42] 'Impact of EU membership on equality and human rights' Equality and Human Rights Commission, https://www.equalityhumanrights.com/en/our-human-rights-work/impact-eu-membership-equality-and-human-rights; Equality and Diversity Forum, 'The EU Referendum and Equality' http://www.edf.org.uk/blog/wp-content/uploads/2016/04/EU-referendum-briefing-v3.pdf.
[43] Colm O'Cinneide, 'Equality rights in a post-Brexit United Kingdom', *Bright Blue* (29 July 2016), http://humanrights.brightblue.org.uk/blog-1/2016/7/29/equality-rights-in-a-post-brexit-united-kingdom.

81. UK anti-discrimination law poses few impediments to Parliament or ministers passing discriminatory legislation. EU law and human rights law have in effect provided legal protection for the right to equal treatment in the UK, however once the UK leaves the EU an important part of this protection will fall away.[44]

Freedom of Information

82. General access to information held by a public authority is set out under the Freedom of Information Act (FOI Act), however, the UK Environmental Information Regulations 2004 incorporates EU Directive 2003/4/EC on public access to information on the environment. The Regulations cover a wider range of bodies than the FOI Act, including those performing functions of public administration or controlled by an authority.[45]

Human Rights

83. Currently, the Human Rights Act is the primary instrument that protects human rights and reflects the rule of law principle that the law protects fundamental rights. However, EU law has also contributed to the protection of fundamental rights in the UK.[46]

84. In some instances, EU law has provided the basis for human rights standards and tests in the context of surveillance, intelligence gathering and security measures, particularly given the need for counter-terrorism measures. The *Digital Rights Ireland* decision by the Grand Chamber of the CJEU found that the EU Directive on the retention of electronic data communications was invalid because it breached the EU Charter of Fundamental Rights. Similarly, the CJEU is currently considering whether UK bulk data collection powers are incompatible with the right to respect for private life.[47]

85. As a matter of the rule of law and international cooperation on security issues, it is important for the UK to meet these human rights standards:
    a) In line with the rule of law principle that the law should protect fundamental rights, it is important that laws on data surveillance do not breach fundamental rights;
    b) The decision of the CJEU in the *Schrems* case found that the data protection laws of non-EU countries must be 'essentially equivalent' to European law to permit simplified transfers of personal data between countries. Accordingly, UK data protection laws will need to meet EU standards to facilitate intelligence and security

[44] Colm O'Cinneide, 'Equality rights in a post-Brexit United Kingdom', *Bright Blue* (29 July 2016), http://humanrights.brightblue.org.uk/blog-1/2016/7/29/equality-rights-in-a-post-brexit-united-kingdom.
[45] Patrick Birkinshaw, 'Regulating Information' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide Eds, *The Changing Constitution* (8th Ed 2015), p 392-393; note also the role of Directive 2007/2/EC implemented in the UK's INSPIRE Regulations 2009.
[46] Colm O'Cinneide, 'Human Rights and the UK Constitution' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide Eds, *The Changing Constitution* (8th Ed 2015), p 129-131 and 132.
[47] C-698/15 R (Davis, Watson, Brice & Lewis) v Secretary of State for the Home Department; the case concerns the *Data Retention and Investigatory Powers Act 2014*, but has relevance for the Investigatory Powers Bill.

cooperation between the UK and EU countries. Data sharing also has economic consequences as it effects e-commerce.[48]

86. Similarly, the decision of the CJEU in *Kadi* upheld the right to be heard, right to effective judicial review, and right to property in the context of listing individuals to be subject to sanctions.[49] These kinds of natural justice or due process rights (the rights to be heard and to judicial review) are central to the rule of law. Accordingly, as the UK leaves the EU special attention should be paid to ensure these kinds of rule of law principles and fundamental human rights continue to be upheld.

[48] Emily Taylor, ''Brexit' Could Put Data Sharing in Jeopardy', *Chatham House* (10 March 2016), https://www.chathamhouse.org/expert/comment/brexit-could-put-data-sharing-jeopardy; Steve Peers, 'How would Brexit affect data protection, privacy and surveillance laws in Britain?', *Inforrm's Blog* (11 May 2016), https://inforrm.wordpress.com/2016/05/11/how-would-brexit-affect-data-protection-privacy-and-surveillance-laws-in-britain-steve-peers/.

[49] *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351; Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) EJIL 1015.

Appendix 4. Parliament's Scrutiny of International Negotiations

87. The Executive tends to resist efforts by Parliament to scrutinise international negotiations prior to their completion. This resistance is based on the concern held by negotiators that the more they reveal outside of negotiations, the weaker their position is in negotiations.[50]

88. The Constitutional Reform and Governance Act 2010 incorporated into statute the Ponsonby Rule that treaties, once signed, are published and laid before Parliament for 21 sitting days, and must not be ratified if either House resolves that the treaty shall not be ratified. However, the Government can effectively disregard such a vote by the House of Lords, and if the House of Commons resolves that a treaty should not be ratified then the Minister can lay before the House a statement explaining why the Minister thinks the treaty should nonetheless be ratified, and the 21 day period starts anew.[51]

89. Parliament also plays an essential role at the intersection of domestic and international law, because it debates and passes legislation that gives effect to treaty obligations in UK law, such as the European Communities Act 1972.[52]

90. As such, the Government will need Parliament's support for the outcomes from its international negotiations. The most controversial treaty will be the agreements on the UK's exit from and future relationship with the EU. The Constitution Committee recently found that it is 'constitutionally appropriate' that Parliament should play a central role in the Brexit negotiations with the EU.[53] The rule of law could be enhanced through a process in which the Government engages with Parliament in advance of and throughout the negotiating process rather than presenting the agreements or elements thereof to Parliament as a finished product.[54]

91. There are good reasons for international negotiations to be conducted in secret so that strategic advantage is not lost by allowing the opposing negotiators to know your vulnerabilities.[55] However, the international negotiations for Brexit will have such fundamental consequences for UK law and policy that a mandate from Parliament could strengthen the clarity and certainty of the negotiators' position. Absent a parliamentary

[50] Sionaidh Douglas-Scott, 'What does 'Brexit means Brexit' mean (if anything)?', *The Constitution Unit* (16 August 2016), https://constitution-unit.com/2016/08/16/what-does-brexit-means-brexit-mean-if-anything/; see e.g. Select Committee on European Scrutiny Minutes of Evidence: Rt Hon Margaret Beckett MP, Ms Shan Morgan and Mr Anthony Smith (7 June 2007), http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/640-i/7060703.htm.
[51] Part 2; per https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml some international treaties are not subject to ratification, but discussions so far have indicated that the Brexit treaty will be subject to ratification.
[52] See also Lord Norton of Louth, 'Parliament: A New Assertiveness?' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide Eds, *The Changing Constitution* (8th Ed 2015), p 179-180.
[53] Constitution Committee, *Report: The Invoking of Article 50* (13 September 2016), http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf.
[54] House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [18].
[55] House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [20].

mandate, decisions by the Executive in the negotiations risk effectively dictating or foreclosing options for Parliament's law-making.

92. As noted by the House of Lords EU Committee, current parliamentary scrutiny can be highly flexible with respect to confidential matters through mechanisms such as committees holding private hearings, confidential briefings, and private meetings.[56]

93. Additional mechanisms for the Executive to engage with Parliament prior to and during international negotiations should be considered and explored. For example, the Joint Committee on the Draft Constitutional Renewal Bill suggested a 'soft mandating' mechanism whereby the relevant minister and officials would meet the committee before negotiations to agree a general bargaining position, and the minister would update the committee during negotiations.[57]

94. The rate of decision making in the negotiations with the EU will almost certainly accelerate over the two years following notice under Article 50, with the last months and weeks being the most crucial. It would be prudent, therefore, for Parliament to set in legislation rules and processes for the negotiations that take this acceleration into account. The possibly frenetic pace at the end of the two years will limit the capacity of the Government and Parliament to engage and consult with each other at that time. A clear mandate from Parliament in advance on the nature and scope of the Government's decision making could provide certainty and guidance in the final stretch of negotiations.

95. Ultimately, concluding an agreement on the UK's future relationship with the EU prior to the UK's leaving the EU is crucial to provide certainty and stability for UK law and policy. Without such an agreement, there will be extreme uncertainty across UK law and policy from trade to national security; from financial regulation to environmental law.

29 September 2016

[56] House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [21].
[57] Joint Committee on the Draft Constitutional Renewal Bill, Joint Committee on the Draft Constitutional Renewal Bill (31 July 2008), [236]; Arabella Lang, 'Parliament and International Treaties' in Alexander Horne and Andrew Le Suer Eds, *Parliament: Legislation and Accountability* (2016), 262.

Ms Jill Barrett British Institute of International and Comparative Law, Lord Kerr of Kinlochard GCMG and Professor Derrick Wyatt QC, Emeritus Professor of Law, Oxford University, Brick Court Chambers–Oral evidence (QQ 1-11)

Evidence Session No. 1 Heard in Public Questions 1 -11

Tuesday 6 September 2016

Members Present

Lord Boswell of Aynho (Chairman); Baroness Armstrong of Hill Top; Baroness Browning; Lord Green of Hurstpierpointl Lord Jay of Ewelme; Earl of Kinnoull; Lord Liddle; Baroness Prashar; Lord Selkirk of Douglas; Lord Teverson; Lord Whitty; Baroness Wilcox.

Examination of witnesses

Ms Jill Barrett, Lord Kerr of Kinlochard GCMG and Professor Derrick Wyatt QC.

Q1 **The Chairman:** I welcome our witnesses on behalf of the Select Committee. At least two of them are well known to the Committee and to colleagues—one perhaps less so. She is sitting in the middle. I would like first to welcome Jill Barrett, who has a distinguished career as a public lawyer, both in the academic sector and in public service. If I am right, you led the Bill team on CRAG.

Ms Jill Barrett: Yes.

The Chairman: You will provide an invaluable perspective on how the public service needs to approach these issues. You are very welcome.

Ms Jill Barrett: Thank you.

The Chairman: On your left—my right—is John Kerr, Lord Kerr of Kinlochard. He is a Member of this House, has an immensely distinguished international career in public service and is the author of Article 50. At least, in a world of uncertainty, we have a person who knows what they are talking about.

Thirdly, we have Professor Derrick Wyatt, who has assisted us greatly this year on a report on Article 50. I notice that the business of cross-citation is now taking place; in evidence that you very kindly offered to us in draft, you referred to some of our report, which is always reassuring. The written work you let us have sight of has been very helpful in forming our ideas.

I do not wish in any sense to resort to my tendency to flippancy, but we find ourselves—the nation, the public services and the public administration—at a time of uncertainty. I am always minded of the

advice of the person who was referred to a conference and returned to debrief his referrer, who asked, "How was it for you?" He said, "I went confused, and I am still confused, but at a somewhat higher level". In a sense, perhaps that is a minimum requirement for us, but it will be immensely helpful to have your wisdom and application on these issues.

You will all, for one reason or another, be familiar with the rules of engagement. This will be webcast, so it is on the record. Members of the Committee should declare their interest, if it is relevant to the specific issue. We will send you a transcript for any corrections of a factual nature. We are very much in the market for any continuing dialogue as to thoughts, afterthoughts and points either that we may wish to develop—not least because of the exigencies of time—or that you may want to offer to us.

If you are happy to start on that basis, we will kick straight off. I will ask the first question of John Kerr, but others can, of course, participate. It is about Article 50. Can you explain how you anticipate that it will operate once the UK Government trigger it, and what are the implications of the statement by the Prime Minister that she will not trigger it by the end of 2016?

That spills on to the question about the implications—referred to in the report that we published earlier this year, which I have already mentioned—of the challenge of completing negotiations within two years, and/or whether you need to extend that, and the length of the withdrawal process. What was the purpose of the two-year deadline under Article 50? Is extension of the formal negotiations beyond two years feasible? Is it likely? What I am feeling after is a sense of your take on the pattern of the negotiations, based on what has appeared in the treaty, what the Prime Minister has said and your experience of other member states in reacting to what is, for all of us, a new situation.

Lord Kerr of Kinlochard: Thank you for asking me. It is the first time for 15 years that I have been on this side of the table, rather than an interrogator. It has been very unpleasant to come back—

The Chairman: We will make it as painless as we can.

Lord Kerr of Kinlochard: This is the pen that wrote Article 50, but do not expect me to tell you how I anticipate that it will work. I do not have the faintest idea. There are no precedents. Anything could happen.

The Committee's report in July was absolutely right in drawing attention to Clause 2 of Article 50 and the framework. It is a legal obligation on the Article 50 negotiators at least to have seen and to take account of the framework for the future relationship between the exiting state and the residual European Union, in addition to a discussion about divorce.

The discussion about the divorce will be nasty and brutish—all money negotiations are—but short. Two years is ample time for a discussion about the budget, acquired rights, pensions, properties and institutions—where the European Medicines Agency, the European Banking Authority and the other institutions that are based in this country will go. It is the assumption in Brussels that that can all be disposed of well ahead of the

2019 European Parliament election, because it would be tidy not to be electing British MEPs in 2019.

If you look at it purely in terms of the Article 50 negotiation, strictly speaking, that is perfectly reasonable—nasty, brutish, but quite short. Money negotiations are horrible. Negotiations about sites of institutions are horrible. It will be very unpleasant, but it will not take for ever. However, in my view, the framework negotiation is a much more interesting and complex negotiation. They are legally obliged to have the framework in front of them as they conclude the divorce. Nobody knows what that means. Do not ask me what it means. Presumably, the framework is, as a minimum, principles that will define how close the relationship is between the UK that has left and the EU. Will it be, sector by sector, a commitment to consult, a commitment to inform, a commitment to co-ordinate or no commitment at all—a complete divorce?

I can think of some areas where all parties—the UK and all the others—will be anxious to see a rather close relationship. In the area of security—internal security, counterterrorism, anti-drugs, Prüm, the European arrest warrant and intelligence—you can see that both sides are likely to want the UK to be in the anteroom, quite close to the Council, and the UK's views to be sought and taken into account. I hope that that would be the UK's view, too, and that it would want that.

If you take foreign policy—including sanctions, international security, development aid and emergency aid—the same is probably true of most of that area. If you take research and the universities, it is certainly true that the British research sector would very much hope to be extremely close. That is probably the case on the other side as well, although as we do so well out of European research programmes there might be divided counsels on the EU side. It is possible that on the environment, climate change, energy policy and energy interconnection of networks there would also be a common interest in keeping close, so the principles that you derived applying to those areas might be quite binding. It is possible that there are other areas I have not thought of, such as the co-ordination of international economic policy positions in the Bretton Woods institutions and UN agencies.

There is another category where our EU partners will be extremely interested to know what the future policy of the British Government is. I refer to areas such as state aid and competition policy, consumer protection, the right of establishment—remember that free movement of persons applies not just to physical persons but to legal persons—health and safety at work and labour laws.

If you spend time talking to, say, the French left, you discover that it believes that the future policies of the British Government will be along the lines that Professor Minford or Mr Gove recommended, that Mr Hannan recommends or that our in-house Hayek, Lord Lawson of Blaby, recommended last week in the *Times*—that we are heading for another big bout of deregulation and that we want not different subsidies replacing an EU subsidy regime, but an end to subsidies for agriculture and manufacturing. We would go back to a very light touch in the City, reduce

workers' rights in order to get labour costs down and have lower taxes. That is quite widely believed on the continent to be what we mean when we say that we want to take back control. We want to do the full Singapore, and to be a libertarian, hard-driving, totally free-market Hong Kong offshore.

If that were our position, we could expect the trade negotiation to go much worse than if our position were the one that I would personally expect, a position closer to the kind of attitudes that Mrs May expressed in her speech on the steps of No. 10; but it would be highly desirable that the UK should make clear to our continental friends before the three negotiations are complete what we are going to do when we take back control—where we are going. If we were going for the full Singapore, the trade regime that we could expect to negotiate would be much harsher than if we were going for elements of co-operation and greater consistency with present practice.

What I am really saying is that this is a three-ring circus. Your report was completely correct to point to the importance of the framework negotiation. It has to cover all the areas that I have just mentioned. The third is trade, which will take much longer. Trade is not the most difficult; the most difficult is the first one, which will be nasty, brutish and short. In my view, the second one—the framework negotiation—is much the most important. Being clear about where the framework is going is crucial to success in the third one, the trade negotiation.

Do I think all that can be done in two years? I do not know. The first bit can. Trade certainly cannot. The second bit possibly can. Do I think that it is impossible to extend the two years? No. It is assumed now that we will come under negotiating pressure as the two-year deadline comes to an end. I do not see that. It seems to me that everybody comes under pressure. You need unanimity if you are agreeing on a treaty. You need unanimity to extend the period in which you try to agree on a treaty. It is the same either way around.

When we invented Article 50 in the convention, the idea of the two years was a reassurance to sceptics that you were not tied to your oar for ever. If you want to get out with no agreement with the EU, if you want just to abrogate the treaty and repeal the Act, you can. That is fine. However, nobody in his senses is arguing that that is what we should do. It would not be in the interests of our continental friends any more than it would be in ours. It seems to me that the idea that the time pressure is on us is a false idea. Of course, it would depend on where you were going. The atmosphere would be affected by what you revealed in the framework negotiation about what the future policies of the UK Government would be.

The Chairman: Thank you, John. That is very helpful and comprehensive. Given the exigencies of time, I will not unpack it further. I might ask Derrick Wyatt to come in a bit; first, on what you might call the legal complexities. I do not mean for a moment to suggest that you in any way minimised those, but is it possible that in this business of sorting out acquired rights, which I am probably a little less agitated about than I was in July, you would find some kinds of formulae that enabled you to say, "If

not resolved, these will be the principles under which it will be resolved", or that there would be a safeguard clause or whatever to deal with any overlooked case? That is just to try to get a handle on whether or not there is any qualification, from Derrick's side, to the general scene that John has painted. Secondly, perhaps he could give his take on the business of negotiating the framework agreement. Is there anything you want to add, Derrick? Maybe you do not.

Professor Derrick Wyatt: Yes. I agree that the two-year period is likely to be enough for the withdrawal agreement, but it may well not be enough for the future trade relations agreement.

I would like to link this with the implications of the Prime Minister's statement that she will not trigger Article 50 before the end of 2016. One implication is that the UK has a time period within which to engage in bilateral contacts with the Governments of member states. These are not negotiations, but they are talks about negotiations. One of the Government's aims might be to influence friendly national Governments—of course, all the national Governments in the EU are friendly, but I mean those friendly to particular points—and to persuade them to take a particular line as regards the negotiating mandate for the Commission and the line that the national Governments will take vis-à-vis the monitoring of the Commission negotiations, via a Council committee.

That period, which, hopefully, will also be a period of tempers cooling a little, will be one in which the UK can talk to national Governments about the likely need for an extension of the two-year period, in order to accommodate the future trade relations agreement. I note that on 27 June Taoiseach Enda Kenny was already talking about a short extension of the two-year period.

Would the other member states be amenable to that extension, which, I emphasise, will probably be necessary for the future trade agreement? I am still betting that it is likely that there will be an extension of the period. I agree with what Lord Kerr has just said. I doubt that the Government want to take a Minford track of simply disarming in international trade against the world and saying, "Come one, come all. We do not care if we do not have access to other markets". That is hardly a sellable proposition to the public or to British business. That will not be the way it will go. The UK will want an ambitious and comprehensive free trade agreement.

It will not suit us suddenly to have to bounce into WTO terms. Will it suit Germany? Will it really suit France? The dislocation to trade would be considerable, in motor cars, in agricultural products and in services, which would particularly hurt the UK. In addition, there will be the attraction of the UK continuing to pay its £8 billion net contribution to the EU. When we stop doing that, rearrangements of a significant kind will have to be made.

