



OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Relations Committee

Thursday 2 February 2017

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 2 February 2017

CONTENTS

	Col.
EUROPEAN UNION REFERENDUM (IMPLICATIONS FOR SCOTLAND)	1

CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
4th Meeting 2017, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

DEPUTY CONVENER

*Lewis Macdonald (North East Scotland) (Lab)

COMMITTEE MEMBERS

Jackson Carlaw (Eastwood) (Con)

*Ross Greer (West Scotland) (Green)

*Rachael Hamilton (South Scotland) (Con)

*Emma Harper (South Scotland) (SNP)

*Richard Lochhead (Moray) (SNP)

*Stuart McMillan (Greenock and Inverclyde) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Sir David Edward (Standing Council on Europe)

Dame Mariot Leslie (Standing Council on Europe)

Ian Mitchell (Scottish Government)

Professor Anton Muscatelli (Standing Council on Europe)

Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 2 February 2017

[The Convener opened the meeting at 09:04]

European Union Referendum (Implications for Scotland)

The Convener (Joan McAlpine): Good morning and welcome to the fourth meeting of the Culture, Tourism, Europe and External Relations Committee in 2017. I remind members and the public to turn off mobile phones, and I ask any members who are using electronic devices to access committee papers to ensure that they are turned to silent.

Today, we are taking evidence on the implications of the European Union referendum for Scotland, and considering the Scottish Government's paper "Scotland's Place in Europe". We will hear first from the chair and members of the standing council on Europe and then from the Minister for UK Negotiations on Scotland's Place in Europe.

I welcome our first panel of witnesses: Professor Anton Muscatelli, principal and vice chancellor of the University of Glasgow and chair of the standing council on Europe; Professor Sir David Edward, former judge of the European Court of Justice; and Dame Mariot Leslie, former diplomat—both are members of the standing council on Europe. Thank you for coming to give evidence to our committee.

I open by asking generally about the work of the standing council and how it has informed the Scottish Government's paper on Scotland's place in Europe. Perhaps Professor Muscatelli would start.

Professor Anton Muscatelli (Standing Council on Europe): Thank you, convener. The standing council on Europe began its work shortly after the EU referendum. We have met roughly every month to six weeks in plenary session and have had a number of workstreams on issues such as the economy and financial services, higher education and research, human rights and social protection.

One of the workstreams is on the options that Scotland could scope out in light of the Brexit referendum. It scoped out in reasonably comprehensive detail all the possibilities for the Scottish Government to consider, then the work

was taken into the Scottish Government. It should be pointed out that the paper is very much a Scottish Government policy proposal, not a paper of the standing council. Once the paper was fully prepared, just before it was published, we were consulted, particularly members with expertise in the variety of areas that the paper covers.

In terms of the membership of the standing council, Professor Sir David Edward and I were part of the options subgroup, and Dame Mariot Leslie as part of the plenary group was consulted at the final meeting before the publication of the paper. As I say, it is very much a Scottish Government policy proposal, but we discussed it before it was published.

Professor Sir David Edward (Standing Council on Europe): It is important to appreciate that we, as individuals or collectively, do not have a particular political position. I personally do not know the political allegiance of most of the other members of the council, and it is certainly true—as said in paragraph 15—that

"The views of Standing Council members naturally differ on some aspects of the analysis and options in this paper"

but it is also true that

"all share a common concern to limit the damage that Brexit will do to Scotland".

That is common to us all.

The Convener: Thank you. The Scottish Parliament has voted to support the Scottish Government's efforts to keep Scotland in the single market. The work of this committee so far, in terms of the reports that we have published, supports the argument that Scotland is better off in the single market. As a result of the Prime Minister's recent statement at Lancaster house, we now know that the United Kingdom Government takes a very different position and intends to take the UK out of the single market.

What are the challenges of the UK Government's position and the Scottish Government's position? Can those challenges be reconciled?

Professor Muscatelli: I will start, and colleagues may want to come in.

That is probably the one point on which there is complete unanimity around the standing council. It was disappointing when the Prime Minister announced that she intends to take the UK out of the single market. The standing council has made it clear in various interventions that we believe that membership of the single market is economically, socially, and for other reasons, absolutely key to the future of the UK and Scotland.

We now face a difficult situation. I will make a few points at the end about whether the route that

the Prime Minister has charted is realistic in terms of timescales, but it certainly takes us into the territory of exploring alternatives to what the “Scotland’s Place in Europe” paper sets out as the first potential solution, which is that the UK as a whole stays in the single market as probably the best solution. It takes us into the territory of exploring whether a differentiated solution is possible.

I should comment on some elements of what the Prime Minister said. She said that she would like to take the UK out of the single market—there was then some equivocation about whether the UK should leave the customs union, but it is increasingly clear that that is what she intends. One of the difficulties is that the timetable that has been set is extremely challenging if we are to agree a bespoke deal that is essentially a standalone free-trade agreement in two years, at the same time as negotiating a divorce settlement with the EU. Most independent experts, including some on the standing council, have expressed the view that it is unrealistic to conclude all that within two years. In the first two years, we will be lucky to conclude the divorce settlement and perhaps some broad headlines around what a free-trade agreement might look like.

09:15

That is one of the areas of concern. Another is how to develop a transitional arrangement to avoid a cliff edge, as in order to develop a transitional arrangement, we need to know where we are going. That is why a number of independent commentators have pointed out that the single market might still remain in play as a transitional arrangement. However, that is difficult—almost impossible—to reconcile, given the red lines and the objectives that the Prime Minister set out in her statement.

That sets out the current situation. It takes us into the territory of the differentiated solution as far as the Scottish Government’s paper is concerned, but there is still a lot of uncertainty about what the Prime Minister’s statement means in terms of negotiations, because of the fact that it will be difficult to achieve all this within the period of the article 50 negotiations. Colleagues may have additional views.

Dame Mariot Leslie (Standing Council on Europe): I am sure that that is right. In so far as we have discussed it, I think that it is the view of the standing council that, when the Prime Minister triggers her article 50 letter notification to the rest of the EU, it will be extremely important for her to say something about the framework for the United Kingdom’s future relations with the EU.

The article 50 negotiations are about the separation—the divorce—and the settlement of financial, personnel and other administrative matters, but unless the Prime Minister or the British Government asks for a parallel process for the future framework, as is specified in article 50 of the treaty, the EU will not offer it to her.

The European Commission is ready to work on the divorce settlement; it is not ready to work on a future framework as it has not yet consulted the EU 27 in any great detail. Unless the UK asks for it, pressure to do the two things in parallel will not exist. Even if there was such pressure, as Professor Muscatelli was saying, it will be extraordinarily difficult to do. I doubt whether very much will get under way before the French and German elections, so not until the autumn of this year, and then time is very short before the 2019 European Parliament elections.