For all those reasons, I still incline to say that an extension is likely. I am aware that some commentators have argued that we might have an interim trading regime. I cannot rule that out or say that it is a bad thing. My only doubt about it is whether one would end up taking as long to

negotiate the interim trade regime as one would take continuing with the main exercise. I am not sure about that.

The Chairman: Or, reading your mind, even finding that the interim arrangement collapsed into the permanent arrangement because it was difficult enough to achieve in the first place.

Professor Derrick Wyatt: Indeed.

The Chairman: I will ask Lord Jay to come in. Jill, if you have a thought at the end, you can add it.

Q2 **Lord Jay of Ewelme:** This follows very much from what has just been said. It is really a question for John Kerr, following what he said. It seems to me that the arguments on both the EU side and the UK side for a withdrawal within two years of invoking Article 50—by spring 2019, let us say—are quite strong, both because of the EU elections and because of the forthcoming UK elections. I wonder whether you can envisage an outcome in which we leave formally within two years of invoking Article 50 with enough certainty about the final arrangements for bilateral trade negotiations with third countries to take place, but none the less with quite a lot of detailed work still to be done on the relations between the UK and the EU on trade matters. Is that a way of squaring the rather difficult circle of a political need to get out by 2019 and the complexity of the trade negotiations?

The Chairman: Could you make your point, Lord Liddle?

Q3 **Lord Liddle:** Will freedom of movement, which is obviously the most politically sensitive thing, be dealt with as part of the withdrawal agreement or as part of the trade agreement? Which bit do you think that the future arrangements for freedom of movement will come into?

The Chairman: Jill, do you want to come in on that first?

Ms Jill Barrett: As I understand Article 50 and the situation, there could be at least five categories of negotiations to be carried out. One is the withdrawal agreement. Another is the framework on future relations. Then, as Professor Wyatt has just said, there is the possibility that we would need a transitional agreement to tide us over until we had the detailed agreement on future relations with the EU. Then we would have the agreement or sets of agreements on future relations with the EU with all the details in them. Finally, we would need to sort out all our agreements with third states and international organisations.

The Chairman: May I interpose on that? Some people have asked about having to divvy up the existing tariff-free quotas. Would that have to be sorted out even before we could contemplate rejoining the WTO, for example?

Ms Jill Barrett: Article 50 itself refers only to the first two categories of things to be agreed: the withdrawal agreement and the framework for future relations. The point of that is that, although you could exit after two years without detailed agreements on future relations, you need a framework. To me, that is something different from the detailed treaties.

The framework may not even be legally binding; it is an outline. It could be a political agreement. You need to know what the framework is going to be because that could affect what you put in the withdrawal agreement, for the sort of reason that you have just suggested.

The Chairman: Would you be comfortable with a situation where there was a framework agreement in place of the nature that you have described, which, as you said, might not even be legally binding? This is an area where, frankly, the Committee does not have expertise, with regard to the World Trade Organisation, for example. If you have not done a deal that is enshrined in a treaty, are you at risk of counter-litigation from affected or aggrieved parties under WTO terms when you are no longer within the Union?

Ms Jill Barrett: Yes; certainly, if we do not have a transitional agreement on our future trade relations, that is a problem. As I see it, Article 50 does not assume that it will be possible to have the future trade relations agreement in place in all the detail that is needed within the two years. It may only be the framework.

Lord Kerr of Kinlochard: What Lord Jay described is a perfectly plausible outcome: withdrawal would be not an event but a process, and it might happen over a considerable period. It is also perfectly plausible to envisage a complete withdrawal agreement, but that the dates of things phasing out would be different sector by sector.

I think you need the framework agreement before you finish the Article 50 discussion. The paradigm case is the point I made about research. The link between the budget and whether UK research institutions and universities will still have access to Horizon 2020 and its successors is pretty obvious. If we have stopped contributing to the budget, the odds are that we will not be getting very much out of it. You need to be clear as to what sort of research partnership you can build going forward. Am I right in thinking that there will be a common interest in trying to do that before you do the nasty, brutish and short discussion about the budget?

I cannot answer Lord Liddle's question. Free movement of persons, legal or physical, is a framework issue; I think it is part of the framework discussion. As he said, it appears that there is a very clear political link—at least in UK minds—to the trade discussion. I do not know what the answer is. Possibly the answer is the European Council. I have the strong impression that Mrs May will end up looking across all three baskets. Perhaps one should look at it like that, as a three-basket negotiation, like the CSCE 40 years ago. The European Council will be in charge. The Commission may say, "No, no, no". The treaty says that, under Article 50, the Commission is negotiating with us, and of course it will be, on what I have referred to as narrow Article 50—on the budget and that sort of thing. On a lot of other things—including, for example, foreign policy and security, internal and international—it is clear that the Commission will not be the negotiator. The negotiator will come from the Council of Ministers. Mr Tusk will be running that, whatever the Commission says.

The Commission may tell us that we are not allowed to talk to anybody until we trigger Article 50 and that then we can talk only to it. That can be ignored and will be ignored by all parties. The outcome could well be all three baskets coming together at a European Council meeting, with the free movement of persons link to future trade arrangements being extremely clear and being negotiated at the highest level. That is a perfectly plausible outcome, too.

The Chairman: I would like Lord Teverson to put a question, initially to Jill Barrett.

Q4 **Lord Teverson:** As Lord Kerr mentioned that part of the negotiations will be about pension institutions, I ought to declare that I am a recipient of pensions from the European Parliament.

As parliamentarians, we all know that treaties are normally negotiated under prerogative powers and that parliamentary involvement is limited to formal ratification. The process changed in 2010, under CRAG. Should we change that for the negotiations on withdrawing from the EU and our new relationship with it? What would be the rationale for giving Parliament an enhanced role?

To move things along quite rapidly, could I ask at the same time what the impediments to giving Parliament an enhanced role might be? My question is about both sides of the equation, if you like.

The Chairman: I will ask both Jill and Derrick Wyatt to deal with that. I think that Derrick had a point on the last question that was left hanging.

Ms Jill Barrett: Yes, there is a need for enhanced arrangements for parliamentary scrutiny of treaties in general, not just in relation to Brexit. That is because the CRAG 2010 reform was only a partial reform. It was led by the Government and covered the parts of the process the Government are in control of—in other words, the Government's obligation to lay the treaty before Parliament and wait, and then, if a resolution is passed opposing ratification, the Government's obligation not to ratify. However, it left a big hole in the middle, which is the parliamentary procedure and the parliamentary institutions that scrutinise treaties. That was left for Parliament to do. As far as I am aware, Parliament has not reformed its institutions in response to that.

It is a good idea to look at it anyway, but it will certainly need reform for the Brexit process. A number of arguments could be made for that. One, of course, is the fact that this is the most substantial constitutional upheaval for a long time. Given that there is no written constitution to set out how the national consensus should be built and given that we have parliamentary sovereignty, Parliament has the responsibility to ensure that that happens.

Another important point is that the various treaties needed for the UK's withdrawal will require a parliamentary procedure before ratification. The withdrawal agreement may need an Act of Parliament under Section 2 of the European Union Act 2011, if it amends the Treaty on European Union or the Treaty on the Functioning of the European Union. There will need to be that amendment of those EU treaties, but I do not know whether it will

go into the withdrawal agreement or be done in some other way. If it goes into the withdrawal agreement, an Act of Parliament will be needed to empower the Government to ratify that agreement. If that is not the case, CRAG will apply.

I suppose that CRAG will also apply to the various other treaties on future relations with the EU and to all the treaties that we will need to review and deal with in relation to third states and international organisations. There will be much greater need for parliamentary scrutiny of treaties and, therefore, enhanced procedures, resources and institutions to do that.

Professor Derrick Wyatt: I have a brief response to Lord Jay's point about leaving with the trade agreement unsettled, and to the Chairman's point about WTO complications. It would be an extraordinarily bad outcome to leave with the trade agreement unsettled. The most likely thing would be to trade on WTO terms, with the UK adopting the same tariff-bound levels currently applied as part of the common external tariff against third countries.

To give a very relevant example, that would mean a 10% tariff on UK cars going to Europe. Last year, the UK made more passenger cars than France, but we exported 80%-plus of them, and most of those went to Europe. We really would not want a solution where we had a 10% tariff, particularly if profit margins for the manufacturers are about 5%, as I read the other day they are for some of our inwardly investing foreign car manufacturers. Equally, the German Government and the German car industry would not be relaxed about that. It is true that the EU is a much bigger market for us than we are for the EU, but the EU is made up of countries. For some countries, such as Ireland, UK trade is of enormous importance. For other countries, UK trade is of significant importance and the parts of the economy affected by UK trade have political clout.

I will leave that, if I may, and deal with the case for constitutional change. I very strongly believe that there is a strong case for constitutional change as regards scrutiny of the Brexit negotiations. Under the current arrangements, Parliament is presented with a fait accompli—a done deal. All that Parliament can do is accept or reject the package, or object to it, in the case of the House of Lords. There is no opportunity for Parliament to review and seek to influence the process by which the treaty is negotiated, including the consultation of interested parties. There is no opportunity to review and seek to influence the content of the treaty in successive stages of negotiation. That is the case no matter how important the content of the treaty for UK vital national interests.

The case for increased parliamentary scrutiny is that the status quo does not provide scrutiny commensurate with the importance of that which would be scrutinised hardly at all under the status quo. When I say "important", what do I mean? I mean important for individual rights, important for the economic and political interests of the population and important for the governmental interest of the devolved Administrations and other public authorities, including Gibraltar and the Channel Islands. For example, the withdrawal agreement will deal with the rights of 4 million EU nationals, some living in the UK and some UK nationals living in

other member states. I would argue that it is just not good enough for such rights to be determined behind closed doors and then presented to the UK Parliament on a take it or leave it basis. That would not be open government and it would not be accountable government.

The same can be said for the future relations treaty. It will be impossible to dissociate trade access rights from key questions of domestic policy. Deciding the former—the trade access rights—can have the effect of foreclosing elements of the latter. Trade access rights agreed can foreclose domestic policy issues. For example, some aspects of the single market have at times proved politically problematic in the UK. Whether the UK would seek to replicate each and every one of those aspects is, of course, a matter of public interest. It should be a matter of debate in this Parliament.

One example was raised recently by the Prime Minister. She referred to the power of government to block unwelcome foreign takeover bids. That is not possible vis-à-vis EU companies within the EU framework, but that option could be reserved in a future agreement. The point is not that I am arguing for that, but that this is a matter of legitimate public interest and public debate, and public debate it should have. Choices made via the negotiating process could have long-term effects for the management of the UK economy, yet the idea is that this would appear, done and dusted, for the UK Parliament to say, "We object to it", or, "We reject it".

There is a further, final consideration at this point, from my point of view. In my previous evidence, I suggested to the Committee that cross-party consensus should be sought when negotiating the Brexit treaties. That is easier said than done, but if cross-party consensus is lacking, there is a risk that the UK's negotiating position could be undermined even before the treaties are concluded, or that the viability of the Brexit treaties could be called into question when there is a change of government. Whatever the difficulties, cross-party consensus is an ideal and should be sought. It is more likely to be achieved in the context of comprehensive parliamentary scrutiny of the negotiating process than in a possibly heated take it or leave it debate on the final text and in debate on the enabling legislation that will be needed to give effect to that final text.

Q5 **The Chairman:** Thank you. I think it is quite important to articulate the argument as it develops, so I will briefly summarise what I hear from the two contributions to date. Jill gave a series of what one might call legal arguments, on matters of process. I do not mean that in any sense disreputably. She spoke about things that would need to be done and why they would have to be done by Parliament. Derrick went on to the wider constitutional questions about engaging people's rights. Those are two mutually complementary approaches; I just wanted to be clear on that.

Can I reflect for a moment on Derrick's comments? One point that has been put to me is that we all have an interest in this—perhaps we should all declare an interest in it—because at the moment we are all citizens of the European Union and, presumably, a withdrawal agreement will strip us of our citizenship. You might say that that is a purely fictional

consideration, but it might be of some interest to some people. Is that not the sort of thing that you have in mind, at least, when you say that this should be confronted by a parliamentary process?

Ms Jill Barrett: Yes.

Professor Derrick Wyatt: Absolutely.

The Chairman: John, do you want to add something?

Lord Kerr of Kinlochard: I am a bit torn about this. I used to be a Sir Humphrey, as you know. It used to be wonderful in the Foreign Office; you could negotiate treaties and there was very little parliamentary scrutiny of them and I liked that very much.

The answer is that there are treaties and treaties. This is not the Montreux Convention or the Antarctic Treaty. We are talking about something that, as you have just said, will affect almost every area of public life in this country. How we come out will affect how the world sees us and it will show how we see ourselves in the world. Vast areas of domestic policy will be affected, and policy choices possibly foreclosed—as Professor Wyatt would say—by this negotiation. Therefore, it follows that this is a treaty where there absolutely needs to be very full parliamentary scrutiny.

Nobody has answered Lord Teverson's point about impediments. I was a Sir Humphrey. There is absolutely no doubt that the chief impediment will be Her Majesty's Government. They will move seamlessly from saying, "I am sorry. We cannot tell you what our position is, because we do not yet have a position"—the unripe time defence, very popular in Whitehall—to national security, "I am sorry. We cannot tell you what our position is because we are now in a negotiation. We cannot give our hand away". The chief impediment will be Her Majesty's Government.

The Chairman: May I gloss on that? We are so much enjoying the way you tell it. The third stage is presumably when they come back and say, "It is now too late to alter anything because it is a done deal". That is just to complete the triplet.

Lord Kerr of Kinlochard: The Government will be in some difficulty, because we are talking about such an unusual set of treaties. The European Parliament will have access to all the negotiating documents. In the TTIP context, after a long battle, it secured a promise from the Commission that it will be shown everything, at every stage. It will be quite difficult for the Government to say, "I am sorry. We cannot tell you anything about what is going on. It would destroy our negotiating hand", if Mr Farage—if he bothers to pop across—can drop in at the European Parliament building and read all the documents. This Parliament will be able to argue quite forcefully that it is entitled to know as much about the negotiation as the European Parliament knows.

The Chairman: We are under considerable time constraints, but I note briefly that that is exactly consistent and consonant with the argument that you developed in your paper, Derrick. Within this, there is an equality of arms issue about the European Parliament vis-à-vis the Commission, as

one party, and ourselves vis-à-vis HMG, on the other hand.

Professor Derrick Wyatt: Perhaps I might add one point about the importance of the treaties. There is no doubt of the paramount special importance of the Brexit treaties. Apropos what Lord Kerr just said, trade agreements have moved on. They used to be mainly about tariffs, but now they are relatively little about tariffs. They are about non-tariff barriers and harmonisation of regulatory standards. They reach deep into the domestic policy-making sphere. That is why TTIP went right up the agenda. Judicial settlement of disputes became and still is a very hot issue with regard to TTIP and its acceptability. The arrangements for arbitration were fundamentally changed because of the groundswell of popular opinion in some member states against it. My only reservation is that I think there is a strong argument to be made for the scrutiny of all international trade agreements that affect domestic decision-making.

The Chairman: We will now have to talk in telegraph, if you will forgive us. I invite Lord Liddle and Lord Green to come in on this point.

Lord Liddle: My point was about the European Parliament. It has just been covered.

The Chairman: That is resolved. Lord Green?

Q6 **Lord Green of Hurstpierpoint:** It is just to clarify a point. What Lord Kerr was saying has the ring of truth. It is inconceivable that the Government would do a complete negotiation and present the finished package to Parliament, for all sorts of reasons. Nevertheless, there is a difference at the end of the day between keeping Parliament informed as the negotiations proceed, and seeking parliamentary approval for specific mandates on particular negotiating positions in advance of the negotiation of those parts of the deal. Presumably, you are saying that we should reasonably expect the former, rather than the latter. To move to parliamentary pre-approval of individual negotiating stances is impractical and would raise significant constitutional issues.

The Chairman: John, do you want to say anything about that?

Lord Kerr of Kinlochard: The presumption is correct in my case, but I was a Sir Humphrey. I argue that the aid to transparency that this House can provide in scrutinising what the Government are doing, and in assessing the views from across the country on what they should be doing, is of the essence in an exercise that is going so deep into so many areas of national life.

I stop short of mandating—maybe because I was a Sir Humphrey. It seems to me that one needs to be able to promise the Government that one can keep confidential particular kinds of confidential information. The Government should have no respectable argument against transparency, provided there is a confidentiality let-out, which will not apply to very many areas of the negotiation. It might apply to the budgetary bit.

The Chairman: Because of time and because both our other witnesses want to engage, I suggest that Lord Selkirk's question about the devolved

Administrations has been swept up, in a sense. If I remember correctly, John said something about the importance of engaging with them. I will take a nod as including them in our concerns. James, do you want to gloss on that briefly? I will then ask Baroness Prashar to come in on her point, as it fits quite well with our immediate discussion.

Q7 **Lord Selkirk of Douglas:** May I sum up the question in a few brief words? Will consultation with the devolved Administrations be an obligation, a courtesy or both?

The Chairman: Can we get in Baroness Prashar's question as well?

Q8 **Baroness Prashar:** My question is about what you think the principal objectives of the parliamentary scrutiny of the negotiation should be. What would you warn us against?

The Chairman: Jill, you look as if you would like to start on those.

Ms Jill Barrett: Yes. I heard the Secretary of State for Exiting the EU say yesterday that his aims were to make sure that the Government "take the time" necessary "to get it right" and "to build a national consensus" for the terms of exit. It seems to me that those are quite good objectives for parliamentary scrutiny as well, not only to hold the Government to account for doing that, but to help to ensure that the Government get it right and build national consensus.

To do that, it is important that the scrutiny should start at the pre-signature stage. The CRAG statutory procedures will not be enough for that because, as has been mentioned already, they come in when the treaty is already negotiated and signed and it is too late to change it. The existing EU scrutiny procedures also tend to be too late, because they operate on documents that have been initiated by institutions of the EU as proposals. Here the UK Government are a negotiating party, so they have the ability to initiate proposals. Therefore, Parliament ought to be engaged at the stage of the Government drawing up their negotiating plan. Of course, the problem is that the Government cannot give away all their negotiating strategy and bottom lines, but they could certainly disclose their negotiating plan, as they have already done for some negotiations, such as the Paris agreement on climate change.

The Chairman: To save time, are you in a position to give us a considered note on some other examples of that by correspondence?

Ms Jill Barrett: I can certainly try.

The Chairman: It would be helpful to have it.

Professor Derrick Wyatt: I will try to answer both questions at once. First, what should scrutiny do? It is important to address what it should not do. It should not seek to micromanage the negotiations in a way that would deprive Government of room for manoeuvre. This may sound paradoxical, but an overarching objective of scrutiny of the Brexit negotiations should be achievement of a successful outcome to the negotiations, including an ambitious and comprehensive free trade agreement.

Scrutiny should increase transparency and accountability to the nation, through accountability to Parliament. It should have a procedural aspect and a substantive aspect. The procedural aspect is: who are the Government talking to? Are they consulting the right people? Are they consulting them in the right way? Are they keeping lobbyists in the right place? Scrutiny should give a public voice to those seeking to be heard by the Government in the negotiations—businesses, trade unions, the devolved Administrations, Gibraltar and the Channel Islands.

On the point about the devolved Administrations, it is for a Committee scrutinising the negotiations to say to Government, "What have you said to the devolved Administrations? What are you learning from them?", and to say to the devolved Administrations, "Have you been listened to? What do you want to say about the interests of your Administrations and your parts of the world as regards these negotiations?"

Scrutiny should also be substantive. It should offer fact-based, constructive criticism of the Government's conduct of the negotiations and invite the Government to think outside the box and to test their internal advice. Indeed, scrutiny should itself test the Government's internal advice.

Scrutiny should remind the Government that the referendum result has placed limits on their negotiating position. It should influence the negotiations in the way that reliable information and high-quality policy analysis will always influence a wise and prudent negotiator.

I come to the earlier point about whether or not there should be ongoing scrutiny of positions that the Government are about to take. I refer to the current practice at the European Parliament and the Commission. The Commission undertakes, and, as far as I know, fulfils the undertaking, to let the European Parliament know what it is proposing and to give that information to the European Parliament in good time for the Parliament to come back to the Commission and for the Commission to act upon that comeback, should the Commission decide that it is appropriate. That is a kind of scrutiny reserve principle, and it is in paragraph 24 of the 2010 framework agreement between the Commission and the European Parliament.

I have a final point about what scrutiny should aim to do. If Parliament thinks that some outcomes could prejudice Parliament's ultimate acceptance of the Brexit agreements, it should warn the Government about that.

Lord Kerr of Kinlochard: Can I add a footnote on the devolved Administrations? I agree with Professor Wyatt's point. It will be the case that we take back control of areas where in the United Kingdom policy-making is devolved. Take agriculture, for example. Presumably, the control that will be taken back in those areas will be exercised by the devolved Administrations and Parliaments. It follows that the positions that the Government will adopt in negotiations concerning those areas ought to be developed in close collaboration with the devolved Administrations, and that the devolved Parliaments should have as much

say in the scrutiny of those areas as we have. It seems to me that there is a strong case for saying that it is a responsibility of the House of Lords to ensure that scrutiny involving the devolved Administrations is effective.

Q9 **The Chairman:** This is what I am going to do; if it is helpful, I can signal it to the Committee in a moment. We have a number of points that all bear on the question, which we have started to explore, of the nuts and bolts of how we should do scrutiny and the areas and ground rules for that. That will be very helpful. I propose that we put our last four questions as a clutch, so that you can comment on them or take them away, reflect and drop us a line, if you wish.

Before we do that, I would like to take up a point that Derrick Wyatt made. In the paper that he sent us, he expressed it at some length. We do not need to go into the area now, but it is about the question of parliamentary diplomacy. Presumably, if we picked up evidence from third parties—I am not talking about the negotiating position of their Government or the Commission—through our links with counterpart Committees through COSAC, for example, or bilaterally, or through friendship groups or otherwise, it would be an obligation on us and a useful convenience for government for that to be fed into government as part of this process. I may be misinstructing myself, but my impression is that in the past, sometimes HMG have been rather blind to the interests or concerns of others in presenting their own position. Is that a fair formulation? I do not want to open up that whole chapter, but you might give us a couple of sentences on it.

Professor Derrick Wyatt: My comment was about parliamentary diplomacy, by which we mean a kind of external face to scrutiny. The House of Lords might take evidence from the German motor car industry, for example, on the impact of coming to the end of the two-year period without a trade agreement. That is information that would be interesting to our Government, but it would be very interesting to talk to the German Parliament about it. My conviction is that there is a huge common interest in a non-recriminatory, close economic relationship with Europe, based on a comprehensive and ambitious free trade agreement. That may become lost, at times, when negotiations at intergovernmental level become heated. I am sorry if I have not dealt directly with your point, Lord Chairman.

The Chairman: That is fine. The sensible way to proceed is for us to bulk these questions. If there is anything you wish to pick out and respond to, please do so. If there is anything you wish to reflect on and come back to us, please do so. I will ask them seriatim. Lord Whitty will put his question. Then I will put a question to the Committee. Then there are two others to tidy up. The Irish Ambassador has now joined us, I am pleased to see. He will follow on in a few minutes. We have a feast this afternoon.

Q10 **Lord Whitty:** We may have already mentioned one role for the Lords specifically. We have been talking about parliamentary scrutiny. We need to decide ourselves whether there is a particular role for the House of Lords, given its history in this scrutiny. Lord Kerr has just mentioned the relationship with the devolved Administrations. Are there other areas

where our guests think that the House of Lords specifically is in a good position to pursue aspects of scrutiny? The slightly more antagonistic atmosphere of the House of Commons and the fact that, at the end of the day, the House of Commons has a veto on the treaty—at least theoretically, under CRAG—means that we are in a different relationship with the Government. Do you have any tips on what we specifically should do?

Professor Derrick Wyatt: I would respond to that by emphasising constructive, critical assessment of the line of the Government's negotiation, not trying to box the Government into a corner, but trying to say, "Let's test these propositions. Let's check your policy arithmetic, and let's take evidence of our own to put next to your evidence. At the end of the day, we are both trying to do the same thing, which is to get the best possible outcome for the UK in these negotiations". That may be a slightly different flavour from the way in which things are handled in the House of Commons.

Q11 **The Chairman:** It is always difficult to manage these things, and we are breaking them down gently into categories. Before you respond, Jill, you might want to think about your experience of the CRAG Act. The Commons has in effect—although never exercised—the power of veto. The Lords has a more advisory role. Does that affect things?

That is one consideration, under that tier. Can I ask two specific questions? There will be round-ups in a moment. The first is partly for Professor Wyatt. Is it your recommendation that, leading up to the parliamentary scrutiny of the negotiations, they should be set out in a formal resolution, akin to, but not identical to, the existing scrutiny reserve resolution? Do we need a new version of that? What are the principles?

There is a second question, which may be more for Jill's side of the house. Should we have a formal code of practice for the conduct of the negotiations, supplementing the existing Osmotherly rules on relations with parliamentary Committees? Do we need to bind the Government through a scrutiny reserve focused specifically on Brexit and to have better ground rules for the conduct of the negotiations, as two ways of influencing that? Jill may want to start with that. Perhaps Derrick could follow.

Ms Jill Barrett: I certainly see a need for the terms of reference or the scrutiny reserve resolution to be more explicit about what this Committee requires from the Government. At the moment, the scrutiny reserve applies only to proposals made by European institutions that the Government then place before Parliament. It would need to be made explicit that the Committee wants to be involved at an earlier stage and wants to know government plans for negotiations before they get to the point of having a draft treaty to look at.

I am not familiar with the Osmotherly rules, so I had better pass on that part of the question.

The Chairman: I am not sure that many of us are. If you have thoughts on that subsequently—

Ms Jill Barrett: In my role on CRAG, it seemed to me that there has always been greater interest in the Lords in the principle of treaty scrutiny. The Commons' preference seemed to be to leave it to the subject Select Committees to deal with only where there was a policy priority. Therefore, a number of treaties may slip through the net.

With the Brexit process, there will be an awful lot of treaties to deal with going forward. If the Lords now feel that it is right to establish a treaty scrutiny Committee to look at things immediately they come in, perhaps with a view to co-ordinating and making sure that they are looked at by the right Committee and that the Government are bound to a delay, where an inquiry is considered to be necessary—in other words, that the treaties are sifted and prioritised into ones that need an inquiry and ones that do not—that could be a very valuable role.

Professor Derrick Wyatt: The scrutiny reserve will not work for some aspects of the negotiations. It will not work for the bilaterals—the government-to-government contacts. To say it will not work is too defensive; it is unlikely to work. That is partly because confidentiality issues are so pressing. If the UK Government talk to another EU Government about how they should be prodding the Commission in the negotiations, that Government will not thank the UK Government for indicating what has transpired between the two.

The Chairman: Traditionally, those are always conversations that have not taken place.

Professor Derrick Wyatt: Absolutely. I am sure that the House and this Committee would accept that. I would advocate that information and negotiating positions be put before the House's Committee in advance, with appropriate guarantees of confidentiality, and that there be a principle of reserve, similar to that set out in paragraph 24 of the 2010 framework agreement between the European Parliament and the Commission.

As regards ground rules, the main point I would make is that a code of practice is probably premature. A code of practice is something that is more likely profitably to evolve from the practice than to be dreamed up now, with the practice evolving from it. A few key principles might be recorded—principles that acknowledge the balance between scrutiny and the Executive's needs.

Parliamentary scrutiny is a new departure as regards negotiations. It might be said that it is essential because of the importance of the negotiations to the future economic and political well-being of the UK, but while it is designed to increase transparency and accountability, it is also to support the Government in their conduct of negotiations in the national interest. Scrutiny would have due regard to confidentiality and the need for flexibility on the part of the Government in their dealings with the EU and its member states. Statements of principle of that ilk, which would signal both the determination of the House to fulfil its constitutional function in scrutinising negotiations and its commitment to the negotiating

process and respect for the Executive's role in that, could be salutary right at the beginning.

The Chairman: We would like to reflect on that, if we may. It leaves two ends hanging; I am grateful to colleagues for their interest. You are aware of our interest in the practical and procedural challenges of effective parliamentary engagement. That is extending on the issue of confidentiality. There is also the question of precedents. Derrick talked about the Commission/European Parliament nexus. There are issues such as the Convention on the Future of Europe, which I am sure John will be able to help us with, and others you may reflect on. Could we leave it that you might respond to those in due course by correspondence?

This afternoon, in particular, I would feel extremely derelict in my duty if I did not thank you on behalf of the Committee. These are extremely complex issues. You have brought very good analysis and good sense to them and have given us a lot to reflect on with regard to how we can, in effect, take on our responsibilities. I thank you, and I remind you that we will send you a transcript of what we have done. We would like to keep this as a living dialogue. If you have further thoughts or contributions, particularly as things develop, we will be more than pleased to hear from you again, but we would like to record our appreciation. Thank you very much.

No one needs to withdraw from the gallery, but I suggest to the Committee that we recess informally for a couple of minutes, if people want a breather or at least to move from their seat, before we resume with the ambassador.

Rt Hon David Davis MP, Secretary of State for Exiting the EU – Oral evidence (QQ 12-26)

Evidence Session No. 2 Heard in Public Questions 12 – 26

Monday 12 September

Members Present

Lord Boswell of Aynho (Chairman); Baroness Armstrong of Hill Top; Baroness Brown of Cambridge; Baroness Browning; Baroness Falkner of Margravine; Lord Green of Hurstpierpoint; Lord Jay of Ewelme; Baroness Kennedy of The Shaws; Earl of Kinnoull; Lord Liddle; Baroness Prashar; Lord Selkirk of Douglas; Baroness Suttie; Lord Teverson; Lord Trees; Lord Whitty; Baroness Wilcox

Examination of witness

Rt Hon David Davis MP

Q12 **The Chairman:** Good morning, Secretary of State.

David Davis: Good morning, my Lord; I have always wanted to call you that.

Baroness Kennedy of The Shaws: And we can call you Secretary of State.

David Davis: I am just about over the shock.

The Chairman: That is off the record, but never mind.

David Davis: No, it is not off the record.

The Chairman: Okay. We will put it on the record.

David Davis: As I mentioned in the House, the best congratulations I had were, "Many congratulations. I now believe in the resurrection".

The Chairman: On that suitably lofty note, we formally welcome the Secretary of State for Exiting the European Union, David Davis. I am never quite sure what interests have to be declared. We are former colleagues and have enjoyed that process. We have occasionally been sparring partners.

You have a huge job, Secretary of State. That makes us all the more appreciative of your time in coming here. You will be very familiar with the rules of engagement of these Committees. We may have a slightly different style at this end of the Palace, but the objective is the same—to get at the truth. As I tend to say to nervous witnesses, which I do not anticipate you to be, remember that it is not a court of law. We are in the process of trying to find out something.

In starting off, I would like to stress two things. One is that immediately—you will have sensed the same in your own department—we are interested in getting the process right, in hearing how the process is going and how we can relate to that. Secondly, we take a fairly strong view—I use some text of your own on this—that a properly conducted parliamentary interest in this will be beneficial, or not unhelpful, to the Government in their considerable task. If we can kick off with that as a general or shared objective, I suggest that we start by referring to our report in July on parliamentary scrutiny of Brexit, which we know to be the first in what will be a rather long process. We concluded that Parliament's role in the forthcoming negotiations would be critical to their success. In what ways do you think that Parliament can help to make a success of the Brexit process?

David Davis: Thank you, my Lord. A proper declaration would be that we were both members of the Whips' Office at the time of the passage of the Maastricht Bill through the Commons, which has relevance.

Turning to the process, I have read your report. As you know, my view on parliamentary accountability is very firm. It is a good in its own right and does not need justification by our saying that it will make this or that process better. The simple fact of parliamentary accountability is a good thing. Because of my stance, I want to engage with and consult Parliament as widely as possible, consistent with doing the job of delivering the national interest in the negotiation. That is the sort of balancing act I have to deal with.

I have already met a number of parliamentarians. In our negotiation process, I intend to do both formal and informal things. I will talk about the formalities in a second. We are in the process of gathering evidence. As you will be aware, there has been a bit of criticism of the Government that we have not said much yet. It will take some months to analyse many of the industrial and commercial effects of various options, and to do the analysis on the negotiating balance—where our allies might and might not be. We will take some time—the process has already started—on the legalities of the exercise. There are tripwires of several sorts. That is where we start.

As regards the parliamentary contribution, I expect a number of Committees to have a view on what we do and on particular interests, whether justice and home affairs, industrial effects or social effects. We expect to see reports on those. Lord Bridges has written to all the Committee Chairs in the Lords asking them to tap into relevant expertise, but that does not preclude us—Ministers—from appearing before Committees like yours to give formal evidence. I understand that discussions are going on through the usual channels about setting aside time to discuss relevant areas. That is in the Lords alone.

There is one thing that I should pick up, however, and it is an area where we might differ. In paragraph 20 of your report, you say that it is important that we strike the right balance between transparency and accountability. That is exactly right. Clearly, there is a need to ensure that Parliament can be informed, without giving away our negotiating position.

I am sure that later in this conversation we will go into that in more detail. At least one member of the Committee will remember that in the days when I was Europe Minister I had to tussle quite a lot to keep our negotiating position on the Amsterdam treaty open to Parliament but not so open that it jeopardised it. You will remember that that was the treaty that concluded our exemption from the Schengen treaty, so it was very important in those terms.

Obviously, we will continue to make regular Statements after European Councils, summits and other fixed events. You pointed out how parliamentary procedure can be flexible, and we will engage with you on that, but I have to caution you that I may not be able to tell you everything, even in private hearings. You mention that in your report as well. You cite the ISC example. You may remember, my Lord, that I was the Minister who was the midwife for the ISC.

The Chairman: Yes, I do.

David Davis: It has had a difficult 20 years to establish where it is. Even today, I do not think it persuades everybody in both Houses that it provides the level of accountability that it should, because, of course, its reports are redacted by the Prime Minister. There are weaknesses in that.

As regards accountability and openness, I will be as open as I can. More accurately, the Government will be as open as they can. That will be a very important part of the process. It will also be an incredibly intensive part of the process. If you think about what is going to happen over the next couple of years, apart from the debates, reports by Select Committees and hearings like this, there is bound to be primary legislation. It is an unavoidable fact that, as we leave the European Union, there will be implications—extensive implications—for domestic law. That, too, will provide a forum and a format.

That is my opening summary. I have probably opened up about a dozen different lines of inquiry. From my point of view, the aim at the end of the day is to be as accountable as possible, consistent with delivering the national interest, of the best negotiated outcome we can get. I hope that was not too extensive.

The Chairman: No, it was a helpful statement. We are all in the business of understanding that this is a balancing act, in the best sense of the term. There have been times—we will not dilate on them—when perhaps HMG has been too tight and we have not heard enough to remediate things or to help with the process. We take it as an index of your good will that we will avoid that, without necessarily saying that the full bag of red lines has to be conceded on day one.

There is a small technical point I would like to reflect on before I ask my other question. It concerns access to expertise. This has somewhat preoccupied me because, modestly in this position, I find myself sitting as a matter of convention on the Cross Benches, which are rather heavily populated by persons like ex-Cabinet Secretaries and ex-professional heads of the Foreign and Commonwealth Office, of whom we have one as

a member of our Committee. They are people with very long experience and expertise in what we have all conceded are highly technical fields. Can I have the assurance that you are seeking means of tapping into their expertise, wherever possible, and, in particular, that if they are worried about something, somebody will listen to them?

David Davis: Absolutely. My entertainments this week include this Committee today, the Commons Foreign Affairs Select Committee tomorrow and a meeting with the Cross-Bench Peers on Wednesday. We have started down the route already. At least one Member of this Committee, if not two, have had meetings put back, but that is under way. I pay great attention to my elders and betters.

The Chairman: Thank you for that. They would be modest, but I am thinking of the gentleman whose book on how we negotiated into the CAP I have on my shelves. He is still around, thank goodness, although not in this House. He is the kind of person you might be able to ask about how you extricate yourself.

To come to the more general issue, as you have already indicated, there is a legislative end point to some of this, whatever form that will take, particularly in relation to the approval of treaties. As you know, under the terms of the Constitutional Reform and Governance Act 2010, Parliament's role in respect of treaties is codified and is limited to approving ratification. As you have indicated, Brexit will have a profound impact on almost every aspect of our national life—domestic legislation and so forth. Do you think that that in itself means that Parliament must have an enhanced role in influencing the shape of the negotiations and achieving the best outcome, presumably leading to some treaty that we will then have to consider on its merits? If I may cut to the quick, just looking at that ex post the negotiations will not be as good as having seen the process of development that leads to a satisfactory negotiation.

David Davis: I do not think it will be a blind process from beginning to end. I would be astonished if it were.

The Chairman: A black box.

David Davis: Yes. It will not be a black box out of which a treaty drops at the end. Indeed, in many ways, the treaty will be the last piece.

Let me highlight it. First, there will be a whole series of negotiating rounds, out of which will come communiqués, prime ministerial Statements and your summoning me back here to talk about this again. A great deal of detail will come out of that. I guess that it will start at the point of triggering Article 50. At that point, we will have some clear public negotiating guidelines. There will be subtleties we will not talk about, but that will be where it starts.

I would be astonished if there were not public debates about the rights and wrongs of various elements of the strategy that we pursue. As I said, the legislation will have an effect. The legislation will reflect what the treaty will do at the end. Off the top of my head, if you have a change in one element of immigration law or even in something like patent law,

those things will start to reflect themselves quite quickly. Deciding what legislative strategy to follow is a complicated problem alone, before we get to the substantive matters. No, it will not be a black box at the end.

I am quite sure that we will follow the rules under CRAG precisely. Do you mind if I call it CRAG? I can never remember all the words. Frankly, that will be just the end game. In my view, that will not be the substantive element.

The Chairman: As you have mentioned the end game, I will bring in Lord Whitty, who takes a certain interest in the sequencing.

Q13 **Lord Whitty:** Potentially, you have started to answer my question. We have a period between now and triggering Article 50 in which we can have one sort of relationship. You will then be in negotiations in two dimensions, as I understand it. One will be mainly to do with the withdrawal treaty. One will end with a new trade treaty with our former partners. In those negotiations, certain legislative things will arise. Even at the end of that, we have to look at our own legislation and how far we need to change as a matter of policy or as a consequence of the treaties. That is a whole lot of different styles of operation of the Government. Do you see through that sequence different styles of engagement with Parliament and, in particular, in the move from before Article 50 is triggered to after Article 50 is triggered?

David Davis: To some extent. Before Article 50 is triggered, there will be a frustrating time, because we will not say an awful lot. We will say a bit; we will lay out guidelines but, as the Prime Minister said, we will not give a running commentary on it, because that would undermine our initial negotiating stance from the beginning.

Afterwards, I expect it to be a more open process. I may be wrong, but if I were on those Committees—as you know, I chaired a modest Committee in the past—I would be looking to make my own contributions. It is the point we started with: whether a Committee has a view on immigration policy, justice and home affairs or whatever. This covers nearly the entire bandwidth of government, so I would expect that to happen.

We—the Government—will not be in command of it all, because Parliament itself will take its views forward, in a variety of ways. I am infamous for other things in my past, including, for example, work on the prisoner votes episode. That gives you an idea of the sorts of things that may well happen. I do not command any of those. Does that answer your question?

Lord Whitty: Yes, I think it does, for now. One issue that arises is whether it is possible to be franker at various stages than it is at the stage when you are coming to the crunch point in all these processes.