The divorce settlement will happen—the clock is ticking on that. A future framework, even if it is only a very broad set of heads of agreement, will be very difficult to negotiate politically in the remaining time.

Sir David Edward: I entirely agree with what has already been said. It is important to appreciate that this is not a world of either/or choices. The president of the European Free Trade Association Court gave a lecture in Edinburgh on Monday evening in which he said that we are not looking at black and white photographs; we are looking at a series of moving pictures—not just one, but several. The idea that you are either in or out of the single market—the idea that there is a customs union and you are either in it or out of it—is an oversimplification of the issues.

I would illustrate the point like this. In the field of competition law, which is very important in the UK and the EU, British companies cannot divorce themselves from the jurisdiction of the EU authorities. That includes the European Commission and the European Court of Justice, in so far as their agreements have effect in the European Union as it remains. Because the Commission will have jurisdiction, so too will the Court of Justice. You cannot sell goods into the EU without complying with the EU standards.

When there is doubt about the interpretation of those standards, the Court of Justice has jurisdiction in the EU to interpret the standards and provide the authoritative determination. Similarly, the Court of Justice has the ultimate jurisdiction to decide how the common customs tariff is to be applied.

I would put it like this: you might escape the direct jurisdiction of the Court of Justice, but you will not escape the jurisprudence of the Court of Justice. The Court of Justice case law is still there.

Therefore, the idea that you divorce yourself entirely from this machine is simply not in accordance with the facts.

It is as well that people realise that before they start discussing whether we are in or out. The question is about the kind of relationship that we will have and how it will work. If a company invests in one of the other EU member states, will its directors, its employees, its salesmen, its artisans and its tradesmen be able to move across frontiers freely to operate the enterprise? Will doctors, dentists, architects and nurses be able to look for work in other member states, and will the nationals of those member states be entitled to come and work here?

All those things are involved in the relationship, and simply to say that we are going to be in the single market or out of it, or in the customs union or not in the customs union, is a gross oversimplification of the problem. That is why, as my colleagues on the panel have said, and I entirely agree, the idea that all this can be wrapped up in a couple of years is for the fairies.

The Convener: How nicely you put it. Thank you.

All members have questions, and we have only an hour for this part of the meeting, so I will try to bring in every member, and I will not take supplementary questions.

Lewis Macdonald (North East Scotland) (Lab): We have had a very interesting introduction to this morning's proceedings. A couple of important points arise from what has been said. The first follows on from Sir David Edward's comments about the complexity of all of this and the comments about the possible shape of transitional arrangements. As has rightly been said, even though we do not know what the transitional arrangements will be or where they will go, we know where they will start from. We are starting from a position in which we are in the customs union, in the single market and subject to the application of all the rules.

Is that a correct interpretation in relation to the UK and the possibility of differentiated solutions within it? Does the fact that we are starting from here allow for, in a transitional period, differentiated solutions to be developed for Scotland and other parts of the UK?

Professor Muscatelli: I will make two points in response to that. First—this is a personal view as opposed to the view of the standing council—I have written about the possibility that, given that we at least know where we are starting from, if we want to develop a transitional arrangement to avoid falling off a cliff edge, a European Free Trade Association and European Economic Area solution is the best one for the whole of the UK.

It is interesting that Sir David Edward mentioned the lecture in Edinburgh by the president of the EFTA Court. One of the things that the president stressed in that lecture was that there is a real misunderstanding here in the UK about the differences between the EFTA Court and the operation of the European courts. The EFTA Court appears to satisfy some of the red lines that the UK Government has set about the primacy of its decision making over the justice systems of the EFTA countries that are part of the EEA. There are also emergency provisions regarding migration within the EFTA agreements, which could have been developed. My personal view is that, if things get really difficult, as I think they will, and if we want to build a transitional arrangement as a bridge, we should build it close to where we are because, as you said, we at least understand what the status quo is.

My second comment is on the potential for a differentiated agreement. If we look at the detail of the proposal in "Scotland's Place in Europe", it is about how to keep Scotland within the single market if the rest of the UK decides to be outside it. In order to maintain the integrity of the UK market, the proposal in the document makes it clear that what is needed is essentially to keep the whole of the UK within the same customs zone and to develop arrangements that in some way allow the regulatory side of the European single market to conform closely to that of the UK so that there is not too much divergence. As Sir David Edward has pointed out, UK companies that still want to export to Europe will have to adhere to European standards. The closer we remain to the status quo, the more likely it is that we will be able to apply a differentiated solution.

Additional work needs to be done in that territory in order to address some of the issues concerning how to implement a differentiated solution. As I and some other members of the standing council have said, it is entirely technically feasible to do that, challenging though it is. However, as somebody else has pointed out, there is no easy solution to Brexit. The only easy solution would have been if the UK as a whole had decided simply to slip naturally from EU membership to EFTA-EEA membership. Everything else is complicated. Hard Brexit is complicated. There are no easy solutions in that territory.

Lewis Macdonald: If we consider the Scottish Government's paper, which looks at differentiated solutions, the fundamental challenge in making any of this work seems to me to be how to operate as part of the UK and its customs union but also to comply with the rules of the European single market. Although we could readily do that at the beginning of a transitional period, by the end of that period the UK will already have diverged from single market requirements because legislation

and regulation are constantly developing within the single market.

For me, the difficult question—I will put it to Michael Russell later this morning, but I am also interested in your views—is how it is possible in the real world and the real economy to apply two different sets of rules without ultimately having to make a choice in some way as to which market and customs union takes precedence.

Professor Muscatelli: I think that it is possible to have a parallel market solution, which is essentially what is described in the document. We would need to look at the way in which business regulation is framed in the UK as a whole. The word that I have used whenever I have written about that in the media is that we would need in some way to “tether” UK business regulation to European business regulation.

I return to the point that, whatever happens in relation to Brexit, 45 per cent of our exports from the UK as a whole are likely to go to the EU, so it is in the UK's interests not to diverge markedly, otherwise those markets will collapse.

Having Scotland within the single market with a differentiated solution might be a huge advantage to the UK as a whole, but it would be technically challenging and we would need to look at how we would run it. For instance, a competition and markets authority—that is just one aspect of business regulation—could be set up under a federal structure to look at the relationship between the two elements.

Lewis Macdonald is absolutely right to say that European standards will continue to evolve. I repeat that, unless we suddenly start to export much more to the rest of the world relative to Europe—as an economist, I think that that is very unlikely, given that we know that economies tend to trade much more with their geographic neighbours—the UK will have to confront how it relates its business regulation to that of Europe.

I echo what Sir David Edward said. We might be leaving the EU, but it is not going away. It is still there and it is still the biggest market, so the rest of the UK will have to find some way of tethering its business regulation and so on, unless we decide to completely change the way that we do business and go for an all-out trade war. I know that some rash comments have been made in the press. The chancellor said something about changing the way in which we do business but, to be frank, in the real world, we will still be trading with the rest of the EU, and it will be in the interests of the rest of the UK to tether its regulations in some way to the EU's.