David Davis: One of the areas in your report I was unsure of was a sort of elision between accountability after the event and supervision in advance of it. I can entirely see accountability after the event—that is very clear—and not very long after the event either; I am not talking about a year later. In advance, I do not think that it is possible for parliamentarians to micromanage the process. That would not give us an

optimum outcome for the country. Much of the confidentiality I was talking about will be time related. We can tell you something late, but we cannot tell you in advance.

The Chairman: You can probably tell us more when you have tabled it than when it is in preparation.

David Davis: Of course.

The Chairman: At a later stage—I do not want to press you now—we want to consider the modalities of how that will go. We will look at scrutiny resolutions and so forth. That is helpful. I have two more supplementaries, from Baroness Armstrong and Lord Green.

Baroness Armstrong of Hill Top: Secretary of State, you have been very interesting about the sequencing. I am not asking you to tell us this today, but how far do you want to get in setting out the negotiating strategy—for example, what you are looking for on access to the single market—before you trigger Article 50? If you are going to be fairly clear about what you are looking for, I think Parliament will want more involvement than if you are going to be very broad. That is our problem about the sequencing and the level of involvement. If things are going to be decided in the negotiating strategy and Parliament has not had involvement in that, it may be very difficult.

David Davis: It is a terrible thing to say to you, but we have not decided that yet. Some of that very question will be dictated by how different some of the outcomes are. We have had a letter from at least one member of the Committee already talking about one set of possible outcomes on the trade strategy. The letter makes very good points, but there are counterbalancing points. If it is like that, it might be more open than if one policy stands out. The other thing is that this is a negotiation. Where we go in at the beginning is not necessarily where we will end up.

Baroness Armstrong of Hill Top: I accept that, but if where you end up does not bear any relationship to where you start, you are in deep trouble.

David Davis: That would be a bit of a problem. I might not be in this job for that long, in that case.

The Chairman: We will meet that when we come to it. I ask Lord Green to comment now.

Lord Green of Hurstpierpoint: I want to pick up the question of the formulation of negotiating strategy before the triggering of Article 50. There is, of course, a question, which Hilary asked just now, about how much detail goes into the negotiating strategy before you get to triggering Article 50. I take the point that you have to have some freedom for manoeuvre on that. Nevertheless, the question arises as to how you test out ideas in the development of your initial negotiating strategy. Is it a question of simply listening to a whole series of representations of interests from various stakeholders—different sectors of the economy and society—or is it what the Government would more normally do, which is to embark on processes of consultation to get advice that can be mulled over

in order to form the negotiating strategy? I accept that it is not easy. I am not trying to score any kind of point. I am interested in knowing how one will get to a representation of different ideas that can then be weighed as you come to a decision on what the strategy is.

David Davis: I am not sure whether or not you call it consultation. Pretty much every department of government is tasked by my department to go out and talk to its stakeholders about, first, what the risks are, secondly, what the opportunities are, and, thirdly, what policies mitigate the risks and maximise the opportunities. That is true of virtually all departments. Nearly all departments have one or other category, or both—risks, opportunities or both. At that point, which is not yet, we will do some quite quantitative assessment of what we think the advantages and disadvantages are.

I got ribbed by the Scot nats in the Commons last week for being rhetorical when I said, "This is a national instruction—a national mandate—and we are going to interpret it in the national interest", but I meant precisely that. We need to take an empirical approach. The purpose is not to damage the national interest or the economic interest—just the reverse. That is the mathematical approach we will take.

Lord Green of Hurstpierpoint: I think I am the one who wrote you the letter, unless anybody else did.

David Davis: You are. You wrote to me about customs union.

Lord Green of Hurstpierpoint: I am not asking you to comment on those things.

David Davis: I hope to talk about it directly, because it is complex, to say the least.

The Chairman: We will take two more questions on this particular line and then go on to Lord Teverson. The point that I want to add is not wholly a flippant one. One or two Members of the Committee—although not me—are quite experienced in war-gaming things, which I have seen on the television, for example. If you wanted to conduct any of those kinds of scenario-planning exercises, I am sure they would be delighted to volunteer, given notice.

David Davis: I may take you up on that.

The Chairman: We are in the business of being helpful. I will take questions from Baroness Browning and Baroness Falkner. We will then move to a slightly different area.

Baroness Browning: Secretary of State, you have made it very clear—I can certainly understand why—that you do not want to give a running commentary while you are getting the strategy together and doing your preparation, up to the point at which you trigger Article 50. You have also said that you will not necessarily share a lot of detail with Committees of this House. What thought have you given to how you will handle how secure the information is with the people you are negotiating with, once

you trigger Article 50 and start those detailed negotiations? It seems to me that the nightmare scenario is that you enter in good faith into very detailed negotiations—possibly, of course, with more than one party, so you have a lot of different interests in the negotiation—and things that you would eventually have shared with the House are spread across newspapers or even publicly debated in other countries. You may find yourself on the back foot, constantly firefighting—for want of a better word—a lot of leaks. Have you thought about the handling of that? If that sort of scenario evolved, Parliament could very quickly come to the view that it was not being kept in the loop.

David Davis: I can see that. We have not gone into detail on that, because, to be frank, in discussions that we have had so far—not very widely—people have been very good about respecting confidences. If that were to happen once, it might change our strategy. The area we have looked at, which may be of particular interest to the Committee Chairman, is the extent to which the Commission notifies the European Parliament, for example, and when that is confidential and when it is not. We have not grounded it all yet, but that is one area where we might be more open than otherwise, because we would not want either House of Parliament to be disadvantaged with respect to the European Parliament.

The Chairman: We are about to come on to that area.

David Davis: Absolutely. You are probably better informed on it than I am. It is an area I had originally not been aware of but which is itself circumscribed by confidentiality requirements. You are right. We depend to a large extent on the trust of our allies. They are still our allies, even though we are negotiating with them. In the past, it has generally been pretty well respected. In English law, as Baroness Kennedy will know, even the courts respect intergovernmental and international traffic as protected, so there is a great deal for them to lose by doing that. I will watch out for it. I take it as good advice.

Baroness Falkner of Margravine: I have to declare two interests. First, a member of my household is affected by acquired rights, because he is an EU citizen only. The second interest is that I co-own a property in the eurozone.

Having declared those interests, Secretary of State, I wonder whether I can take you back to the questions on sequencing. I tried to come in then, but it is an important enough point to put to you now. Between January 2013, when the Prime Minister, in his famous Bloomberg speech, announced that he would seek a referendum on Britain's relationship with the EU, and February 2016, when he finally concluded his negotiations, there was a period of three years and a month. In that period, Parliament and the European partners did not know what the areas he was seeking to negotiate were until mid-2015. We then got to a situation where we saw the results of the negotiation in February, and the referendum was in June. In my view, it was a very good renegotiation—certainly on financial services, the area in which I am particularly interested. However, as Chairs of the various Select Committees, we scrambled to work out what the deal was and to advise the British public, under our scrutiny function,

what we thought of it.

Although you were on the other side of that debate, do you accept that potentially three months, with Easter in the middle, was inadequate time, and that the fact that we spent over three years on a negotiation and then gave Parliament and the British people such a limited window is possibly why we are in the uncharted territory where we find ourselves now? Will you take some lessons from that? I can direct you to one or two. Although it is a negotiation and everyone accepts the importance of keeping your powder dry in a negotiation, unless and until you can prepare for what you think you want, people will not be able to assess whether what you want is what they want—on the other side—or, indeed, find other ways of getting to where you want. It is not just a matter of "A says this and B says that"; it is a longer-term conversation, and it has not been done very well, according to the record we have just looked back on.

David Davis: I really cannot comment on the record beforehand. Today of all days, when the erstwhile Prime Minister is standing down, I will not do so. I think that he was a pretty good Prime Minister, to tell you the truth. I am not going to criticise him today.

Baroness Falkner of Margravine: I was commenting only on the process. I was not commenting on the individual.

David Davis: You can guess how it would be written.

Baroness Falkner of Margravine: I am not playing the man. I am playing the ball.

David Davis: Yes. In those terms, I will not comment on it. In terms of our approach, I imagine that it will be something over two years, because that is intrinsic to the trigger. As I have already said, I will seek to be as open as is possible. Bear in mind that, unlike that negotiation, which was relatively narrow, this one will be as broad as the entire governmental front. Even were I to decide that I was going to behave like Rasputin and keep it all entirely secret, I would fail. It would not be possible, partly because of some of the comments that Lady Browning made; other Governments would do it. In the Government's own interest, it is a better idea to be more open than is perhaps traditional, but always subject to the overriding point that we cannot pre-empt the negotiation. Other than that, that is where I am.

The Chairman: We will now take up a strand you have already touched on, which is about parity of treatment vis-à-vis the European institutions. There is no one better than Lord Teverson, as a former MEP, to pursue that line of questioning.

Q14 **Lord Teverson:** Indeed. Perhaps I could follow up on that. The comment about not giving a running commentary is fair enough and we all understand why we do not want that, but, as we know from politics and public life, if you do not run the commentary, someone else does.

David Davis: It started over the summer.

Lord Teverson: Exactly. Where there is not fact, there is supposition, through to make-believe.

David Davis: Exactly.

Lord Teverson: There is a real issue for the public, for Parliament and for the Government, if they are to be successful in their negotiation. Interinstitutional agreements in Europe are very powerful things. We are not so used to them over here. As you know, in 2010 there was a framework agreement between the Commission and the European Parliament, which states, "Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives". As I understand it, the European Parliament is expecting that process to take place as part of these negotiations.

Are the Government and you, as Secretary of State, going to get ahead of the process, or are we all going to have to get on to the European Parliament website every Monday morning to find out what is really going on, or even to bring over and talk to our British MEP colleagues who are helpful and positive, hopefully, rather than anything else? It is a serious challenge. This Parliament would not want to be treated as a second-class citizen in comparison with the European Parliament.

David Davis: Neither do I want to treat Parliament in that way. It will be a little bit of matching and meeting sometimes. That is what it will be; it will be between the two. There is no interest whatsoever for the Government in leaving the text to be issued by somebody else—none whatsoever. We will certainly match and, hopefully, improve on what the European Parliament sees.

At given times, that will be tactical, I am afraid. I do not want to be boring about it, but this is likely to be the most complicated negotiation of modern times. It may be the most complicated negotiation of all times. By comparison, Schleswig-Holstein is an O-level question. We will not always be entirely free agents, but we will be as open as we can be.

The Chairman: Do you want to come back on that, Robin?

Lord Teverson: I think we had a strong statement that we would not be behind the European Parliament.

David Davis: That is what I was saying.

Lord Teverson: I am very happy with that response, Chairman.

Baroness Suttie: Secretary of State, could you tell us what your understanding is of the role of Guy Verhofstadt in this process?

David Davis: I am not entirely sure. Roll back for a second. A little bit depends on which final process we end up with, for a start. On the presumption that it is the most efficient process from our point of view, we have to get a majority vote out of the European Parliament. Therefore, we

have to do what we can to persuade him that our deal is good for everybody.

Let me say as an aside that, over the summer, I watched both the British and the European press invent history between Michel Barnier and me that I do not remember. He is a perfectly nice man. He has a bit of a reputation in the City of London, but that is all right. He is a tough arguer and a classically French negotiator. There is nothing wrong with any of those things. At the end of the day, much of this will be down less to personality than to calculation of interests. Those interests are not all simple interests. There is national interest, obviously. We hope very much that people understand the national interest of trade negotiations, justice negotiations and so on. That will be much more important than the individuals concerned. I do not take too much notice of some of the comments that have been made in the British press. Does that answer your question?

Baroness Suttie: Yes, thank you.

The Chairman: Secretary of State, may I inject a note of inevitable flippancy into the proceedings? Some years ago, I discussed a particular event related to human rights with one of Her Majesty's ambassadors. I think I have the order right. Her line was, "It is too early to say. We have not formulated". Then a senior member of a previous Administration came along and said, "It has all been decided. It is too late". Those things took place simultaneously. Somewhere along the way is the mantra, "We will not give a running commentary", or, "We will not give away our hand".

Taking it out of the musical comedy level, can you at least do your best—if only for the good reputation of the conduct of this process—to see that that kind of stratagem is not applied? We all understand that there will be moments when confidentiality has to be respected, and I concede you that now; but if we can try to do it in as straight and open a way as possible, with the idea of sequencing that has come out, it will be helpful to us all. Do you accept that sort of approach?

David Davis: Timing will be important. There will be times when we can tell you things that we could not tell you the month before.

The Chairman: Yes, of course.

David Davis: Anybody who has been involved in negotiations—a number of people on this Committee have been very involved in negotiations—will know that perfectly well. When it comes to it, I suspect they will understand it.

Lord Liddle: If in the present circumstances I was acting as an adviser to the Prime Minister, which I once did, I would be saying to him—

David Davis: It is her, actually.

Lord Liddle: Sorry—to her. Apologies for that. I would say, "You have to make up your mind about certain fundamental things. If you want access to the single market, are you prepared to put yourselves in a position where you accept rules in certain sectors that you do not have much say

over? Yes or no? Are the Government prepared to accept that?" If we are interested in research, which we think is a good thing and beneficial to Britain, are we prepared to make budget contributions of any type to common European programmes? That is a question of principle. It is not something that depends on our partners; it is about what we are prepared to do.

On free movement of labour, we say that we need more control. We may need more control, but does that mean that we are aiming to cut EU migration to 100,000, as opposed to 300,000, or that we want dramatically to reduce unskilled migration, as opposed to skilled migration? Surely the Cabinet has to come up with the policy on those questions and say to Parliament what its position is before it enters into any kind of discussion with Brussels, or do you not see it that way?

David Davis: Yes. The Cabinet will have to come to that conclusion. That is the sort of debate internally I was talking to Lord Green about earlier. Disclosure will start at the point of the triggering, but it will go on from there—in what sequence, I cannot tell you at this stage.

The Chairman: We are getting through this particular area, which is central. We now go to Lord Selkirk.

Q15 **Lord Selkirk of Douglas:** Secretary of State, might you feel able to appear relatively regularly before our Committee? I know that it is a very difficult question, because we do not know exactly how the negotiations will play out. What would you consider reasonable?

David Davis: I have not calculated the diary requirements at the moment. My answer is, within reason, yes. There will be claims on me from the Foreign Affairs Select Committee in the Commons, which I have mentioned. We may have our own Brexit Select Committee, in itself. One of the outcomes of the sheer complexity of this is that it will be quite onerous in time terms. I may crave your indulgence from time to time because of that.

Just think about it. We have a whole series of economic exercises and a whole series of diplomatic exercises. We have at least 30 interlocutors—27 countries, the Commission, the Council and the Parliament. We have the legal analysis to complete. One or two of you around the table are lawyers. I have to tell you that we have been given 180-degree opposite opinions on some things. People will be familiar with that. There is a whole series of things of that nature. Once it really gets under way, I suspect that the pace of life will be quite hard. Within that consideration, I will do absolutely what I can to appear before you. To be frank with you, appearing before Lords Select Committees is a pleasure. The tenor is good, and it is useful. Actually, I quite like appearing in front of Select Committees full stop, but Lords ones are always enormously courteous.

The Chairman: It could get worse. Who knows?

Lord Selkirk of Douglas: I have a very quick supplementary. First, thank you for the response that you have just given, Secretary of State. What do you see as the main impediments to Parliament playing an active

scrutinising role during the negotiations?

David Davis: I do not see that there is much impediment to its scrutinising and holding accountable. It comes to the distinction as to whether Parliament—or Members or groups in Parliament—try to micromanage it. That will be impossible. It just will not work. By comparison, it would not have worked when we were negotiating one of the relatively simple treaties, on which Lord Jay, I and others were involved, so it certainly will not work with this. On accountability, the thing is simple. It is about timing and confidentiality. I do not think that will be a problem.

The Chairman: We will close this area of process and come to some more specific questions. My final point on it is that perhaps you will need to bear in mind the question of ex ante and ex post. We had lively exchanges with David Lidington, when he was Minister for Europe, and persuaded him—in very different circumstances, I concede—to do some pre-Council sessions with us, which he had previously not done, rather than simply reporting post-Council. Obviously, it interacts with arrangements for Ministers to report to the House and make Statements on a regular basis, and for the usual channels to arrange debates on a regular basis. No doubt that is something that you will be considering. I suppose that it is self-evident to everyone that it may be a little difficult before what happens has happened. If it has happened, we would like to know about it as soon as possible. Is that reasonable?

David Davis: Yes, absolutely.

The Chairman: Fine. On that note, we will pass to the second line of questioning, with Baroness Falkner.

Q16 **Baroness Falkner of Margravine:** Secretary of State, you are familiar with the scrutiny reserve resolution, the latest iteration of which was agreed in March 2010 and which prevents Ministers of the Crown from giving agreement to European institutions in relation to any document that we hold under scrutiny here unless there is an agreement that we provide a waiver. What is your view on having that sort of refreshed, new scrutiny resolution, which we are considering, to deal with this slightly different situation, where it is not necessarily documents—although it could be—but information and conversations that you are having with negotiating partners?

David Davis: I am not sure that it is applicable in this circumstance. At one of your previous hearings—it may have been your last one—at least one of your witnesses called into question whether we could complete what we are trying to do inside two years. I think we can, but the simple truth is that we will have to be nimble, fast and responsive. I worry about anything that ties our shoelaces together in those terms. I am not sure that it is the appropriate mechanism. I would like to see it in writing to give a proper response, but that is my instinct, initially at least, for the reasons we have talked about before—confidentiality and speed of response. I assume that it will be a dynamic negotiation, the nature of which may well change in the course of a couple of years. We will have to be smart in how we respond to it, and I do not want to slow us down.

Baroness Falkner of Margravine: Have you been contemplating this? Has this conversation happened between you, your officials and the House of Commons?

David Davis: No. I read your report and the evidence from your last hearing.

The Chairman: There is also an issue of what one might call the multi-tier nature of the negotiations. One understands that the central element is a discussion at European Council level, but the details will be remitted to the Commission. There will be expert working groups and so forth. It will be a matter of being able to report on what is rather a piece of three-dimensional chess.

David Davis: Exactly. It is not only that. The European Union loves to make linkages. You might want to freeze one of my rooks, which is important to the checkmate over here. It may not be obvious to the Committee what is going on, particularly if I am being good at my job with respect to the negotiation itself. That is part of it. That is why I worry about it. If the Committee writes to us, we will have a look at it, but my instinct at the moment is that it is not really appropriate.

The Chairman: We will give further consideration to that issue. You have put out a reasonable challenge to us.

Q17 **Baroness Kennedy of The Shaws:** Secretary of State, you have spoken about your desire to build national consensus around the position that is developed. I want to know how you think you will do that. I am particularly interested—we all are—in how Parliament will be engaged in that process. Although the victory in the referendum was with Brexit, of course, 48% of those who voted did not vote for it, so winning consensus will be an uphill—

David Davis: The referendum did not exactly build consensus, that is for sure.

Baroness Kennedy of The Shaws: That is right; it did not. It was somewhat divisive. We all have mailbags reflecting that.

David Davis: I agree. That said, and we have to be very wary of believing polls, as we all know, what has been interesting to me is that, although it was a narrow result in one sense, something like 70% of the population want us to get on with it and do it. That means more than half of those who voted remain, if the poll is right. To develop consensus, one of the things we need to do is to address people's worries and legitimate concerns, whether they be about Northern Ireland and the very serious issues there or about elements of the City or industry—the automotive business and so on, with their linkages.

Baroness Kennedy of The Shaws: Or law enforcement.

David Davis: Absolutely. We need actively to engage with each of those round-table groups. That is why I hesitated about using the word "consultation" with Lord Green. It is a bit more than consultation. It is a two-way process, in which I hope that one of the outcomes will be that

many of the movers and shakers in those stakeholder groups will start to think that we are taking it seriously, that we mean it and that we want to do what is possible. First, there is that aspect to it. It has started, by the way. I slightly teased the Labour Party by telling it that my very first meeting was with the TUC general secretary.

Baroness Kennedy of The Shaws: That is a useful thing to do.

David Davis: There was a point to that. I wanted the TUC and the trade union movement to understand that this Tory Minister took their interests seriously.

Baroness Kennedy of The Shaws: One concern that people and the general public may have is that articles have been run recently suggesting that this will be a feast for lobbyists—that professional lobbying outfits will access you and your colleagues and use their best endeavours to pursue their own interests. That always makes the public feel that they are not part of that and that they do not get purchase in the way the corporate world does by using lobbying outfits to get access to you and your ear. Other people's concerns will not be addressed in that way.

David Davis: The least effective approach to me so far has been by a lobbyist—I will not tell you who—because they self-evidently had an axe to grind. We will endeavour to address that, including in regional terms. You will have noticed, for example, that one of the things that the Prime Minister did was to visit the devolved Administrations—the first of them before she had even had a reshuffle. In fact, it was in the middle of the reshuffle. My first visit was to Northern Ireland, followed by southern Ireland.

Of course, they are two-way things. They are about finding out, but they are also about telegraphing that they matter, and they do. That is part of it. After I finish here, I am going to a dinner with a modest-sized gathering of very senior scientists. Why? Because I want to hear what their concerns are and to let them know that we are engaging on them. You will have seen that during the summer the Chancellor made an announcement about guaranteeing and underwriting funding. That is because we could see straightaway that people were fretting—

Baroness Kennedy of The Shaws: Universities are absolutely fretting.

David Davis: Exactly. We have done some things on that already. I saw Universities UK last week, to that end. The department calls it engagement. I hate processy words, but it is a very big programme for me and my Ministers. Ministers in other departments are doing the same. They are all pretty engaged on it. This recurrence to Whitehall is after a gap of 20 years. Frankly, I have been impressed by the extent to which all departments of Whitehall have taken the engagement process very seriously.

The Chairman: There is always an interesting analogy with wartime conditions. When there is a crisis, Whitehall seems to work better, because people are focused.

Can I follow up with one supplementary point to Helena's question? It is on the question of political parties. I do not want you to go off into a lecture about the current political situation, but given that the kind of settlement that will be negotiated is presumably one the country will want to live with for a considerable amount of time—likely to be over the coming and going of future Governments—will you also want to involve, as far as is practically possible, parliamentary colleagues in other parties or across parties, as we are on this Committee?

David Davis: Yes, of course. As I said, I will be speaking to the Cross-Benchers—of no party, I guess—on Wednesday. I will be joining my brilliant Parliamentary Secretary, Lord Bridges. There is a political reality, which is that in both Houses of Parliament there is a remainer majority—although I hate using such words. If we are to make this work, we have to persuade most of them that this is a worthwhile exercise and that the national interest is that they get engaged in it and we do the best job possible. The answer is yes. For me, political party is almost irrelevant in this context.

Lord Green of Hurstpierpoint: Building on Helena's question, Secretary of State, you have created a very good impression among us of the way in which you are positively engaging with various groupings, whether they be the TUC or various sectors of industry.

David Davis: The fishermen, the farmers—whatever.

Lord Green of Hurstpierpoint: I am concerned to be assured that one group you are listening to is foreign investors, particularly in sectors where their investment is important and strategically significant. The automotive industry is the most obvious example; financial services are another, but automotive above all. The Japanese, who do not put their heads above the parapet very often, produced a very detailed 15-page summary of the issues that worry them. Can you assure the Committee that this is a set of views you will listen to very carefully as you go about the process of formulating the negotiating strategy?

David Davis: Yes. To take the Japanese, you are right; they do not often come out into the open on these things. I will certainly be seeing the Japanese ambassador. It will be after the party conference; it will not be immediate. We will also talk to Japanese firms to that end, to see whether the view there is an issue. The automotive industry is clearly important. It is a highly integrated industry across Europe, with, of course, integrated ownership. From my point of view, that has some advantages when negotiating leverage across borders. The answer is yes, absolutely.

This may sound like a weird thing to say, but I am going to try to make the consultation half of the engagement process as scientific as I can. I will go to businessmen and say, for example, "Can you please quantify this for me? It is very difficult to do, but can you quantify the effect of a non-tariff barrier versus a tariff barrier? Which of these matters?" Everybody will say that their issue matters most. I need to get some size and some numbers on it. That is something I am sure you will understand better than most.

Q18 **The Chairman:** Can you say a little more about the role that you see parliamentary Committees collectively—not just this Committee—playing in promoting dialogue with stakeholders? As you know, we will be doing some specialist reports on areas of interest to us and obviously we will share them with you. There is a related, though slightly separate, issue of what is sometimes called parliamentary diplomacy—you travel and meet people who may have a certain perspective. Could we have some kind of clearing-house in your department—not a large one; you have plenty to do—where at least people who have concerns and/or information or perspectives can feed them into the process and somebody will take note of them, on their merits?

David Davis: I had not thought about it in parliamentary terms. That is interesting. As you can imagine, because this is the sexiest area of politics at the moment, everybody writes to us. At the moment, my department is actually quite tiny.

The Chairman: I know that.

David Davis: It has quadrupled in one month, basically. It is eight weeks, but everybody around this table knows what Whitehall and Brussels are like in August. It has quadrupled in a month, in effect. It will probably double in size again, but it will still be very small by the standards of Whitehall. Once we get to that sort of size, we will be looking to outsiders. I have a lot of very bright young civil servants. They do not have that much grey hair yet. I may have to find that outside. We are not that big. Subject to that, we will help where we can. Certainly, if this Committee comes to us, we will help. Within the limits of our capacity, we will help the others, too.

Q19 **Baroness Armstrong of Hill Top:** Everybody today has talked about the public. I come from a bit further north of where you were born. When I talked to folk over the summer, they had very different ideas of what the vote was about and what their expectations are. Politicians are not very well thought of—any of us. This is a really critical issue when it comes to confidence in a vote. How will you ensure that the views people have, which are different in different parts of the country, are fed back in? Are you going to have major exercises run not by politicians but by other people, who can talk with people about what they want? Is there any thought about how you will effectively engage what is a very divided electorate?

David Davis: There has been a lot of thought about how we engage, but not, I think, in the terms that you have described. It is quite interesting. In truth, I am not quite sure how we would do that. I can see how I can engage with trade unions—

Baroness Armstrong of Hill Top: I can talk to you about that.

David Davis: By all means. Write to me or come to see me about it. I spent the early parts of the night of the 23rd—or 24th, as I guess it was by then—watching the north-east change the colour of the country. Indeed, that Monday I had been speaking in the north-east, to a very enthusiastic audience. In that case, yes, come and talk to me about it.

Again, we may have a capacity issue, but as I said in the Commons, to a very large extent, this vote was by the British industrial working class—for various reasons—outside the metropolitan south-east. It is very important to understand exactly what they want out of it. I made some points about, for example, protection of employment law, which I think is quite important. So yes, can we talk?

Baroness Prashar: Secretary of State, you mentioned that, quite rightly, you are taking a scientific approach to this, but it is a very complex, comprehensive exercise and it has a number of objectives—managing expectations. Ultimately, once you have done all the consultation, it is decision-making time and you need to analyse the information before you. In attempting to make it as scientific as you possibly can, do you really have the capacity within your department or elsewhere to weigh up what you have and what you think is the right way forward? People will say different things to you, so weighing up what is the national interest and what is the right chunk of information will be the most difficult part.

David Davis: Yes. The answer is, "Not yet, but we will have". As I said, we are literally creating this from scratch. There were about 45 people in the various bits of the Cabinet Office—the EGIS group and so on—at the beginning. We are building like Topsy. That is partly why I made the point about grey hair. It was not supposed to be an ageist point. It was supposed to be about people understanding individual sectors—the City, for example, where a lot of the public argument has been slightly naive. The City is an ecosystem, not an industry. There is a balancing of what is important there, and what is lethal, if you remove it. Similarly, the automotive industry will be quite difficult to assess, because some of the analyses are almost about chain effects, if that means anything to you. We will get there, but we are not there yet.

The Chairman: You will use outside help, when that is appropriate.

David Davis: Yes, absolutely. My department was attacked this week for spending whatever it was—£30,000—on lawyers. Actually, it turned out to be the salary of our internal lawyers. We had not spent anything outside, but we will.

Baroness Kennedy of The Shaws: Purely inside lawyers.

David Davis: Exactly. That is what we are doing.

The Chairman: We go on to Lord Trees.

Q20 **Lord Trees:** Good afternoon, Secretary of State. You have already spoken about the colossal task of the negotiation ahead that you and colleagues and the Government are facing. One might argue that on the other side—in the EU—it may be even more colossal, because they have to take into account 27 member states. Having said that, of course, we now have devolved Administrations. Particularly in view of the fact that there were some striking differences in the voting patterns in the four parts of the United Kingdom, what mechanisms do you anticipate there being, or will you put in place, to seek and to take into account the concerns of the devolved Administrations? Secondly, if they have real

problems, what mechanisms might you put in place to try to resolve those?

David Davis: At the moment, there is a very intensive official-to-official connection going on. Very shortly, we will put in place—I will notify you as soon as it is done, Chairman, but I cannot do so until then—a liaison at ministerial level, which will be designed to maintain a link and a sight of the issues that affect them.

It will not be restricted to that. We will be looking directly. Let us take Scotland. We will talk directly to the Scotch Whisky Association, Scottish fishermen, Scottish finance personnel and so on. We will do the same for each of the groups. When I was in Northern Ireland last week, one of the groups that I saw was the Secretary of State's new business advisory group. I wanted to get straight to not quite the ground floor; the chamber of commerce was there, small businesses were there, and so on, so we jumped past the official group. That is all under way.

It is true to say that the Prime Minister, who, at the end of the day, runs this process, not me, is extremely seized of that and wants to make it work. We do not want it to be used by anybody as a way of damaging the union.

The Chairman: In earlier inquiries we have done, we have noticed a certain divergence of approach—perhaps understandable—between official-to-official or Government-to-Government talks with the devolved Administrations and dealing with the opinions of the devolved Parliaments, from which there is perhaps a greater degree of distancing. Can we take it that collectively, as it were, the kinds of acknowledgement that you have made of the role of Parliament transfer to the role of the devolved Parliaments, with all their diversity, in handling the issues?

David Davis: Up to a point, yes, but it is up to a point. This is a reserved power, at the end of the day. We have made it very plain that, although we want to deal with the issues that address each of the devolved Administrations or the populations in the nations, our and Parliament's responsibility is paramount. There will be no veto for anybody other than government and Parliament. This is an instruction that we have been given, effectively, and we have to carry it out. We cannot let anybody else veto it.

Baroness Suttie: Have you taken a decision on whether or not to second officials from the Scottish Administration?

David Davis: No, not yet. Because we have not put in place our organisation at ministerial level, it is a bit early to do that.

Baroness Suttie: Is it actively under consideration?

David Davis: I had not thought about it up to this point, but it is now.

The Chairman: From my experience in Europe, it should be, in my view.

David Davis: Yes, I can see that.

The Chairman: The next question is from Baroness Wilcox.

Baroness Wilcox: This is light relief.

David Davis: I thought I had provided that already.

Q21 **Baroness Wilcox:** Secretary of State, it is wonderful to see you here. I have never seen so much energy coming off somebody—certainly not off MPs—as I have seen coming off you in the last hour. It is wonderful to live in exciting times. I would like to know whether or not you have had discussions with the Administrations of the Crown dependencies, as well as, in particular, Gibraltar.

David Davis: Not yet. They are on the list. That one has been thought of.

Baroness Wilcox: They are on the list.

David Davis: Yes. As Lord Jay will know, this has been a difficult point with the Spaniards for a long time. Lord Chairman, you will remember my nicknames in the days of old. I was Monsieur Non and Herr Nyet—all those things—but because there are ladies in the room, I cannot tell you what the Spaniards called me, and it was mostly over Gibraltar. It is a difficult area, but we will be very cognisant of it. They are on the list to see. I was going to say that one of my junior Ministers had been, but he has not yet.

Baroness Wilcox: From what I have seen and gathered thus far, it seems that it will be two years before we really get going, hand in our notice and move on. There are so many people knocking at your door and so many areas that wish to talk to you that you will have to have some other form of letting people talk to one another, if they cannot talk to you. I wonder whether you are already starting to plan such things.

David Davis: That is interesting, because it ties in with what Baroness Armstrong said earlier about engaging. The truth is that we have been focusing on the various groups we call stakeholders, because they tend to have organised opinions. That is because that is easy to marshal, whereas what you are talking about, and what I think Baroness Armstrong was talking about, is not so easy to marshal and to crystallise. The answer is that I have not really thought that through properly. It is something that I will take away from this meeting and consider. You see, you have helped me already.

The Chairman: As you are clearly in listening mode, which is helpful, can I at least entertain the concept, without necessarily thinking that it will work, that in some areas it may be quite sensible to get the interested parties together under some independent mediation or guidance that does not involve Government to Government at all? I have found many times in environmental head-to-heads that you can get a perfectly good accommodation at local level when there is still megaphone diplomacy going on at the centre. I am not asking you necessarily to give a commitment to that, but could you at least consider it?

David Davis: I will think about it.

The Chairman: Thank you. We will go on to some of the nuts and bolts of

the negotiation.

Q22 **Lord Whitty:** Could we go back to Whitehall? You sounded fairly bullish, Secretary of State, about the degree to which the departments were all co-operating and the staffing that you are building up at this early stage in your own department. Some of us have had experience, both as civil servants and as Ministers, of new departments being created in Whitehall. Normally it takes them two or three years to get over it. There have been some slightly worrying media stories about tensions at both the political and the Whitehall end.

David Davis: I have yet to organise the pyjama party at Chevening.

Lord Whitty: No comment.

David Davis: I thought that was what you were referring to.

Lord Whitty: You can have a very nice weekend at Chevening—all three of you.

Your department is supporting the Prime Minister in the negotiations; that is clear. That covers all negotiations. You are covering the withdrawal side and the trade with the EU side, but Liam Fox's department will somehow in parallel be covering relationships with other—

David Davis: Other parts of the world. That is exactly right.

Lord Whitty: That will depend a bit on how we come out of the EU, what our arrangements with the EU are and what arrangements we have within the WTO subsequent to that.

David Davis: Indeed it will.

Lord Whitty: The need for cohesion is important. More widely than that, clearly you have the Cabinet Office, the Treasury and the Foreign Office, which, if rumour is correct, may be slightly peeved at what I think you called the biggest game in town moving away from their purview. Is there a new structure to keep it all together, both for Whitehall and for Ministers?

David Davis: Yes. There is a Cabinet Committee, chaired by the Prime Minister. The three dramatis personae you listed, among a number of other Ministers—all the senior Cabinet Ministers, really—are on that. That is the primary driver.

You are right, in a sense. My department is stepping on absolutely everybody's toes, which is why I am pleasantly surprised that it has been taken very well. The reason is that we have decided not to replicate in my department the immigration policy department from the Home Office or the CAP department from Defra. Frankly, none of the credit for that goes to me; it goes mostly to Olly Robbins, my Permanent Secretary. We have bright people from those departments who do the diplomacy, the co-ordination and all the rest of it. That has minimised the pressure on the foot of my department. That is how it is working.

It is early days, but that co-ordination is working well. The Cabinet Secretary himself is seized of this. He came to see me on my very first day in the job. Everybody in Whitehall recognises that this is an enormous and important project. Without being too oleaginous to the ex-Permanent Secretary here, I happen to think that all our civil servants are very patriotic people and want the right outcome. That is the biggest driver, to be honest.

The Chairman: On that specific, presumably you may want to take advice from those with experience of government—not necessarily as ex-civil servants—who might be able to steer you through some of the pitfalls of the difficult process of trying to do things yourself and in parallel with other departments.

David Davis: Indeed. I have already had Robin Butler in to see me, for example. He is on one of your subsidiary committees, is he not?

Baroness Falkner of Margravine: Yes, Financial Affairs.

David Davis: Lord Jay is coming to see me at some point. We were due to meet last week, but things overwhelmed me. Yes, absolutely.

The Chairman: On that note, Lord Jay might like to ask the question that he had in his mind.

Lord Jay of Ewelme: Thank you, Lord Chairman. Civil servants like a challenge, and they have certainly got one.

David Davis: Absolutely. That is what he said about me when I joined the Foreign Office.

Q23 **Lord Jay of Ewelme:** I had seen you as a Whip before that, so I knew what to expect.

Could I ask you to step for a moment beyond the invocation of Article 50 and into the negotiations themselves? This is not at all about substance. I just wondered how far your thinking had gone about the process and structure of the negotiations themselves, when they start. Who is likely to be involved at ministerial level? Who will be involved at official level? What will be the role of UKRep? Do you envisage there being different baskets of negotiations—I think you mentioned baskets of negotiations earlier—for different subjects? What kind of negotiation, with whom, should we be expecting?

David Davis: UKRep will be fundamental, as it has to be in this. Essentially, we have taken temporary responsibility for UKRep, the old EUD and so on. In fact, my Minister of State, David Jones, is doing the General Affairs Council, in order to keep that link together. I expect that, just as always happens with standard negotiations in the European Union, the departments will pick up their piece of it, via their UKRep representation. That is the expectation there. At ministerial level, I expect much the same, but it is really down to the Prime Minister. We have not really had time to talk that through in any detail. Nobody will go to Brussels until she has been to the European Council in October. From then on, we think that the cascade will start.

As regards the approach, I noticed that in your previous hearing—indeed, in your previous report—you thought that the legalities allowed us to run in parallel the termination agreement and the post-termination agreement. I rather agree with that. It looks sensible to me. By the way, my German is not good enough to tell the difference between the German version of Article 50 and the English version, but the English version is good enough for us on that.

That is really the structure. We have not thought a great deal beyond that. To be frank, some of the structure of negotiations is driven by the power of your aims—which ones are most predominant and which are your best negotiating cards. Why am I telling you this? You know full well that that will determine the structure.

Lord Jay of Ewelme: Do you have a sense of whether the EU—the other side—is working out now what sorts of structures it will have and what the roles of Barnier and Tusk will be, or is it all a bit murky?

David Davis: "Murky" is perhaps a cruel word. It seems not wholly decided; let us put it that way. It looks to me that there is a tug of war going on. To be honest, as I said earlier, I do not think the personalities will matter quite as much as the newspapers would have us believe. At the end of the day, the Commission will have to be the servant of the Council when they go towards the end game. The Council has to lay down the negotiating remit anyway. I do not think that they are there either. That is why—I have seen it written up, and I think it is right—it is almost as valuable to the EU as it is to us to take a little time before we trigger Article 50.

Q24 **Lord Teverson:** We have talked mainly about things that we want to achieve and do. One of the key areas of any activity, whether it is business or government, is contingency planning. One of the things that is absolutely clear about Article 50 is that two years after the P45 is sent to Europe we have no guarantee that there will be membership. I want to concentrate on the legislative side and the legislative vacuum. My own Committee deals largely with environment, which is an area where there is a huge amount of European legislation. Is your department also looking after all those contingency areas, particularly of legislative vacuum, when the break takes place, which could be two years after we have given notice?

David Davis: I mentioned before the legislative programme that will have to be created. Again, it is still work in progress. We have to think through the best way not to leave a hole. In my tiny department, there is one section—the one that cost the legal fees—that is thinking about exactly that. There are various difficulties with it; whether we end up with a Bill with huge Henry VIII components to it, which we are obviously trying to avoid, or the issue of whether the Bill—or Bills—has to match what happens in the negotiations and so on. We talked about war-gaming earlier. We are mentally war-gaming that exercise at the moment. Again, that is somewhere we have to be at by the end.

Frankly, the shape of the deal that we are doing has an impact as well. We have just seen the Canadian treaty land in the mixed procedure, with all

that goes with that. We have to work that out, too. It is not obvious. It is one of those bits of European law that are as much about politics as they are about law.