09:30

Lewis Macdonald: If the UK Government agreed to tether its regulation in that way, would there be any need for a differentiated solution?

Professor Muscatelli: It would actually make a differentiated solution much easier if we wanted to be full members of the single market. It is undoubtedly true that the softer the Brexit, the easier it will be to implement a differentiated solution.

I return to the question of how, if we were to have a bespoke free-trade agreement with the EU, given that 45 per cent of our trade depends on it—it is not like Canada or South Korea entering such an agreement with the EU—we would ensure that we could maximise the benefits of that agreement. That is the completely unknown bit in the UK Government's plan. We have no idea how it is going to implement that. My view is that it is going to have to tether our business regulation at the UK level to the EU's in some way.

The Convener: Thank you. I am afraid that I have to ask for questions and answers to be as brief as possible if everybody is going to get in.

Richard Lochhead (Moray) (SNP): I thank the panel for giving evidence this morning. I have two questions. The first relates to my experience of European negotiations when I was Cabinet Secretary for Rural Affairs, Food and Environment. When one of the 28 member states asked for different things from the others, we were often told that things were not possible and that there was no precedent for them, but suddenly, at midnight, a political agreement would be struck and the country would get what it wanted. Given your diplomatic and legal expertise, will you say where the boundary is between legal constraints and precedents, on the one hand, and what can be achieved through political negotiation, on the other, as regards Scotland achieving the outcomes that we want with a differentiated relationship with the single market?

Dame Mariot Leslie: First, it is not a free-for-all. People who say that anything can be negotiated with political will overlook the fact that, in the EU, there are treaties, a body of jurisprudence and so on, so it is not always the case that one can negotiate absolutely anything provided that there is the political will.

It seems to me that, in the case of the Brexit negotiations between the UK and the rest of Europe, and what might happen between Scotland and the rest of the UK internally, the starting point is the political one.

The legal frameworks in terms of the EU treaty will have to be amended to take account of the UK's exit: there will have to be revision of some of

the financial provisions, voting rights and so on. Once we start to open up treaties and ratification, it is possible to open up a space in which other things are negotiated as well. Incidentally, that also has to be true for EFTA and its conventions and agreements if anything was to happen on that front. It is therefore simply wrong to say that it is impossible to envisage any change to the legal provisions as they stand.

On what will happen next, first, the crucial position is that of the UK Government. If it, under our current constitutional arrangements, refuses to take account of the wishes of the Scottish Parliament and the Scottish Government or indeed those of the Welsh Assembly and the Welsh Government or people in Northern Ireland, it is very hard to see how we would make progress. However, if the UK Government takes account of those wishes and comes with a solution that is compatible with the spirit of European legislation, compromise, the single market and the interests of the other member states, I think that things are possible in a world in which the other 27 member states know that Europe, its economy and its politics are under challenge.

Whether it is doable is a question of time, will, detail, expertise and not making silly mistakes, but there is a space in which things could be negotiated with skill and good will. Anyone who says that that is impossible for a legal reason is probably wrong.

Richard Lochhead: That is really helpful. My second question relates to the panel's observations on the relationship and the negotiations to achieve those outcomes between the UK Government and the Scottish Government since the referendum. What are your observations on how those negotiations are going?

Dame Mariot Leslie: We are not party to those negotiations. The panel meets to advise the Scottish Government, and it is the Scottish Government that is party to the negotiations. I can speak only for myself, and what I know is what I see in the press.

The Scottish Government was the first constituent part of the United Kingdom to get its paper out and say quite plainly what it wanted and the options that it saw. It was extraordinarily unfortunate that the Prime Minister's speech seemed to set that aside when it had not been considered in any detail at the joint ministerial committee.

As I understand it, the Scottish Government's paper is still under consideration in the joint ministerial committee, but with the clock ticking and the British Government's timetable for its article 50 notification being the end of March at the latest, I find it hard to see how serious and sincere

attention could be given to the paper and all its details along with all the other things on the agenda. That is a very personal observation. My colleagues will speak for themselves, but I think it is fair to say that it is not part of the remit of the standing council to have a view on the politics of relations within the UK.

Professor Muscatelli: I echo what Dame Mariot said. In the run-up to the triggering of article 50, it is really important that discussions are intensified on what arrangements might be possible within the UK. I say that because there are so many moving parts in the negotiations that, unless you can at least have some traction and begin to join some of those parts within the UK, it will be much more difficult to do that in the more dynamic environment of the negotiations after the triggering of article 50.

I gather from the previous meeting of the JMC plenary that there was a commitment from the Prime Minister to intensify scrutiny of the proposals, and I would certainly encourage that. This is a critical time.

Tavish Scott (Shetland Islands) (LD): It seems to quite a lot of people that there is now a huge disconnect—that is a hellish word—or a huge difference between business and trade and politics and the process of whatever is going to happen after article 50 is triggered. On Tuesday night in Lerwick, I met the Faroese Prime Minister and he told a group of us that informal trade discussions are already under way. The idea that nothing is going to happen for two years is cloud cuckoo land. It is for the fairies, as Sir David said earlier, because things are already under way. Lots of European companies need to trade into the UK and they will continue to do so.

Has the council taken any evidence on what seems to me now to be the big difference between all of us endlessly discussing questions that we do not know any of the answers to and the reality of businesses just getting on with their lives?

Professor Muscatelli: I and many of my colleagues have certainly spoken with a number of different business sectors, and I have to say that the situation is variable. It depends on the nature of the sector. Those that depend critically on the single market because their value chains are spread around Europe, be they in motor vehicles or aerospace, are genuinely worried. They see the danger that my colleagues pointed out earlier—that we will fall off the edge of a cliff because there is simply not the time to negotiate a free-trade agreement that will allow us to transition smoothly into a new post-Brexit world.

There will be some sectors for which transition to a post-Brexit world will be less painful because their value chains are less integrated and, as long

as their product or service is going to be allowed in the EU, they will cope and just get on with it.

My impression from having spoken to representatives of business sectors across the UK is that there is considerable concern that none of that will be pinned down properly over the next two years, and that there is a danger that we could have a very hard Brexit without an FTA in place after two years, as most of us predict. That essentially means reverting to World Trade Organization rules, which would not—

Tavish Scott: Why are businesses not saying that more forcibly? Why are they not saying that that affects jobs in every part of the United Kingdom?

Professor Muscatelli: That is an interesting point. Some of them are: financial services have said that loudly. I sit on a group that is involved in a particular financial services sector in the City of London and people in that sector are very worried. They are trying to make those points to UK ministers behind closed doors. At the moment, the response seems to be, “It’ll be okay. Don’t worry. We will deal with it.”

That is the difficulty. There is such a political imperative to deliver Brexit that people are trying to make those points behind closed doors. My impression is that, although some sectors feel that they will not be affected, the ones that will be affected, including financial services, are making their points loudly and clearly behind closed doors.