Lord Teverson: Extending that, are there any other areas of major contingency we need to be aware of, apart from the legislative vacuum, or is that the main one?

David Davis: That is probably the biggest known unknown; put it that way. Do not get me wrong. It is not by any means an unmanageable one. It is a choice of different slightly awkward options. That is all.

The Chairman: At this point, I remind colleagues that, of course, we continue as members of the EU until we leave, and the EU is making proposals and legislating on things in real time, as we speak. The essential part of this, and the locus between our Committee and traditionally, the Foreign and Commonwealth Office, was in relation to the co-ordination of the scrutiny process—submission of explanatory memoranda and the relevant documents. Generally, that has worked pretty smoothly latterly.

I understand that responsibility for co-ordinating the scrutiny process has now moved to your department. Indeed, my next job will be to go back and do my weekly sift, on the basis of the documents and EMs referred to. Can you confirm and honour the commitment made by David Lidington, when he was Minister for Europe, that Her Majesty's Government will continue to observe their current scrutiny obligations to Parliament, and in full, until such time as the UK leaves the EU?

David Davis: Yes. I am not familiar with the undertaking. If David gave you the undertaking, I will uphold it.

The Chairman: Thank you. That is quite sufficient. In return, we would be more than happy to bring our expertise to bear to encourage and advise officials who may be less familiar with the process. I think that something is going on at official level. I am happy to come and talk to officials. Again, it should not be a zero-sum game. There should be an element of mutuality in the process, if it works well.

Q25 **Earl of Kinnoull:** Secretary of State, over the last 20 minutes or so, we have touched a couple of times on the level of resource that you have in your department. Of course, during the summer break, there were quite a lot of articles that were highly critical of the level of resource and whether it was available. The first element of what I want to ask is for you to comment on that.

The second thing, which you have touched on already, is that you are busy building a department and I wondered to what extent you felt confident that you had done a skills audit, so that you knew what you were trying to build, and whether you could give an assessment of how far along the building process you had got. Finally, I wondered whether you would venture a guess as to roughly when your department might be practically complete.

David Davis: To be honest, I did not read many of the newspapers, beyond the headlines, so I do not have much idea of what they said. This is an ab initio department, to all intents and purposes, apart from a tiny core.

You asked whether I had done a skills audit. No, it is not quite like that. That is what I might have done in my old days, when I was running a big business, with a block I was looking at. This is more about finding the people to match to individual tasks. We are probably about halfway there. We have had a formidably fast start. Some of the second phase may be a little more difficult. The first phase was creating a structure and getting lots of very bright people, but the next bit may be very specific. That being said, we have had overtures from a number of organisations—I am not talking about PR; I am talking about law firms and so on—which have said that they are willing to second people to us and so on. That may well accelerate it, but I do not know yet.

Earl of Kinnoull: I have a tiny additional question. If it is not called skills, is there any area where you think, "Gosh, actually there is a bit of a shortage of people who understand that particular thing. I am going to find it very difficult to fill those posts"?

David Davis: Not really, so far, because most of what we have been doing so far has leant heavily on the other departments. When we come to the stage that I mentioned to Lord Green—doing the quantification, the analysis and so on—it may be a bit more difficult, unless I rest heavily on the Treasury. That is a step along. So far, I do not think so. I am not aware of it, certainly.

The Chairman: In general terms, your relations with the Treasury on resources matters—although, I am sure, professionally correct—are reasonably constructive.

David Davis: Oh yes.

The Chairman: Fine. That is helpful. Secretary of State, we are going to round this off with something that switches hats from the general to the particular. It is the bit of the inquiries that my Committee and Sub-Committee complex are conducting that this Committee, as the central Committee, has taken aboard, because it involves substantial constitutional issues. It is the question of the future of the island of Ireland and the relationships both with the UK and cross-border. If we may, we will conclude with one or two questions on that. I think that your early visit to that island was appreciated. We shall be going there shortly and reporting separately on it before too long. I ask Baroness Browning to lead on this.

Q26 **Baroness Browning:** Secretary of State, you have already said that you have visited both Belfast and Dublin. How much are you able to share with this Committee today about the nature of the discussions that you had? I know that you have flagged up that the border issue is one of the more difficult ones. The Committee has already received written submissions on that—in particular, one from Professor Derrick Wyatt, in

which he says, "It is possible that the present 'soft border' arrangements will be undermined by Brexit". Would you like to say a few words about how you are going to make sure that that does not happen and that any disturbance to the relationships is absolutely minimised?

David Davis: Let us deal with Northern Ireland first, but it overlaps with the Dublin visit as well. There are two or three issues. There is nervousness about the peace process because of the prior involvement of the EU in it. It was not a particularly well-specified nervousness; it was just a nervousness. It was not specified down to a particular thing. There is the border, and there is the common travel area. There were other technical problems—for example, things like the Irish energy market—but they are at a more detailed level than I think we are talking about today.

Both the Northern Ireland Executive and the Irish Government are of a single mind that they want to see the open border maintained. Nobody wants to go back to the hard border at all. In a way, that is the biggest symbolic thing relating to the peace process. The optics would be poor, and it would not feed the feeling of viability of Northern Ireland. From that point of view, both sides are the same. So are we—the UK as a whole. We want to see maintenance of the common travel area. We see absolutely no reason why not. It has been around since 1923, it is not EU dependent, and the interlinking of British and Irish societies is extensive. I probably have my numbers wrong, but I think that there are something like 600,000 Irish passport holders in the UK. When I was at the British Irish Chamber of Commerce—a very jolly occasion—they told me that there were 60,000 Irish company directors in the UK. I thanked them for the loan. The interlinking is incredibly important.

I do not see that the common travel area should be under threat. I may have missed something, but I do not see why we cannot maintain it. I think that both the issue of the common travel area and immigration control and the issue of goods across the border are resolvable, by a variety of technical and technological means. With an open border, there will always be a bit of frictional loss; let me put it that way.

The Chairman: There always has been.

David Davis: Exactly—you have beaten me to the punch. There is a fair amount of low-level alcohol traffic across the Norway-Sweden border, for example, and so on. Heaven forfend that that should happen in Northern Ireland, but I suspect that we may have to put up with a loss of revenue somewhere. I do not see any of those problems as incapable of resolution. Of course, it is very important to Ireland that it maintains as much of a trading link with us as it can. It is one of our biggest export markets, and we are its biggest export market, I think. We can deal with all those issues.

We will have differences. I had the most pleasant reception I have ever had on a foreign trip in Dublin last week, and I have had some pretty pleasant receptions over the years. It was very good. There was a difference of view on borders, as you might expect. It related not to their border but to what they thought about the free movement of people policy. I have rambled a bit, but that is basically it. They were two very

good visits. We are of one mind as to how we want to resolve the problems. There will be quite a lot of official-level technological and other exchange between the Northern Ireland Office and the Irish Government, and maybe the Home Office and the Irish Government as well.

Baroness Browning: Do you read anything into the reluctance on the part of Northern Ireland to form a committee with the Republic?

David Davis: Not really. I am not sufficiently skilled in the finesse of such things to comment on that. When dealing with all the devolved Administrations, I do not always understand all the sensitivities, so I am very careful about how I handle them. "Know your ignorance" is a good motif.

The Chairman: It is usually the beginning of wisdom on these issues.

On the machinery, can we have your assurance that the right kinds of structures are in place—maybe yet to be evolved—with the Irish Government, the Northern Ireland Executive and HMG on these issues, in the context of the negotiations? We have talked rather about the cultural aspects, but there will be an immediate job to be done in seeing how those are carried through in the negotiations, bearing in mind—just for the record, I think the ambassador acknowledged it last week—that the Irish Government will have a seat on the other side of the negotiations as well.

David Davis: Of course. When I went to Dublin, I met Charles Flanagan, the Minister for Foreign Affairs, and the Justice Minister and Deputy Prime Minister—I cannot pronounce the Irish term—and the Taoiseach, as well as the Europe Minister. I met them all variously—the Taoiseach over dinner, at great length, and the others beforehand. I left in one of those circumstances where I felt that, if I wanted to right now, I could pick up the phone to Charlie Flanagan.

On the machinery, I am not sure of the answer quite yet. If we need more formal machinery, I am sure that we will be able to create it.

The Chairman: Do colleagues—either Baroness Brown, who expressed an interest earlier, or Baroness Wilcox—want to come back on this?

Baroness Browning: Could I ask one final question? It relates to a comment in Professor Wyatt's paper to us. In your discussions—I realise that they are very early and preliminary—was there any hint on the part of the people you spoke to in Dublin of any pressure or consideration for Ireland ever to join Schengen?

David Davis: No, it was not raised at that stage. I am just casting my mind back, because I can remember pretty much the whole conversation, despite the fact that it was in Dublin. No, it did not come up, but it is the sort of thing that we will discuss. In the event that we seek some sort of light-touch immigration policy—as we will—we will have to talk that through, but at this stage it was not raised with me.

Lord Teverson: I have a very short point. Yes, there has been an open border for ever—there were some difficulties over the Troubles—but both

countries have been in EFTA or in the European Union. This is the first time that we are not. If we are not in the same customs union, are we saying that we will solve the border issue through technology? It is a genuine question. Is that what the Government are saying? In every other aspect, one would say that there just has to be a border there.

David Davis: First, as I relayed to you earlier, the common travel area predates all of that; it goes back to the 1920s. It is incredibly important in this joint approach. We have been in the same customs unions, but, before those, we were not in the same customs union. You need to look at the border. It is a very complicated, wrinkly-shaped border. You can drive in and out three or four times without realising it, I suspect.

Lord Teverson: I have.

David Davis: There we are. We are determined to solve it. I do not have a technical solution today, but the intimations I have had are that it is soluble. It is certainly a very high priority.

The Chairman: I have a final question, Secretary of State. You referred to the large number of Irish nationals living and working in the United Kingdom, remembering, in particular, the position in Northern Ireland, where people may have dual passports and so forth, although that is a separate issue. Do you envisage that there will continue to be a special status for Irish nationals in the UK? Do you think that you can secure that?

David Davis: Yes. The CTA is a central part of that. It is exactly that. On a lighter note, I should tell the Committee that, at some point in the diplomatic exchanges, I was telling the Foreign Minister about some of my Irish lineage. He immediately assumed that I was applying for an Irish passport.

The Chairman: We will leave it at that point. I have already ruled that possession of an Irish granny is not required to be a declarable interest in relation to our inquiry, but we know that it is an important part of it. I am grateful for your sensitivity.

Across the piece, it would be fair to say that, in Whitehall-speak, your job is challenging. You have shown welcome signs of zeal—it has been commented on by my colleagues—ebullience and readiness to meet the challenges. We will, as ever, want to look at the small print. For greater accuracy, we will, of course, send you a transcript, so we can look at that. It would be very churlish not to end with a note of appreciation for your readiness to attend and to answer questions, with a degree of panache, for nearly two hours. In conclusion and in thanking you, perhaps I can summarise by saying, in the words of "Casablanca", that this may be the beginning of a beautiful friendship. Thank you very much.

David Davis: Thank you, my Lord.

Lord Kerr of Kinlochard GCMG, Ms Jill Barrett, Senior Research Fellow in Public International Law, British Institute of International and Comparative Law and Professor Derrick Wyatt QC, Emeritus Professor of Law, Oxford University, Brick Court Chambers – Oral evidence (QQ 1-11)

Transcript can be found under Ms Jill Barrett, Senior Research Fellow in Public International Law, British Institute of International and Comparative Law

Professor Derrick Wyatt QC— Written evidence (BRU0001)

EVIDENCE FOR HOUSE OF LORDS EU SELECT COMMITTEE ON ENHANCED PARLIAMENTARY SCRUTINY OF UK NEGOTIATIONS WITH THE EU

INTRODUCTION

1. The United Kingdom (UK) has not negotiated an international trade agreement in its own right for several decades. That is because the European Union (EU) has the legal authority to negotiate international trade agreements which bind both the EU and all its Member States.

2. In the forthcoming UK negotiations with the EU (and with other potential trading partners), transparency and accountability in respect of the UK side of the negotiations will depend on such guarantees as are afforded by the UK Constitution, rather than those of the EU legal order. There is no compelling reason for UK Parliamentary scrutiny of the UK side of the negotiations to be less rigorous than European Parliamentary scrutiny of the EU side of the process.

3. There has been an increase in the transparency of the EU treaty making process in recent years. This has partly been a response to public opinion, and partly a response to the increased power of the European Parliament (EP) over EU treaty-making since the coming into force of the Lisbon Treaty. This increase in transparency has included publication of negotiating mandates, and liaison between the Commission and the EP. The EP has made its voice heard, by, for example, adopting recommendations on the ongoing TTIP negotiations, and communicating them to the Commission, and indeed, to the US Administration and Congress. There has also been consultation by the Commission with businesses, with representatives of civil society, and with the public generally. This consultation has not always been regarded as being particularly transparent, and has been criticised for being excessively focussed on businesses. This criticism has in turn led to more transparency about the processes which the Commission adopts for its consultations.

4. The forthcoming UK negotiations with the EU (and with other potential trading partners) should meet high standards of accountability to the UK Parliament, of transparency, and of public involvement. This will mean constitutional change for the UK, rather than simply picking up the threads. But the case for change is strong.

Parliament plays a limited role in scrutinising treaty negotiations. Should this change for the negotiations on withdrawing from the EU and on a new relationship with the EU? If so, why?

5. In my view there should be a new and enhanced form of parliamentary scrutiny of the negotiations on withdrawing from the EU and

on a new relationship with the EU. I said in previous evidence to this Committee that I thought that a political argument could be made "for a high degree of Parliamentary involvement in the withdrawal process. The process and the direction of future UK relations with the EU would be of great practical and political importance to the people of the UK." The Committee referred to my comment in its Report on the Process of Withdrawing from the European Union.[58] Reflecting upon this comment I would add that the argument is as much a constitutional argument as a political argument. The scrutiny by Parliament of the Executive is a constitutional matter. An argument for enhanced parliamentary scrutiny, based on the need to strike the right balance between the function and powers of Parliament, and those of the Executive, is a constitutional argument.

6. I would argue that the role of Parliament in scrutinising treaty negotiations in general should be changed, because the UK is a Parliamentary democracy, and present arrangements fail to ensure a level of transparency and accountability in negotiating the content of treaties which is commensurate with the importance which treaties may have for the economic and political interests of the UK population, and for the exercise of powers by the various tiers of government which represent that population, not least the devolved administrations.

7. Under the current statutorily enhanced version of the "Ponsonby" principle, parliamentary scrutiny of the content of a treaty is postponed to a stage when all that each House of Parliament can do is to accept or reject the package of provisions contained in a treaty which HMG has negotiated. There is no opportunity for Parliament to review and seek to influence the process by which the treaty is negotiated (including the consultation of interested parties), nor to review and seek to influence the evolution of the text of the treaty, no matter how important the content of the treaty for the future political or economic well being of the UK and its citizens.

8. The case for enhanced parliamentary scrutiny of the Brexit treaties is thus that the level of scrutiny currently required by UK law and practice will not provide a standard of scrutiny, transparency and accountability which is commensurate with the importance of the treaties in question for individual rights, for the economic and political interests of the population at large, and for the governmental interests of the devolved administrations and other public authorities (including Gibraltar and the Channel Islands). I respectfully agree in full with the reasoning of this Committee in its 1st Report of Session 2016-2017, entitled Scrutinising Brexit: the role of Parliament, in paragraphs 3 to 9.

9. I would add the following in support of the proposition. First, as regards the withdrawal agreement. It will no doubt address a range of issues, and I single out but one, highly important issue. That issue is the extent to which rights of residence (and related rights) of some millions of nationals of EU countries living in the UK will be recognised. The withdrawal agreement will also determine the rights of residence, and related rights, of more than one million UK citizens living in other EU countries. For such rights to be

[58] Paragraph 66.

determined in negotiations to be presented to the UK Parliament as a done deal, on a "take it or leave it" basis, would not be open government, and it would not be accountable government.

10. The future relations agreement will differ in important respects from the EU Treaties. The referendum result requires as much. Yet the extent to which the terms of the future relations agreement are compliant with the referendum result may turn out to be a matter of political dispute.

11. Quite apart from the question of respect for the referendum outcome, negotiating the future relations treaty will raise large questions of policy, some of them overtly political, some of them not. Some questions will turn on technical and factual questions concerning the needs of various economic sectors, and whether and how those needs might be met by trade access rights the same as or different from those currently enjoyed in trade with European partners under the EU treaties.

12. It will be impossible to dissociate trade policy questions connected with the trade access rights to be sought in a free trade agreement with the EU from questions of domestic policy. Deciding the former might foreclose elements of the latter. For example, some aspects of the single market have at times proved politically problematic in the UK. Whether the UK would seek to replicate these aspects in a future relations agreement would be a matter of public interest and debate.

13. One example is access to bidding for public contracts. As guaranteed under EU rules, this has sometimes been regarded as giving more opportunity in practice to bidders from other Member States to bid for UK public contracts than vice versa. It might be argued that the future relations agreement with the EU should make at least some appropriate reservations in this regard.

14. Another example is a hypothetical commitment in a future relations agreement to a regime similar to the EU state aids regime. This kind of regime can prove awkwardly inhibiting in some cases, for example, if the UK Government is minded to provide state funding to facilitate a take-over of a failing company by a successor. It might be said that the UK Government should avoid such stringent commitments in a future trade agreement with the EU.

15. Another example was raised recently by the Prime Minister. She referred to the power of the Government to block unwelcome foreign take-over bids. This is not possible vis-à-vis EU companies within the EU framework. But that option could be reserved in a future agreement.

16. In cases such as those just mentioned, choices made via the negotiating process could have long term effects for the management of the UK economy. It is difficult to accept that Parliament and public should have to await the conclusion of negotiations on the text of a future trading agreement before having their say in some formal and structured way about the contents of the agreement.

17. Scrutiny of the negotiation of the Brexit agreements should extend to scrutiny of Government action in the WTO in the Brexit context. The negotiation of the future trading agreement might not have been concluded by the time that the UK leaves the EU. The UK might find itself driven to deciding that the WTO must become the framework for UK trade with both the EU, and with countries outside the EU. Decisions on the rates of tariffs which the UK would apply vis-à-vis all trading partners including the EU under MFN rules would raise complex issues. Potential tariff rates might have important implications for UK businesses and UK domestic policy, as regards, for example, the agricultural or automotive sectors. Potential tariff rates might be different if they were to be applied to the EU than they would be if trade with the EU were to be subject to a comprehensive free trade agreement, and the WTO regime were to have no application to that trade. If tariffs were to be applied to the EU then some tariff rates might be designed as much to put pressure on the EU to conclude a trade agreement as to achieve the right balance in trade with the rest of the world, or to achieve domestic policy goals. Whatever the other considerations, tariffs would always have implications for consumers. All in all, large policy issues of both a political and technical nature would be involved in UK Government planning re its WTO engagement and I would argue that this engagement should be as much subject to Parliamentary scrutiny as the negotiation of the Brexit agreements.

18. No doubt businesses will have views on all the foregoing matters. The same will be true of trade unions, NGOs, and civil society generally. How will the Government consult with all these interested parties? The substantive issues to which I have referred, as well as questions concerning the appropriate mechanisms for consulting interested parties, should be matters for consideration by Parliament as well as by the Government, but our current constitutional arrangements do not acknowledge this. The truth is that our current arrangements need to be significantly adapted to meet the challenge posed by the negotiation of the Brexit treaties. That adaptation should in my view take the form of the enhanced parliamentary scrutiny to which this Committee has referred in its Reports of 4 May and 22 July 2016.

19. There is a further consideration. I suggested to the Committee in my previous evidence that cross party consensus should be sought in negotiating the Brexit treaties. That is of course easier said than done. But if a cross party consensus is lacking there is a risk that the UK's negotiating position could be undermined even before the treaties are concluded, and/or that the viability of the Brexit treaties could be called in question when there is a change of government. In 1973 the UK joined the Common Market on terms which lacked cross party consensus. Within two years there was "renegotiation" and a referendum on membership. Whatever the difficulties, cross-party consensus is the ideal and should be sought. It is more likely to be achieved in the context of comprehensive parliamentary scrutiny of the negotiating process, than in a possibly heated "take it or leave it" debate on the final text. Parliamentary scrutiny of the Brexit agreements would provide a framework likely to help rather than hinder cross-party cooperation and consensus.

20. I would add that much of what I have said about the need for enhanced parliamentary scrutiny of the negotiation of the future relations treaty would also apply to the negotiation of trade agreements with third countries. EU negotiations with the US about a future trade agreement have provoked enormous public interest across Europe, and no small amount of controversy. The reason for this interest and debate has been in part the impact of the agreement on existing and EU internal policies. Modern trade agreements do tend to have effects on the existing and future internal policies of the trading partners. That is because non-tariff barriers in the form of differences between regulatory requirements, and mechanisms to achieve their convergence, figure increasingly largely in trade agreements. Free trade agreements also contain guarantees for foreign investors, and these guarantees in turn limit the discretion of national governments in their formulation and implementation of industrial policy. I refer again to the example of possible government vetoes on unwelcome foreign take-overs. All these characteristics of modern trade agreements argue in my view for parliamentary oversight of the negotiation of all UK trade agreements, though I accept, and would indeed maintain, that the case is particularly strong as regards the Brexit agreements.

21. The expertise needed for a parliamentary committee to oversee the negotiation and conclusion of the Brexit agreements would be transferable to overseeing the negotiation and conclusion of other international trade agreements. Preliminary negotiations of these other trade agreements will take place in parallel with the negotiation of the Brexit agreements, and will include steps to secure the continuation of UK trading relations with the fifty or so markets with which the UK trades via agreements made by the EU for its members. It would not be difficult to envisage a parliamentary committee charged with oversight of negotiation of the Brexit agreements evolving into an international trade committee.

Are there any precedents of effective Parliamentary engagement in treaty negotiations?

22. I am going to address this question by considering the role of the EP in ensuring transparency and accountability on the part of the EU when it negotiates trade agreements with third countries. I note that it is this level of transparency and accountability which currently applies to protect the interests of the UK public when trade agreements are negotiated for the whole of the EU, including the UK. But quite apart from that, the role of the EP in EU trade negotiations gives at least some indication of what sort of role is feasible for a parliamentary body vis-à-vis the executive authorities responsible for negotiating trade agreements.

23. In order to place in context the role of the EP in ensuring transparency and accountability in the negotiation of trade agreements by the EU, it is appropriate to refer at least briefly to the transparency and accountability of the EU negotiating process in general.

24. The following summary provided by the European Commission provides an outline of the EU negotiating process:[59]

When it comes to trade talks, it is the European Commission that negotiates on behalf of the EU and its 28 member countries. …

The EU Trade Commissioner represents the EU side. Alongside the Commissioner are teams of negotiators and specialists from various Commission departments – for example agriculture, public health, and small and medium-size firms. The Commission Team negotiates using guidelines it gets from the governments of the EU's 28 member countries who meet together in the Council. The Commission consults the Council and reports to the EP throughout the negotiating process.

The Commission also consults widely with representatives of civil society. These include:

- *non-governmental organisations*
- *business organisations*
- *health groups*
- *environmental groups*
- *animal welfare groups*
- *faith-based groups*
- *consumer groups*
- *trade unions*
- *trade associations*

25. I would add the following gloss on the above outline. The European Council/Council will address guidelines/negotiating mandates to the Commission for the negotiation of the Brexit agreements (the withdrawal agreement and the future trading relations agreement). The Commission will make recommendations as to these mandates, but the Council is not bound by the recommendations and can adopt mandates in the terms which it chooses, and appoint a chief negotiator of its choice.

26. The Council may modify negotiating directives and monitor the negotiations via a committee meeting regularly with the Commission negotiating team.

27. The negotiating mandates are likely to be confidential, at least initially, though the Council has published negotiating mandates while negotiations are still on foot in the case of the TTIP agreement and the TiSA (Trade in Services Agreement). I note below that the declassification and publication of the TTIP mandate came after that mandate had been leaked into the public domain.

28. The general account above refers to the Commission consulting widely with civil society, and that merits some further explanation. I refer by way of example to consultation in respect of the TTIP negotiations. The

[59] *Who sits at the negotiating table?* http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/questions-and-answers/index_en.htm Accessed 3 August 2016.

Commission set up an Advisory Group consisting of representatives of civil society in January 2014.[60] The "representatives" were experts representing a broad range of interests, from environmental, health, consumer and workers' interests to different business sectors. The aim was to provide EU trade negotiators with high quality advice. The Commission engaged an independent consultant to carry out a sustainability impact assessment (SIA) on TTIP for the EU. The consultant published a draft interim report for public consultation in May 2016.[61] For the draft version of the report, stakeholders were consulted, including NGOs, trade unions, environmental groups and smaller businesses. Commissioner Malmström said:

Now… everyone will have an equal opportunity to scrutinise the study and comment on it – all of which will build into a final report which [the independent consultant] will publish towards the end of [2016].

The Commission arranged a Civil Society Dialogue about the draft interim sustainability impact assessment at the end of May 2016 in Brussels.

29. The general account above states that the Commission consults the Council and reports to the EP throughout the negotiating process. To provide a little more detail I set out below extracts from a speech of the President of the EP delivered in April 2015 on the role of the EP in the negotiation of trade agreements.[62] The following points about the EP's role are worthy of remark - the EP must be kept informed in the course of negotiations, draft negotiating texts can be consulted by members of the EP under conditions of confidentiality, the EP can make recommendations to negotiators, and such recommendations may even precede the issue of a negotiating mandate by the Council to the Commission. Here are the extracts from the speech:

Since the Treaty of Lisbon is in force, the Council must ask the EP's consent to conclude an EU agreement, once the Commission has negotiated a draft text. This means strictly speaking that the draft agreement which has been negotiated will be brought to the Parliament for a simple "yes-or-no" vote at the end of the process. But to avoid a "no" vote, the Council and the Commission are well-advised to find out in advance what the wishes and sensitivities of the EP are.

*That is why our Treaties also provide that the EP must be "immediately and fully **informed** at all stages of the procedure" (Art 218 TFEU). This means in practice:*

- Firstly that the European Commission comes regularly to the relevant parliamentary committee to update its Members on the state of play of

[60] http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152102.pdf
[61] See Speech by Commissioner Cecilia Malmström of 13 May 2016 http://ec.europa.eu/commission/2014-2019/malmstrom/blog/today-trade-council-and-draft-report-ttip_en
[62] http://www.europarl.europa.eu/the-president/en/press/press_release_speeches/speeches/speeches-2015/speeches-2015-april/html/the-role-of-parliaments-in-negotiations-on-international-treaties;jsessionid=7591209BC7C1BF776E587AADC618C49F
Accessed 5th August 2016.

negotiations, and
- Secondly that draft negotiating texts can be consulted by Members of Parliament under condition of confidentiality.

…….

*For negotiations on EU trade agreements, it is now standard practice that the Commission shares information with the Committee on International Trade on a regular basis. For very complex negotiations like those on **TTIP** (the Transatlantic Trade and Investment Partnership), written information is even accessible - under certain conditions - to all Members of the EP.*

*Here I want to commend the **transparency** shown by the current Commission, for instance in obtaining the declassification by the Council of negotiating mandates and directives for TTIP and TiSA (the Trade in Services Agreement), and in publishing textual proposals.*

Given the intense, sometimes passionate, public debate, this helps people to judge for themselves based on facts what is going on.

*Apart from being informed, the EP has also developed the possibility of making **recommendations** to the negotiators. For important and complex negotiations, this can even be done several times. For the TTIP negotiations, the EP first gave recommendations at the beginning of the process, before the Commission even received its negotiating mandate.*

And, now that negotiations are well underway since yesterday in New York for a ninth round, the EP is about to come with further recommendations in June.

30. The "further recommendations in June" referred to in the last paragraph of the above extract, in fact came in July, and are referred to below.

31. The 2010 Framework Agreement on relations between the EP and the European Commission contains provisions on liaison between the Commission and Parliament in respect of the negotiation of international agreements, which in relevant part read as follows:[63]

23. Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives….

The Commission shall apply the arrangements set out in Annex III.

[63] In a statement of 21/10/2010 the Council objected that as regards international agreements the Commission had conceded more rights to the EP than the Commission was entitled to give, or the EP to receive, see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/117238.pdf

24. The information referred to in point 23 shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account. This information shall, as a general rule, be provided to Parliament through the responsible parliamentary committee and, where appropriate, at a plenary sitting. In duly justified cases, it shall be provided to more than one parliamentary committee.

Parliament and the Commission undertake to establish appropriate procedures and safeguards for the forwarding of confidential information from the Commission to Parliament, in accordance with the provisions of Annex II

ANNEX III

Negotiation and conclusion of international agreements

This Annex lays down detailed arrangements for the provision of information to Parliament concerning the negotiation and conclusion of international agreements as referred to in points 23, 24 and 25 of the Framework Agreement.

1. The Commission shall inform Parliament about its intention to propose the start of negotiations at the same time as it informs the Council.

2. In line with the provisions of point 24 of the Framework Agreement, when the Commission proposes draft negotiating directives with a view to their adoption by the Council, it shall at the same time present them to Parliament.

3. The Commission shall take due account of Parliament's comments throughout the negotiations.

4. In line with the provisions of point 23 of the Framework Agreement, the Commission shall keep Parliament regularly and promptly informed about the conduct of negotiations until the agreement is initialled, and explain whether and how Parliament's comments were incorporated in the texts under negotiation and if not why.

5. In the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled. The Commission shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account.

32. The EP fulfils its responsibilities with the assistance of its International Trade Committee, which prepares drafts for consideration by the EP as a whole. The EP, for example, on the basis of a text prepared by the International Trade Committee, submitted recommendations to the Commission on its negotiations with the US on the TTIP agreement, in a Resolution of 8 July 2015.[64] It will be noted that these recommendations were made in the light of the negotiating mandate of the Council, which had been published on 9 October 2014, and in the light, inter alia, of "the EU's textual proposals tabled for discussion with the US in the TTIP negotiating rounds, in particular those which have been declassified and made public by the Commission.." I note in passing that the documents to which the Parliament referred in this last preambulatory reference included but were not confined to those EU negotiating texts tabled for discussion with the US which had been declassified. The fact that the Resolution was able to take account of the Council's negotiating mandate (declassified), and EU negotiating texts, both declassified and confidential, bears upon the question of confidentiality in the context of international trade negotiations, and I shall return to that point below.

33. This resolution of the EP was sent to the Commission, and (for information) to the Council, and the governments and Parliaments of the Member States, as well as to the US Administration and Congress.

34. I would make the general point about the Resolution that it is recommendatory and non-combative in tone, while making fairly specific and in some cases firm recommendations about issues which should be covered in the agreement, about what might be described as "no-go areas", and about safeguards which should be included. The text of the actual recommendations (as opposed to preambulatory matters) runs to a dozen pages of text, and I shall not attempt to summarise it, but I think one or two points from it are worth citing, to give some indication of the degree to which the EP becomes involved in the ongoing process of negotiations, and of the tone and spirit in which its interventions are framed. The last of the citations below shows the EP's response to political opposition in Europe to the role of binding arbitration under the auspices of the International Centre for the Settlement of Investment Disputes. The extracts of recommendations I wish to draw to the attention of the reader are as follows:

…to emphasise that while the TTIP negotiations consist of negotiations on three main areas – ambitiously improving reciprocal market access (for goods, services, investment and public procurement at all levels of government), reducing NTBs and enhancing the compatibility of regulatory regimes, and developing common rules to address shared global trade challenges and opportunities – all these areas are equally important and need to be included in a comprehensive package;

…….

[64] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0252

to combine market access negotiations on financial services with convergence in financial regulation at the highest level, in order to support the introduction and compatibility of necessary regulation in order to reinforce financial stability, to ensure adequate protection for consumers of financial goods and services and support ongoing cooperation efforts in other international forums, such as the Basel Committee on Banking Supervision and the Financial Stability Board; to ensure that these cooperation efforts do not limit the EU and member states regulatory and supervisory sovereignty, including their ability to ban certain financial products and activities;

……..

to base negotiations on SPS and TBT measures on the key principles of the multilateral SPS and TBT agreements and to protect European SPS standards and procedures; to aim in the first place at the elimination or significant reduction of excessively burdensome SPS measures including related import procedures; in particular to ensure that pre-approvals, obligatory protocols or pre-clearance inspections are not applied as a permanent import measure; to achieve increased transparency and openness, mutual recognition of equivalent standards, exchanges of best practices, strengthening of dialogue between regulators and stakeholders and strengthening of cooperation in international standards-setting bodies; to ensure in negotiations on SPS and TBT measures, that the high standards that have been put in place in order to ensure food safety, human, animal or plant life or health in the EU are not compromised in any way;

……..

to recognise that, where the EU and the US have very different rules, there will be no agreement, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the cloning of animals for farming purposes, and therefore not to negotiate on these issues

to encourage the US side to lift the ban on beef imports from the EU;

……..

to ensure that the economic, employment, social, and environmental impact of TTIP, is also examined by means of a thorough and objective ex-ante trade sustainability impact assessment (SIA) in full respect of the EU Directive on SIA, with clear and structured involvement of all relevant stakeholders, including civil society; asks the Commission to conduct comparative in-depth impact studies for each Member State and an evaluation of the competitiveness of EU sectors and their counterparts in the US with the aim to make projections on job losses and gains in the sectors affected in each Member State, whereby the adjustment costs could be partly taken up by EU and Member State funding;

……..

to ensure that TTIP contains a comprehensive chapter on investment including provisions on both market access and investment protection, recognising that access to capital can stimulate jobs and growth; the investment chapter should aim at ensuring non-discriminatory treatment for the establishment of European and US companies in each other's territory, while taking account of the sensitive nature of some specific sectors;

……..

to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives……

35. The role of the EP in respect of EU negotiations with third countries has not been confined to overseeing the conduct of negotiations by the Commission - it also has an external face. The EP maintains a liaison office with the US Congress in Washington, and delegations from the EP and the US Congress meet twice a year, in Europe and the US.

36. Since the decision to open negotiations on the EU-US TTIP agreement in 2013, discussions on these negotiations have figured prominently in these twice yearly meetings. To give an indication of the degree of detail to be found in these discussions, concerning the subject matter of the negotiations, I refer to the following extract from the Joint Statement on the meeting of the 27th June 2016 held at the Hague:[65]

We hold that negotiations must eliminate duty tariffs, going beyond what the EU and the US have achieved in previous trade agreements, while respecting that mechanisms can address treatment of sensitive products on both sides. We discussed our goals in access for services, public procurement, cross-border data flows, investments, the Intellectual Property Rights chapter, the protection of ILO core labour standards, the work on the Small and Medium Sized Enterprises and the need to abolish existing restrictions on exports of energy.

37. This engagement by the EP directly with the US Congress regarding the ongoing negotiations between the EU and the USA is worthy of remark. It is activity which borders upon "parliamentary diplomacy", aiming to promote the EP's perception of the aims and key provisions of a prospective TTIP agreement. I suggest below that UK Parliamentary scrutiny should similarly

[65] https://polcms.secure.europarl.europa.eu/cmsdata/upload/52787547-ba0b-4e90-ba99-467e40b72286/Joint%20Statement_78th%20EU-US%20IPM%20The%20Hague_26-27June%202016.pdf

have an external face, designed to promote a European wide consensus in favour of an ambitious and comprehensive trade agreement between the UK and the EU.

What should the principal objectives of Parliamentary scrutiny of the negotiations be, and what should they not be?

38. The objectives of parliamentary scrutiny should be to improve standards of transparency and accountability, at all stages of the negotiating process. By transparency I mean that HMG should disclose and explain to Parliament who it is consulting, what it is doing, and what its objectives are. HMG will no doubt itself seek to achieve some degree of transparency in the course of negotiating the Brexit agreements, and I note that the Government appears to have briefed the press on its consultations with the devolved administrations, Gibraltar, and representatives of the financial services industry.

39. I do however think that it is essential that the Government's efforts in these directions should be supplemented by parliamentary scrutiny. This scrutiny would involve comment upon, and constructive criticism of, the procedural steps taken by the Government to consult interested parties, when it is preparing its negotiating positions in respect of the Brexit treaties. Scrutiny would also cover the substantive content of the negotiating position of the government, as that position evolves, and the successive draft texts of the agreements as they evolve. Scrutiny should as far as possible be public, both in its processes, and in its recommendations and conclusions. It is a legitimate aim of scrutiny of the kind I have described that it seeks to influence the negotiating process, and the content of the emerging agreements which are being negotiated.

40. There is one feature of the Brexit agreements which distinguishes them from any other trade agreements which the UK is likely to be negotiating in the foreseeable future. That feature is that the content of the agreements will be expected by political parties and public alike to respect the outcome of the referendum on UK membership of the EU. That referendum was advisory only, but the word "only" in this context should not be read dismissively. The advice given by the people of the UK in this referendum was advice which many politicians will regard as providing over-riding political conditions with which the Brexit agreements must comply. It would unrealistic to ignore the fact that the referendum result will be a major political influence on the conduct of parliamentary scrutiny of the negotiation of the Brexit agreements, and in particular on the negotiation of the future free trade arrangements between the UK and the EU, just as it will be a major political influence on the way the Government addresses these negotiations.

41. Other elements of the Brexit agreements will no doubt be politically controversial, though opinions will not necessarily divide along party lines. One issue which might arise is one described (rightly or wrongly) as the extent to which the UK should seek "access to the single market", or should seek to negotiate a comprehensive trade agreement which reflects modern

trends in the content of trade agreements between the EU and third countries.[66] An issue such as this is likely to give rise to a mix of "referendum politics", general political controversy, and debate about the relative costs and benefits of different possible outcomes of negotiations. This debate involves politics but also involves assessments which cannot be fully resolved by assertions of political conviction. It is a strength of parliamentary scrutiny via the committee system that it can provide informed, expert and detailed critical assessment of the evolution of government policy. In the case of the Brexit agreements, the evolution of government policy will take the form of evolving negotiating objectives and evolving texts of the draft Brexit agreements.

42. What should parliamentary scrutiny NOT do? It should not be conducted in a way which inhibits the Government from conducting effective negotiations. The government has political and constitutional responsibilities in this context which only the government can discharge. There is a separation of powers issue here which Parliament must respect. But the precise line of demarcation cannot be drawn in abstract.

What role could the House of Lords play in achieving these objectives? What terms of reference should the committee scrutinising the negotiations have? Should they include a scrutiny reserve?

43. The House of Lords is not an elected body. Its contribution to the functioning of democracy in the UK must accordingly be achieved by means other than the representative capacity of its members. In the present context it would contribute to democracy by publicly scrutinising both the procedure and the substantive content of the negotiating process of the Brexit agreements. The scrutiny should extend to all matters incidental to these negotiations, including contingency plans for the UK to trade with the EU on WTO terms, either as an interim expedient, or as a longer term framework for trading with the EU.

44. The type of scrutiny for which the House of Lords is particularly well qualified is that referred to in paragraphs 38 and 39 above, along with the informed, expert and detailed critical assessment of the evolution of the negotiations referred to in paragraph 41 above.

45. I have said that the House of Lords should scrutinise procedure as well as substance. By this I mean that the House of Lords should investigate how the Government has consulted, and how it means to consult public bodies (including the devolved administrations, Gibraltar, and the Channel Islands), businesses, trade unions, and civil society generally. One issue in this context is access to the Government by lobbyists. Lobbying is legitimate in principle. But it should be transparent. There should be no special access

[66] See Wyatt, Can the UK retain access to the single market without allowing free movement of workers? Lets rephrase the question. Brick Court Chambers Brexit Blog, 26 July 2016. https://brexit.law/2016/07/26/can-the-uk-retain-access-to-the-single-market-without-allowing-free-movement-of-workers-lets-rephrase-the-question/

for particular lobbyists, for example, those who can call on the services of recently retired politicians.