Rachael Hamilton (South Scotland) (Con): Let me take you back to the conversation about EEA membership. That would mean not having a say at the table, but we would have to abide by EU regulations. Do you have any comments on how that would affect the way in which we try to deliver the result of the referendum?

Sir David Edward: Let us be clear about how the EEA works. The EEA does not directly adopt EU law. Norway, Iceland and Liechtenstein are within the single market because the EEA agreement includes provisions that mirror the treaties. In so far as there is EU secondary legislation, that is international law adopted by the member states of EFTA by their own legislation. The relationship is not one of dependence.

On the other hand, the undertaking is that the EFTA states will incorporate the law of the EU in so far as it applies to the free movement of goods, persons, services and capital. It is important to realise that as an illustration of the way in which participation in the single market can take place without the commitment of membership of the EU or direct subjection to the law of the European Union or the jurisdiction of the Court of Justice of the European Union. As I said, you do not escape

the case law of the Court of Justice or certain aspects of its jurisdiction.

I do not know whether that answers the question.

Rachael Hamilton: I was wanting more to explore the fact that we would not necessarily have a say at the table, which would go against the way in which we are trying to shape our negotiations.

Sir David Edward: One of the problems for the EFTA states, particularly Norway, is that they are compelled to adopt domestic legislation to comply with the rules of the single market. A state cannot have a full seat at the table unless it is a member of the EU. That is the short fact.

In certain areas, such as justice and home affairs, provided a state goes fully into them, it may have a seat at the table in discussions about those areas, but its seat at the table is not assured. The idea that you can be on the island of Atlantis in the middle of the Atlantic ocean but still be fully part of the system is for the fairies.

09:45

Ross Greer (West Scotland) (Green): Let us go back to the customs union. The Scottish Government’s desire to prevent a customs border at Gretna is entirely understandable. If we are optimistically assuming that a differentiated agreement is possible, a solution for that, in particular, needs to be found. My reading of it is that there is far more political will for, and importance placed on finding, a solution for the island of Ireland—for obvious reasons—and that it is hoped that that solution will be somewhat transferable to Scotland. However, there seems to be huge concern that no solution for Ireland has been found yet. Are you aware of any options that would be possible for the north and the Republic of Ireland, which might be transferable to a Scottish-English internal union?

Professor Muscatelli: I understand that the only solution for Ireland as far as the movement of people is concerned is to maintain a common travel area. However, as the Scottish Government’s paper points out, that immediately validates what the approach could be as part of a differentiated solution for Scotland. In essence, a differentiated approach to visas and the right to work could be enforced at the workplace as opposed to at the border. The border around the British Isles would be a common travel area—that would be secured—but there could then be differentiated arrangements. That is the only approach that could be taken if Ireland were in that common travel area.

There are examples around Europe of situations involving a border arrangement for goods—there is such an arrangement between Norway and Sweden, for instance. Norway is in EFTA, within the single market, but it is outside the customs union, yet trade works reasonably well within Scandinavia. Such a solution would need to be applied to Ireland and could, by extension, apply if a differentiated solution was agreed for Scotland. Exactly the same principles would apply.

Professor Edward: Perhaps I could address the question by giving an example. Let us suppose that there was a free-trade agreement between the United Kingdom and the United States that required the United Kingdom to accept hormone-treated beef. Let us also suppose that the EU continued to ban hormone-treated beef. I do not see how, without some form of customs control, we could avoid a situation in which hormone-treated beef was imported into Belfast, taken in a lorry to Dublin and transported from Dublin to the other member states of the EU. Therefore, the EU is going to require some form of border, although I do not know what form it might take. You cannot say that we are going to have a totally borderless situation in Ireland.

Once you start to evolve solutions to deal with that, to avoid a situation in which there is a form of hard border in Ireland, then you can discuss what the border is going to be like between Scotland and the rest of the UK. You cannot have an arrangement within the island of Ireland whereby the Republic of Ireland remains a full member state of the EU and say that that arrangement cannot be applied to Scotland.

The Convener: Emma Harper wants to come in on that point.

Emma Harper (South Scotland) (SNP): My question is similar to Ross Greer's question. Theresa May and Enda Kenny said this week that they want a "seamless, frictionless border" in the future, yet "Scotland's Place in Europe" says that it is apparently a red line for the UK Government that it will control the border. We have serious concerns about the movement of people, given the staffing of our national health service, as well as about all the trade aspects. Any additional comments on that would be welcome.

Dame Mariot Leslie: People often talk in a loose way about borders, jurisdictions and controls. When people say things such as, "It is a red line not to have a hard border," they are usually talking about the visible, in-your-face appearance of a line across a bit of geography. They are talking about not having something that has got two flags around a bit of road and people in uniform on either side of it. Sir David Edward is absolutely correct to say that some of the difficult questions about one set of controls applying in

one jurisdiction and another set applying in another cannot be avoided, and there will have to be a means of policing, controlling and enforcing that.

It seems to me that the British Government has a conundrum, which it is trying to deal with, and I simply do not know where it has got to yet. It has to find a means of implementing such controls as are necessary without doing so via a geographical line that is very visible and that therefore has a political connotation of its own.

As Professor Muscatelli said, there are examples elsewhere in Europe that could be drawn on, if anyone wanted to. Sweden and Norway, for instance, have an agreement that they implement each other's customs and controls of the movement of people. A Swede can implement them on behalf of Norway, and a Norwegian official can do so on behalf of the Swedes, because they have a bilateral agreement to do so. That reduces the element of visibility.

Some controls take the form of physical controls, such as lorries getting inspected, but they do not happen at a border crossing. A town or an office has been designated, and people who have goods in their lorry know that they will not be able to legally take them from one jurisdiction to the other without inquiring whether they have to have a goods control. If they do, the lorry goes to the depot and gets controlled.

It is perfectly possible—undesirable, but possible if we have Brexiting—to envisage controls like that between the north and the south of Ireland, with points of check that happen in other ways. A lot of the things that control criminality, fraud and movement of people, as well as contraband goods, weapons and so on, can take place via intelligence-led police action between two jurisdictions without somebody having to stand at a border and ask every car driver to wind down his window.

It seems to me that those sorts of solutions are going to have to be found in Ireland—although I do not know what the detail will be—and, likewise, between Scotland and the rest of the United Kingdom, to deal with the situation in which something is legal and part of the regulation in Scotland but illegal and not part of the regulation in England, or vice versa. There are ways of implementing those controls without having somebody standing at Carter Bar doing it.

Stuart McMillan (Greenock and Inverclyde) (SNP): Sir Ivan Rogers's evidence to the House of Commons European Scrutiny Committee this week was extremely interesting. He suggested that the first argument will be on what the UK and the EU are negotiating, with the EU wanting a

sequence of negotiations but the UK wanting everything to be rolled up into one.