46. I have said that the Government's efforts should be tested by parliamentary scrutiny, and I would anticipate that this would entail the HL EU Committee itself hearing evidence from public bodies, business, trade unions, and civil society generally, on any or all issues relating to the Brexit agreements. One aim of this would be to ensure and to demonstrate that all interested parties have a voice throughout the negotiation and conclusion of the Brexit agreements. But the assessment and publication of evidence (subject to confidentiality considerations) by the HL EU Committee might in turn influence the course of negotiations by providing the Government with new insights into the options which might be pursued, and the relative advantages of one option over another.

47. What should the terms of reference of the HL EU Committee be? I note that the current terms of reference of the Committee are "to consider European Union documents deposited in the House by a Minister, and other matters relating to the European Union". The reference to "other matters relating to the European Union" envisages a potentially wide remit for the Committee, and this is reflected in the Committee's description of its role on its website:

The European Union Committee of the House of Lords scrutinises the UK Government's policies and actions in respect of the EU; considers and seeks to influence the development of policies and draft laws proposed by the EU institutions; and more generally represents the House of Lords in its dealings with the EU institutions and other Member States.

48. In light of this, I think that terms of reference for the Committee, designed to cover negotiation of the Brexit agreements, could be worded along the lines "To consider the negotiation and conclusion of agreements between the UK and the EU consequential upon the result of the referendum of 23rd June 2016, and other matters relating thereto."[67] This would authorise the Committee *inter alia* to scrutinise the UK Government's policies and action in respect of the negotiation of the Brexit agreements, and to seek to influence the Government's negotiating position, and thereby to influence the evolution of the draft texts of the Brexit agreements. It would also cover, for example, scrutiny of the option of the UK engaging with the EU in the short term or medium or long term, on WTO terms. It would also cover the negotiation of agreements or arrangements, legally binding or not, designed to replace arrangements originally applicable by virtue of the UK's EU membership, such as, for example, arrangements relating to access and

[67] I have noted that I think that there is strong argument for scrutinising the negotiation of trade agreements with third countries, and that a committee charged with scrutinising the Brexit agreements would be well qualified to scrutinise trade agreements with third countries, and might evolve into an international trade committee, see paragraphs 20 and 21 of this written evidence. I would suggest that consideration should be given to formulating the terms of reference of the committee to provide for this from the outset. Terms of reference could read: "To consider the negotiation and conclusion of agreements between the UK and the EU and third countries consequential upon the result of the referendum of 23rd June 2016, and other matters relating thereto."[67]

terms of study of students, or common foreign and security policy policy, including sanctions. It would also cover the HL EU Committee inter-acting directly with the EP, and national parliaments, in a process which I describe as "parliamentary diplomacy", and to which I refer further below.

49. Should there be a scrutiny reserve? I would say "yes" BUT…

50. Negotiations will take place at two levels throughout. At the pre-negotiation stage HMG will talk bilaterally to national governments. When Article 50 is triggered, the Commission will handle formal negotiations on the EU side, under a chief negotiator. But government to government talks are likely to continue, even if not officially part of the negotiations. The aim will be to influence national governments to push the negotiators in the right direction, and perhaps to extend the two year period. I doubt that a scrutiny reserve would work for such bilateral contacts, but time will tell.

51. On the other hand, a scrutiny reserve should apply to documents disclosed to the HL EU Committee which the Government intends to table in negotiations, or to potential negotiating positions disclosed in outline to the Committee, whether disclosed in written form or orally. Formulating a scrutiny reserve in the right terms will depend on the relationship envisaged between the UK Government and the HL EU Committee. I would envisage a relationship along the lines of the relationship between the European Commission (in its capacity as negotiator of trade agreements) and the appropriate committee of the EP (the International Trade Committee). That is to say, the UK Government would inform the HL EU Committee (subject to any appropriate safeguards necessitated by confidentiality) of its negotiating objectives, and of the contents of negotiating documents to be tabled in negotiations with the EU.

52. I note that there is a provision in the 2010 Framework Agreement between the European Commission and the European Parliament which comes close to being a scrutiny reserve. It is in paragraph 24 and states

The information….. shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account.

53. If responses from the HL EU Committee are to serve a useful purpose, documents must be provided in sufficient time to allow the committee to formulate and convey its view to the Government, and to allow the Government to take those views into account when it tables its proposals, or otherwise advances them in the course of negotiations. A reserve should be formulated in terms which ensure that this is what will happen in practice.

What are the practical difficulties of effective Parliamentary engagement in treaty negotiations, particularly in terms of confidentiality and pace of negotiations? Can they be overcome? How?

54. There are inevitably some practical difficulties in the way of effective Parliamentary oversight of treaty negotiations, and they would have to be addressed. First, the question of confidentiality.

55. This Committee, in its 1st Report, noted that:

…parliamentary scrutiny has shown itself, in practice to be highly flexible. The Intelligence and Security Committee of Parliament, though a statutory body rather than a Select Committee, conducts its hearing wholly in private; other Committees, such as the House of Commons Defence Committee, may receive confidential briefings, while private meetings are common across both Houses.

56. Flexibility, and responding to the needs of confidentiality in the ways indicated, as appropriate, would, I am sure, enable the right balance to be struck between transparency and accountability, on the one hand, and the needs of confidentiality, on the other. If the right balance can be struck in the fields of Intelligence, Security, and Defence, then it can surely be struck in the context of the negotiation of trade agreements. I would also counsel maintaining a sense of proportion about the requirements of confidentiality in this context. It is a context in which national governments around Europe, including HMG, will be briefing the press, European officials will be briefing the press, and Members of the EP will be briefing the press. Some of these briefings will be "official", others will not. Some will have regard for considerations of confidentiality, and others will not. In any pecking order of serious commitment to striking the right balance between transparency and confidentiality, it is likely that the HL EU Committee would come out close to the top of the list.

57. I refer by way of information to the practice of the EU institutions in this context. I pointed out above that the Commission makes available negotiating texts to the EP on a confidential basis. The 2010 Framework Agreement on relations between the EP and the European Commission contains provisions on the forwarding of confidential information to the EP in Annex II. The Annex is extensive and the reader is referred to 2010 OJ L304/47 at pp. L304/56-60.[68] I note the following features of the arrangements provided in the Annex. These arrangements relate to information of varying degrees of confidentiality. Confidential information may be subject to limited circulation, for example, restricted to the chair and rapporteur of the relevant parliamentary committee, or made available to all members of the relevant parliamentary committee, or to all members of the EP. In all these cases the confidential information in question must not be published or forwarded to any other addressee without the consent of the Commission. There are also options as regards arrangements for the handing of confidential information; one option is examination of documents in a secure reading room, another is holding the relevant meeting in camera, coupled with certain other safeguards.

[68] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:304:0047:0062:EN:PDF

58. Negotiations between the EU and the US on the TTIP agreement provided a precedent for EP access to confidential negotiating texts. I refer to a press release of the EP of 2 December 2015:[69]

All Members of the EP will have access to all categories of confidential documents relating to the EU's Transatlantic trade and investment partnership (TTIP) talks with the USA, under a EP/European Commission agreement approved by the College of Commissioners on Wednesday. The accessible documents will include the so-called "consolidated texts", which reflect the US position.
"Eleven months of negotiations with the Commission have paid off. The result is a big win for the EP – all MEPs will now be able to exercise their duty of democratic scrutiny of the TTIP talks", said the Parliament's Trade Committee chair Bernd Lange (S&D,DE), who led the negotiations. "The access conditions we have agreed on will increase the transparency of the TTIP process significantly. What we have achieved today will also set a precedent for the transparency of future trade talks", he added.
MEPs will be able to read the "consolidated texts" in a secure reading room at the EP, take handwritten notes and use the information as a basis for their political actions .
The agreement nonetheless ensures that the confidential nature of this information is not compromised , so as to protect EU interests and avoid weakening the EU's negotiating position. MEPs' "comprehensive access" will be subject to the security rules governing access to confidential documents.

59. It is of course necessary to consider all this in light of how it works in practice. Preserving the confidentiality of the negotiation of EU trade agreements must be understood in context, and that context is a little untidy, and less than ideal. The EU negotiating process is a fairly "leaky" process. I indicated above that the Council had declassified its negotiating mandate for the TTIP agreement. The Commission had pressed for this. But by that time the negotiating mandate had been leaked by an MEP in any event. Drafts of parts of the EU-Canada CETA agreement were repeatedly leaked. There is a website which specialises in covering international trade negotiations and publishing leaked negotiating texts and other leaked information.[70] To give a flavour of the website, I refer to its latest news item when I accessed it on 11 August 2016, it read:
Negotiators in Brussels and Washington haven't finalized a single chapter of the Transatlantic Trade and Investment Partnership, or TTIP, according ***to an internal ministry report obtained by Handelsblatt****.* [emphasis added][71]
UK negotiating positions will be vulnerable to leakage, at the EU end, whatever the UK Government or Parliament does.

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[69] http://www.europarl.europa.eu/news/en/news-room/20151202IPR05759/all-meps-to-have-access-to-all-confidential-ttip-documents Accessed 11 August 2016.

[70] This information is from Christopher Hermann's article "Transleakancy", published in *Trade Policy between Law, Diplomacy and Scholarship. Liber Amicorum in memoriam Horst G Krenzler*, page 38, at page 45. The website referred to is bilaterals.org and is to be found at http://www.bilaterals.org/

[71] http://www.bilaterals.org/?handelsblatt-exclusive-no-ttip The ministry in question is the German economics ministry.

60. In drawing to the attention of the Committee the reality of expectations of confidentiality concerning contemporary international trade negotiations, I am neither condoning nor counselling a cavalier approach. But I would argue for a balanced and realistic approach, which would not undermine the process of parliamentary scrutiny of the negotiation of the Brexit agreements, in the name of an exaggerated regard for the needs of confidentiality, while leaving the British public to be represented by their MEPs,[72] or to be informed by browsing the internet. Throughout, the balance between confidentiality and transparency will be a question of judgment. There is no reason to doubt that members of the UK Parliament will have more than ample judgment for the job in hand. My conclusion, as regards confidentiality, is that any problems that might arise can be overcome.

61. What of the pace of negotiations? I doubt that negotiations with the EU will, *in general*, move too quickly for scrutiny to keep up. It is likely (though not inevitable) that nothing will be agreed until everything is agreed, that a number of "baskets" of issues will be visited, and re-visited, and that negotiations will be complicated by particular demands from particular Member States, which might seek to prevent any agreement at all being reached unless their demands are met. The HL EU Committee's modus operandi might for the most part be regular analysis of, reports upon, and recommendations in respect of, the state of play in the negotiations as those negotiations are reported to the Committee.

62. On the other hand, it is likely that particular issues might require swift investigation and a swift response. Rapid response and flexibility might be needed especially in the coming months while "pre-negotiations" take place, but these qualities might well be needed at any stage. I would be surprised if such demands presented insurmountable difficulties for the HL EU Committee. On the other hand, pace of events, range of subject matter, and cumulation of issues might require more in the way of expert input from the specialist staff who assist the Committee than their present complement can provide. My answer to the question posed is that I think it likely that the Committee could deal with the demands of the scrutiny of UK Brexit negotiations, providing sufficient expert support staff are available or can be made available. The question of resources is the subject of a distinct question by the Committee, and I refer to this question below.

Is it possible that Parliamentary scrutiny could be seen as a means of helping the Government in the negotiations, rather than hindering it? How could this be achieved?

63. There are a number of ways in which parliamentary scrutiny could support HMG in its negotiations, rather than making its task more difficult. I shall make three points:

[72] I do not know whether or not restrictions can be placed upon British MEPs in respect of any access to information relating to negotiations on the EU side. Negotiations for a free trade agreement might not be complete at the time when the UK exits the EU, and after that there will of course be no British MEPs.

Point One: Fact based and well informed analysis of policy options could supplement the resources available to UK negotiators, and improve the quality of their efforts.

Point Two: Parliamentary scrutiny could have an external as well as an internal dimension, **in two linked respects**.

- **First**: evidence could be gathered from businesses, trade unions, etc, in other Member States, as well as from the UK.
- **Secondly**: **UK** "**parliamentary diplomacy**" could engage with the EP and perhaps with national parliaments to promote an EU wide consensus that the Brexit agreements should be used to forge the closest possible relations between the UK and the EU, rather than providing a vehicle for recrimination and reprisals.

This external dimension would be positive for the UK negotiating effort.

Point Three: Parliamentary scrutiny could flag up political or other limitations on UK negotiators' room for manoeuvre, temper expectations on the EU side, and help nudge negotiations in productive directions.

64. The role of the HL EU Committee best suited to the general constitutional role of the House of Lords, is also that best suited to assist the UK in its negotiations. This is fact based analysis of the various policy options available to negotiators, based on evidence gathered by the Committee itself, and considered in light of the wealth of evidence likely to be available, and proliferating, in the public domain. Scrutiny of this kind could and should embrace the processes of consultation, fact finding and analysis used by HMG to formulate its position in negotiations. HMG has no monopoly of expertise as regards the fact finding, consultations, and policy analysis which will inform and shape its negotiating positions. Scrutiny of all these matters, conducted in a spirit which combines commitment to transparency with commitment to cooperation with HMG to achieve the best possible outcome for the UK, should not inhibit UK negotiators, but could, and I think would provide them with valuable support.

65. I referred above to engagement by the EP directly with the US Congress regarding the ongoing negotiations between the EU and the USA. I described this activity as bordering upon "parliamentary diplomacy", aiming to promote the EP's perception of the aims and key provisions of a prospective TTIP agreement. I think that there are lessons to be learned from this. UK Parliamentary committees engaged in the scrutiny of UK negotiations with the EU could and in my view should consider engaging in "parliamentary diplomacy".

66. As far as the HL EU Committee is concerned, such diplomacy could seek to build an EU wide consensus that any free trade agreement with the UK should be the most comprehensive and ambitious free trade agreement with a third country that the EU has ever negotiated. The Committee might facilitate such a process by ensuring that the evidence it takes when undertaking its policy analyses includes where appropriate evidence from businesses and stakeholders across the EU, as well as within the UK. Such

parliamentary diplomacy might involve direct engagement between the HL EU Committee and other national parliaments. The framework which already exists in the form of COSAC for contacts between national parliaments and between national parliaments and the EP, might facilitate contacts with both the EP and national parliaments, and in this context I would refer to the UK's National Parliament Office in Brussels.

67. I would make this broader point about "parliamentary diplomacy" on the part of the HL EU Committee. During a period in which feelings about the UK on the EU side will be very mixed, and in which relations between HMG and EU Member States may deteriorate at certain stages in the negotiations, there will be a need for some official organ or agency of the UK to be, and to be seen to be, unequivocally committed to a warm as well as close relationship with the EU, and to positive outcomes at the end of the day. The HL EU Committee appears to me to be potentially well suited to this role.

68. There is a further way in which Parliamentary scrutiny could help the Government. This would be by making more visible any political limitations on UK negotiators' room for manoeuvre which resulted from the referendum result, or from other factors.

69. The EP might be said to have used its powers in respect of EU trade agreements in this way. The EP has recommended that EU negotiators treat certain matters as being non-negotiable. I have already referred in this note of evidence, to a resolution of the EP on the TTIP negotiations, and set out extracts from it. The resolution included a recommendation in the following terms:

to recognise that, where the EU and the US have very different rules, there will be no agreement, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the cloning of animals for farming purposes, and therefore not to negotiate on these issues

70. This recommendation is of course aimed at EU negotiators. But the document in which it was contained was also sent, by the EP, to the US Administration, and to the US Congress. This recommendation might be seen as designed as much to temper the expectations of US negotiators as to strengthen the resolve of EU negotiators. This passage was the subject of a follow-up question to the Commission in the EP, as follows:[73]

In its resolution of 8 July 2015 containing its recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), Parliament recommends the Commission to recognise that, where the EU and the US have very different rules, there will be no agreement, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the

[73] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2015-011473+0+DOC+XML+V0//EN&language=et

cloning of animals for farming purposes, and therefore not to negotiate on these issues

1. How is the Commission going to implement this recommendation?

2. Has the Commission informed the US side that there cannot be negotiations which touch directly or indirectly on chemicals, public healthcare services, GMOs and the use of hormones in the bovine sector, given that there is no support in Europe for a TTIP agreement including rules on these issues? If not, why not?

71. The Commission replied:[74]

The Commission can assure the Honourable Members that during the negotiation process it will take into account the resolution of the EP. The Commission has repeatedly stressed that the overall objective of the Transatlantic Trade and Investment Partnership (TTIP) negotiations is not to negotiate convergence in areas where EU and US approaches differ. TTIP aims to cut unnecessary red tape, reduce the costs of doing business across the Atlantic and make it easier for companies to comply with both American and European laws. But this would only be done while upholding the high standards and levels of health, safety, and environmental protection that each side deems appropriate.

Both sides have taken a commitment not to lower any standards through TTIP including on the various topics listed in the Honourable Members' question. On various occasions the Commission has made it clear that the EU does not intend to change its high level standards on food safety, including its legislation on GMOs, as a result of TTIP. Commissioner Malmström and her US counterpart Ambassador Froman have publicly confirmed that they are jointly committed to protect public services (including healthcare).

In addition, the Commission has clarified on several occasions that TTIP will not put the existing EU legislation on chemicals in question. This applies notably to the regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation (EU) No 1907/2006 which will not be in anyway renegotiated in the context of TTIP. However, EU and US regulators have identified work strands in the chemicals sector that could usefully be pursued, such as identifying new chemicals for which risk assessment should be prioritised.

72. Appropriate UK Parliamentary committees might adopt the same approach as that adopted by the EP in the above example, as a means of flagging up the political significance of the referendum result as regards the scope of the future trading relationship, and dampening expectations on the EU side that, for example, the free movement of persons would have the same place in the UK's future relationship with the EU as it had in the past.

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[74] (footnotes omitted) http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-011473&language=ET

73. It might not be thought appropriate for the HL EU Committee to take the lead in adopting recommendations of this sort, because of the political issues involved. That said, since it is clear that the referendum must have ruled out some options, such as unrestricted free movement of persons, in a future trade agreement between the UK and the EU, it would be unrealistic to expect the House of Lords to ignore the obvious, and it would not be incompatible with its constitutional role if the HL EU Committee were to make reasonable assumptions about the parameters of the politically possible when it scrutinises the negotiation of the Brexit agreements.

74. There may be other restraints on the UK's room for manoeuvre in negotiations which the HL EU Committee could identify, and emphasise, in the course of its scrutiny of negotiations, without any incompatibility with its constitutional role.

Are there resource implications to scrutinising these negotiations?

75. There will inevitably be resource implications if the HL EU Committee engages in scrutiny of the kind referred to in its 1st Report of the current sessions, and discussed in this evidence, and the most obvious would seem to be the need for specialist support staff to assist the Committee. I have already referred to this in the context of difficulties in undertaking enhanced scrutiny of the Brexit negotiations. Another possible need for further resourcing might arise in the area of what I have described as "parliamentary diplomacy". Another need might be expenses involved in taking evidence from businesses and representatives of civil society from other Member States.

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12 September 2016

Professor Derrick Wyatt QC, Emeritus Professor of Law, Oxford University, Brick Court Chambers, Ms Jill Barratt, Senior Research Fellow in Public International Law, British Institute of International and Comparative Law and Lord Kerr of Kinlochard GCMG – Oral evidence (QQ 1-11)

Transcript can be found under Ms Jill Barrett, Senior Research Fellow in Public International Law, British Institute of International and Comparative Law