Dame Mariot, earlier you suggested that the two-year timescale is unrealistic, because of the French and German elections. Last week, a few of us were in Brussels, and we were informed that very little would take place during the last six months of the two-year period, which is when the member states would have to ratify any agreement that had been put on the table. Therefore, the two-year period seems to have been cut down to a one-year opportunity for negotiations, considering what you have said today.

Dame Mariot Leslie: Everybody is playing hardball at the moment. In practice, if the EU institutions, the other 27 member states, the European Commission and the Parliament all agreed an end point for the decision, but the ratification and the implementation took a bit longer—if, as a matter of pragmatic politics, that suited, by unanimity, all the 27 member states—it would of course be possible to reach an agreement a bit later, with ratification and implementation beyond that.

Because everybody is playing hardball at the moment, I think that the politics of doing that is getting more and more difficult. However, it is not impossible that it might suit other people to avoid uncertainty and have a ratification process, and therefore an implementation process, that takes a bit longer.

What I find inconceivable is that it will be possible to agree the article 50 provisions for the UK exiting the EU and the totality of the detail of an arrangement for the future relationship between the UK and the EU—that has not yet been defined, let alone agreed and ratified—all in one period within the next couple of years. It is certainly true that the European Commission and many member states are saying that the processes have to be sequential rather than simultaneous—that is, the article 50 stuff must come first, with the future relationship stuff coming later. However, it is also true—Professor Edward is an expert on this—that the text of article 50 envisages that the procedure for leaving takes account of the future framework for the relationship between the exiting state and the rest of the EU.

It seems to me that the broad outlines of that future framework—what the rough heads of agreement might be, the areas that it ought to cover and its shape—ought to be part of the article 50 process. However, I am much more sceptical about how we get from there to the full agreement and whether there is any will or, indeed, political bandwidth and negotiating capability to have some transitional arrangement that stands between the two. As Lord Kerr and other members of the

standing council have often reminded the public, it is very rare for negotiators to concede in an interim agreement something that they think that they might be unwilling to concede in the final agreement.

Stuart McMillan: I have one more question. One of the issues regarding the discussions will be that of good will. As you said a moment ago, everyone seems to be playing hardball at the moment. We were reminded last week that the treaty of Rome was signed on 25 March 1957, and it was suggested that the UK should not trigger article 50 on 25 March. Is that something that you would recommend to the UK Government?

Dame Mariot Leslie: I think that all forms of gesture politics that suggest a lack of respect for other parties to the negotiation are to be avoided, and that is true of pretty much any negotiation.

Professor Muscatelli: Another aspect of gesture politics that it would have been best to avoid is the status of EU citizens currently residing in the UK being part of the negotiations. Frankly, it would have been a signal of good will to indicate that current EU residence rights would be maintained. I think that there would have been reciprocity on the other side very quickly and that that would have engendered some good will. The current situation with EU residence rights is another bit of posturing that I simply do not understand.

The Convener: On that point about good will, we have seen the recent hand holding between the Prime Minister and the new president of the US, who has been up front about his hostility to the European Union. How do you think that that will affect the UK's negotiating position with the EU?

Dame Mariot Leslie: Pass.

Professor Muscatelli: I do not want to comment on that particular point, but I will comment on a related point. One of the things that Lord Kerr pointed out in a lecture that he gave in Glasgow recently is that the atmosphere out there, whether we are looking at the United States or other parts of the world, is increasingly mercantilist and protectionist. As a country, we must therefore not think that life outside the EU will be a bed of roses. There are not many countries out there that will enter into free-trade agreements that do not put their main interests at the top. We should not kid ourselves that trade discussions or negotiations with countries outside the EU will be easier than those with the EU.

The Convener: Thank you. Do you want to come back in, Sir David?

Sir David Edward: I want to come back on one point, if I may.

The Convener: Of course.

10:00

Sir David Edward: It is on the question of Scotland's position vis-à-vis the EU and compliance. Remember that there is an EU certification mark—the CE mark. That says that a product complies with European regulations. Similarly, the free movement of professions—for example, the profession of doctor—is regulated under directives and, if the universities and the professions comply with the rules, a person who is qualified as a doctor in this country is entitled to practise in other member states.

It would not be impossible for Scotland to incorporate rules regarding products or the professions that enabled that certification to continue. However, I warn the committee that ensuring continued compliance requires manpower to ensure that the internal regulations comply and are adapted as the EU requirements are adapted and to ensure that the professional bodies and the producers of goods comply. It is a complex idea, but it is a way in which Scotland could continue to comply with the EU rules, at least in part, and have its products—possibly with a special Scottish certification mark—accepted in Europe.

The Convener: I presume that additional devolution of powers to Scotland would be required to enable Scotland to do that.

Sir David Edward: If necessary, yes.

The Convener: I thank our witnesses very much. I suspend the meeting briefly before our next panel of witnesses arrives.

10:02

Meeting suspended.

10:05

On resuming—

The Convener: We will continue our evidence taking. I welcome Michael Russell, the Minister for UK Negotiations on Scotland's Place in Europe, and Ian Mitchell, who is deputy director of external affairs at the Scottish Government. I invite the minister to make opening remarks.

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): Thank you for the invitation, convener. I am pleased to be back at the committee. I compliment the committee on the information and evidence gathering that it has been undertaking, and on the publication of its second report, which is a significant and important document in the debate that is taking place.

On 20 December, the Scottish Government published "Scotland's Place in Europe", which contains the Government's proposals to tackle the divergent democratic outcomes among the nations of these islands. Let me start by saying that it is a compromise set of proposals. The proposals require political implementation above all, and it is now for the UK Government to show its willingness to be flexible, to come to the table with a compromise and to understand the politics of the matter. The proposals that we made could benefit not only Scotland but the whole UK. The central feature of the approach is that it would not impose a hard border between the different parts of the island.

The public and parliamentary debate on "Scotland's Place in Europe" has been positive and—mostly—constructive. Voices from all sides of the political spectrum have welcomed the opportunity to engage with what has been described as the first credible proposal for a post-Brexit relationship with Europe.

The Prime Minister made a promise to give the matter serious consideration, and on Monday, at the joint ministerial committee plenary in Cardiff, a commitment was made to intensify the process of discussing our document and the Welsh paper in the run-up to the triggering of article 50, which is expected to take place within four to six weeks. I will be happy to answer questions about the JMC process and where we are in that regard.

I think that there was great disappointment that the Prime Minister did not wait to present her Government's outline of plans until after they had been discussed with the JMC (European negotiations), which took place 48 hours after she made her speech. There will be similar concern today when the Government's white paper appears—as, apparently, it will—that it has not been discussed with the JMC(EN) or even the JMC plenary. I hope that in the coming period we will see more effective engagement. Although time is running out, we still think that there is time for an agreement to be reached.

We do not think that the Prime Minister's hard Brexit position reflects the democratic will or the vital interests of Scotland. To decide to leave the single market in order to end the freedom of movement for UK and EU citizens is, in essence, to decline the first proposal in our document, which is that the UK should remain part of the world's largest single market. However, two other proposals in the document remain live and on the table, and I will be happy to discuss them.

Last week's statements by the Home Secretary appear to decline differentiated immigration rules, despite recommendations from House of Commons committees. We believe that

differentiated rules, which work well in other places, could work well in Scotland.

Last Thursday, this committee heard reactions to our paper from stakeholders; you have had further discussion today. I welcome the committee's genuine engagement with the proposal and look forward to discussing it with you.

There are hard choices ahead: our paper recognises the difficulty of those choices. I think that the same standard of discussion should apply to the UK Government as applies to ourselves. Many of the UK Government's assertions are not backed up by evidence of the quality that we have in our paper.

The Convener: Thank you, minister. I want to explore the intergovernmental relationships and the JMC process. The last time you appeared before the committee, you told us that you would keep us informed about your negotiations in the JMC(EN). You will be pleased to know that I have in front of me all the letters that you have sent to the committee since then; I want to make a couple of comments about them.

On 7 November 2016, 5 December 2016 and 12 January 2017, you wrote to us about forthcoming JMC(EN) meetings. It strikes me that, in each case, you seem to have received very little notice of the meetings. In each letter, you say—rather apologetically—that you are unable to provide us with a detailed agenda for the meeting. That suggests that the Scottish Government does not really have much influence over the timing or agendas of those meetings.

Michael Russell: The meetings cannot take place without us, which probably means that we have some influence on the dates, but it has proved to be difficult to set dates. We are beginning to plan ahead, but an added complication now is the situation in Northern Ireland. The presence of all the constituent parts is expected in the JMC process.

With regard to the meeting in January, it was agreed only late in the day that two Northern Ireland ministers should attend. Two ministers can attend if they choose to do so, but only to participate in discussions—they cannot take things away for a decision or make decisions. We will have to work out meeting by meeting whether that situation will continue through to the Northern Ireland elections on 2 March and the process of Northern Ireland attempting to put in place an Administration.

We are beginning to plan ahead, but we have not been given a clear timeline—for example, for the triggering of article 50. A piece of Commons legislation has now been passed at least, and according to the Prime Minister article 50 will be

triggered before the end of March. That gives us something less than 60 days. Not only do we not know the exact day, but we have not seen a single piece of paper that is either a draft of the letter, a paper that says what might be in the letter or a document that indicates what the options in the letter should be. In fact, as recently as January, it was not even on our work programme; we have made significant contributions towards ensuring that that will not be the case from now on.

Officials agree the agenda for each meeting in consultation with ministers. Although I would not want Ian Mitchell to go into enormous detail about how difficult that is, I am sure that he will say a word or two about the fact that the process is not without its frustrations. In addition, papers sometimes appear very late in the day, and it is quite a challenge to find the time to sort and go through them. The UK Government has not made the process easy, but we continue to do our very best to engage in the process with determination, and we will go on doing so—not least as an illustration of our good faith, because we are genuinely trying to get the best out of the situation. Ian Mitchell might want to say a word or two about the process between officials, which goes on all the time.

Ian Mitchell (Scottish Government): I will be brief. I agree that it is not so much the timing of the meetings that is the issue, but the lateness of papers and our not knowing what those papers will cover. That makes it very difficult to brief properly—and to think properly—before we go into the JMC meetings.

The other issue is the work programme. It has been an uphill struggle to get a work programme that involves genuine discussion of some of the key strategic issues that are of importance to us, especially given that article 50 will be triggered very soon. Those issues include the single market and the customs union. As the minister said, we have tended to find out information through speeches rather than from discussions with officials. Those are the two main issues.

The Convener: That is very concerning, especially in the light of the communiqué that was issued when the JMC(EN) was set up. The First Minister included in her letter of 4 November to the committee that communiqué and the terms of reference for the JMC(EN). I will go through those terms of reference and ask you whether you think that they are being adhered to. There are four terms of reference. The first is a commitment that the Governments will collaborate to

“discuss each government's requirements of the future relationship with the EU”.

Has that happened?

Michael Russell: There is discussion of papers that are submitted—papers have been submitted largely by the UK Government, although there has been a paper from Northern Ireland and there is now a Scottish paper and a Welsh paper—but the context is that the discussion is usually focused on positions, and further consideration is deferred to officials. One of the issues that I raised at the previous meeting, and which will come to the next meeting, is the need for an update on where discussions are.

10:15

The Convener: The second term of reference was that you would collaborate to

“seek to agree a UK approach to, and objectives for, Article 50 negotiations”.

Michael Russell: As I said, we have seen no paper or draft letter. The matter was raised at the JMC plenary with the Prime Minister on Monday. A commitment was made to intensify discussion of our materials in the run-up to that, but I cannot say that, from that meeting, there was any commitment or timescale for seeing the options or the document. I stress this point: at present there is no agreed UK position on triggering article 50.

The Convener: The last two terms of reference refer to the situation after article 50 has been triggered. They are that you will collaborate to

“provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations”

and

“discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.”

Looking ahead, given your experience so far, how confident are you that those last two terms of reference will be adhered to?

Michael Russell: We have seen some movement since the first meeting from the chair, David Davis. I pay tribute to him because I think that he has tried to ensure that he is a conduit both for what is discussed in the meeting to the UK Government and from the UK Government back into the committee. That is the role that he wishes to play. An extension of that role is to ensure that that happens during the negotiating process.

We and the Welsh Government have raised the issue of participation in the negotiations on issues of devolved competence. We have not yet entered into full discussion of that, although it is on the agenda. It is important that we have representation in that process.

The Convener: Have you received any indication as to the UK Government’s position on that?

Michael Russell: No.

The Convener: I believe that Tavish Scott has a brief supplementary question.

Tavish Scott: I have a number of questions, convener.

The Convener: In that case I will bring in Lewis Macdonald to be followed by Tavish Scott.

Lewis Macdonald: Thank you for those introductory comments. We understand that at the JMC plenary meeting the UK Government said that there would be intensified consideration of the proposals from the Scottish and Welsh Governments. What is your understanding of that and what is your expectation of the process? Is it the principle that is being considered, or is it the detail or practical issues?

Michael Russell: If I might correct you, I will say that it was not the UK Government that said that there would be intensification—that was the agreement of the JMC plenary, and it is in the communiqué from the plenary. There is not much in many of those communiqués; that is an exception.

It is perhaps worth noting that that was the first time in its entire existence that the JMC(P) met outside London. That tells you something about the nature of the process, and should be borne in mind.

On Tuesday, Mark Drakeford and I wrote to David Davis to say that we believe that the changes must be qualitative, not quantitative—it is not about meeting more often, but about the nature of discussions. The Scottish Government has said very clearly, first to the Secretary of State for Scotland last Thursday—in a meeting that he sought but to which, alas, he brought nothing—that we want to see what is on offer. In other words, the UK Government has “Scotland’s Place in Europe”, which contains concrete proposals. We want to know what the UK Government says: we want to know whether a particular proposal will be accepted or rejected and whether a proposal should be the subject of bilateral discussion between me and David Davis or someone else.

What we need now, as the article 50 letter is drawn up, is a commitment to say—whether that is in the letter or subsidiary documentation—at the very least, that the issue of a differentiated solution will be put on the agenda for negotiation with the other 27 countries. Even if you believe that that cannot be achieved, it is the right thing to do because that would place the issue in the discussions, allowing the decision to be made in

that context, rather than ex cathedra by the Prime Minister or the Tory UK Government Cabinet.

We expect that to happen and it is what we want to happen under intensification—we would be talking about the detail of the document as opposed to having talks about talks. We have had a lot of talks about talks and we are done with those. We need detail.

Lewis Macdonald: You mentioned putting the differentiated propositions into the body of the negotiations with other member states. Surely, as a first stage, you would expect a detailed discussion, going beyond broad principles, within the JMC. I am keen to understand what has happened and what has not.

Michael Russell: I would like to have that detailed discussion, but in my view that should clarify the issues that are to be placed into negotiation, or get the response “No, we are not going to do any of this—we do not want to do any of it.” There has to be discussion about what is in the paper, as opposed to the means by which we sit down to discuss, which has been the burden of the discussion in too many meetings.

Lewis Macdonald: A central point in both your proposition and that from the Welsh Government is access to the single market and what that might look like.

Michael Russell: It is membership of the single market.

Lewis Macdonald: That is the point that I was going to make. The Welsh Government's paper talks about

“participation in the ... Single Market”,

but defines that as “full and unfettered access”. That is different from what is in the Scottish Government's paper, so I am keen to understand how you see that difference and how the different positions can be moderated within the context of the JMC.

Michael Russell: There is a spectrum of positions, which are complementary but not exactly the same, and there is the use of language to consider. The language in this bedevils the matter. Membership of the single market, by our definition, could be achieved in two ways—by being a member of the EU or by EEA membership through EFTA. Either would constitute membership—our proposal makes it clear that we believe that the EU is the right place to stay. For a variety of reasons, that does not appear to be the UK Government's view. In the circumstances, membership through EFTA and EEA is the right thing for the UK. Apparently, the UK has rejected that, so now it is for Scotland.

The situation is different for the Welsh Government. The Welsh vote was different and there are different circumstances prevailing, but there is a complementary position because it is seeking some form of “special status”. Those are the two words that are used by Sinn Féin in its paper, which we should not forget. It does not have the status of a Northern Ireland Executive paper because there is no agreement in the Northern Ireland Executive—indeed, it does not exist any more. I recommend Sinn Féin's December paper. It is short and talks about “special status”.

All the proposals are, broadly, in the same space. Our paper contains the most detailed and clearest proposal of how access to the single market could be achieved, but the Welsh paper has much to commend it and, of course, it is a joint paper between the Welsh Assembly Government, which is Labour with one Liberal Democrat member, and Plaid Cymru, so it has a very substantial level of support.

Lewis Macdonald: Yes, indeed. On the substance of the proposals in the Scottish Government paper, in the previous evidence session with members of the standing council on Europe, the compatibility or incompatibility of membership of the European single market for Scotland with its remaining fully part of the UK customs union was raised. One of the answers from Professor Muscatelli was that, in order to avoid divergence, some tethering of UK business regulation to that of the EU would be required. Would the ability to make that work depend not just on buy-in by the UK to the idea that there should be a differentiated solution, but on the whole UK approach to regulation of business, and what flows from that, being tied to EU regulation?

Michael Russell: Broadly, yes. That is, strangely enough, what UK companies will find themselves having to do. There is, essentially, the issue of parallel marketability, which is addressed in the paper. If there are two ways of operating, how can they operate seamlessly? The answer to that is that Scotland and the UK inherit the same thing at the same time. On day 1 we would have the same position—the level of variation from that position is the issue at dispute.

Our position is that we would require to keep regulation within the European context. There are indications that the UK Government might want to decrease significantly social protections, employment defence and safety standards, which is a very interesting issue. In reality, if the UK is going to continue to sell into the EU as it exists, it cannot do that. It will have to observe EU requirements if it is going to meet whatever tariff arrangements it comes to. Perforce, there is an

enormous pressure on the UK to keep the regulatory system the same.

That is why the overblown talk of “freedom” is pretty nonsensical; things will not work in that way. The reality is that the regulatory systems would be together. If the rest of the UK began to fall off in that regard, that would have severe implications for its economy, whereas Scotland would be able to continue to operate as it operates at the moment and, of course, to sell at a higher standard elsewhere.

The issue of future regulation is interesting. I have some information that has come to my attention only in the past 24 hours that I would be happy to provide to the committee. It relates to the visit to the UK that was made by the United Nations special rapporteur on human rights and hazardous substances and wastes, between 17 and 31 January. With regard to regulation about human rights as it relates to the handling, storage and use of hazardous substances and wastes, he drew the conclusion that Brexit poses a real threat. He said that without a detailed plan, Brexit appears to open “a Pandora’s box” that would pave the way for

“deregulation and regression from human rights standards.”

He went on to point out that the UK Government appears to be moving in that direction. That is bad enough for citizens, but it would be disastrous for trade, because no company will wish to trade with the UK if it feels that there are dangers with regard to dangerous substances and things of that nature. There needs to be an understanding that there will be a requirement on the UK no matter what happens.

Lewis Macdonald: On that basis, reflecting some of the evidence that we heard previously, if the UK enters into trade deals that allow the importation of goods that are not permitted within the European single market, what will happen? How will that impact on any differentiated arrangements that might exist?

Michael Russell: It is clear that there would be a major impact on the rest of the UK’s ability to trade. Such an action would damage its ability to trade. It would not damage the trade between Scotland and the rest of the UK per se, but Scotland would still be observing the highest standards and, therefore, doing not only the right thing, but the thing that gives it the best access, because it would be doing things well. That has tended to be what works. It is a bit of a fallacy to say that what works is slashing protections or terms and conditions and just getting on with it. Unless the intention is to make the rest of the UK a low-cost, sweat-shop manufacturing nation, it will not do that—in fact, the potential for that is

probably non-existent, given what happens in the rest of the world.

A great deal of this is difficult to predict, because the UK does not appear to have a consistent or clear view about how the new situation is going to work for it, but we can read the implications. If the UK refuses to accept the existing standards, it will suffer economically.

The Convener: I ask that questions and answers be kept as brief as possible, so that we can get in as many questions as possible.

Tavish Scott: Let me try to get some facts. Did the Prime Minister say at Monday’s JMC meeting that immigration was the top priority of the UK Government?

Michael Russell: I do not know whether she said it on Monday. I have heard it so often that I do not think that I am in any doubt that there are two priorities: migration and judgments of courts outside the UK.

Tavish Scott: But did she lay out in crystal-clear terms her Government’s formal position to the other Governments in the UK? Has she ever done that at the JMC?

Michael Russell: That has been laid out at the JMC. I cannot say whether she did it. We do not normally attribute individual views, although on this occasion I would be prepared to. I have heard that laid out in very clear terms.

Tavish Scott: She said it in her Lancaster house speech, so one would think that she might say it to the JMC.

Michael Russell: She might well have said it; I might be inoculated against it now.

Tavish Scott: It is probably best that you are not.

Is business saying enough on what it judges to be the consequences of an exit from the single market? I am not talking about Scottish business, because we know what the position of Scottish business is. In a UK context, are you aware of what business is saying? Is it saying it visibly and authoritatively to the UK Government?

Michael Russell: That is an interesting question. Yesterday, I had a meeting with a representative of the UK Confederation of British Industry, who was in Edinburgh to give evidence to the House of Lords EU Select Committee, to which I also gave evidence.

The CBI published an interesting document, which lays out its requirements. It is particularly concerned about the free movement of labour—or, rather, barriers to employment and to trade. However, there is a recognition that, although it wishes to work closely with the UK Government

and us—the CBI representative made that commitment and the discussion was positive—it does not appear that it is being listened to on some of its key concerns. Therefore, as I said to the representative and have said to a number of business gatherings, the CBI needs to be very clear and explicit about what will and will not work. If the UK Government continues to hold its current position on migration, it will cause very considerable economic damage.

10:30

Tavish Scott: Have the financial institutions in Scotland that are aligned to the city of London made that clear?

Michael Russell: They continue to make a number of things clear but they seem to be reluctant to lay down the line that they feel that they need to follow. I understand that, because it is such a fluid situation. However, for many of them, there are severe difficulties without passporting. It also goes back to free movement, which is a sophisticated thing. It is not just about labour moving from one place to another; it is about the right to go and open branches or premises, to start companies and for individuals in the creative and digital industries to work elsewhere and to do so as if going into the next town. It is really important to make that point.

The second point that they need to make—that the whole of Scotland needs to make—is that 90 per cent of population growth in Scotland in the next generation is predicated to come from migration. We write that off at a stroke if we do not have free movement. Given the positive net benefit of migration in Scotland, which is entirely provable, we are also looking at a decline in the economy because of that attitude.

Tavish Scott: However, for Scottish and UK large business, whatever happens with Brexit will be straightforward because they will just set up a European operation and run their business out of Europe. Might not the smaller businesses, which do not have that opportunity, be much more damaged?

Michael Russell: As you know, major banks are considering the situation and already setting up subsidiaries or companies in Ireland or moving to Frankfurt. On the digital start-up side, there were advertisements in the media last week from France that said that people could have residency and a special deal if they based themselves in Paris. That will happen and those who are not mobile, by which I mean smaller companies and older people—not that I am including you in that, Mr Scott—will pay the price.

Tavish Scott: I had a mobile discussion with the Faroese Prime Minister in Lerwick on

Tuesday. He said that there was no disadvantage to being outside the European Union if the economy was based on selling fish. That is the case for the constituency that I represent. What will the Government do about that?

Michael Russell: Sections of my constituency have an economy that is based on selling fish. I recognise their concerns as being profound. As Mr Lochhead knows, the common fisheries policy did not favour many Scottish fishermen as a result of actions of the UK Government many years ago. I am happy to discuss, and have been discussing, with fishing interests how we take that forward.

The reference to fishing in the Prime Minister's speech was interesting because she referred to it as a trade-off deal with the Spanish. That is the great fear. It would be appalling if we saw a repeat of history. I am happy to see Scottish management of waters. That is not only possible, but is what would happen under the EEA option, because EEA membership does not involve fishing or agriculture.

Tavish Scott: Indeed, but the point that the Faroese Prime Minister made is that the Faroese economy is growing at 9 per cent per annum. We can only hope for anything like that. That growth is based on being outside the EU with fishing as the major export around the world, including to Europe. There is no downside.

Michael Russell: I have met Faroese representatives and been to the Faroes and understand that. I do not wish to diminish the importance of the Faroes, but their economy is not our economy.

Richard Lochhead: I detect a lot of frustration about your dealings with the UK Government over the biggest issue that faces future generations and that we face at the moment. Theresa May's speech referred to her wanting Europe to take into account differences throughout the continent and everyone to use their imagination and ingenuity to find solutions to address how each nation's differences could be taken into account. Has that principle been reflected in the UK Government's dealings with the Scottish Government and other devolved Administrations?

Michael Russell: No—demonstrably, it has not. The UK Government shows a lack of understanding of the UK constitution in that the approach appears to be that the UK constitution is uniform and there is no divergence, whereas, of course, devolution is differentiation—the settlement in Scotland is different from the settlements in Northern Ireland and Wales. The Act of Union is an act of differentiation, because it sets out the things that will not be the same. There is a lack of understanding of what devolution is

about and what the United Kingdom has been about so far, and that is a problem.

The UK Government also does not recognise the diversity of arrangements that the EU has, although it pays lip service to them. For example, France has arrangements for its *outre-mer* territories. Even within these islands, the arrangements of the Channel Islands and the Isle of Man are very different; they are in the customs union and, because of the nature of that, there is *de facto* membership of the single market, although it is not quite the same. Those are different circumstances from the ones that prevail in other sub-state arrangements in Europe.

Europe has also been very flexible. If these points are put into negotiations, they will be seriously considered and—if there is the political will—there will be the possibility of finding that solution. That is the reality of what happens in Europe. Therefore, if Theresa May puts these points on the table, the likelihood is that we will be able to find a resolution.

Richard Lochhead: The other debates that are pertinent to this relate to powers automatically being repatriated from the EU to Scotland post-Brexit and extra powers being built into the devolution settlements. Have we had any positive response from the UK Government on the automatic repatriation of all the powers to the devolved Administrations?

Michael Russell: No. The Prime Minister and a range of other ministers have given a commitment that the devolved Administrations will not lose any of the powers that they presently have. That is not an overwhelming promise because, if we were to lose any of them, things would be even worse. However, when the discussion turns to the automatic repatriation of those issues that lie within the devolved competencies—Michael Gove said that the Scottish Parliament would be immensely strengthened by all the powers that would automatically come here—the attitude has changed very substantially. What is now being said is that there needs to be a discussion of the right place for those powers to go. The question is: who decides where is the right place?

Also, we are told that there needs to be a discussion about frameworks. You are very familiar with the European framework for agriculture, and the implication is that we would have a UK framework—those powers would transfer to the UK and the devolved Administrations would not get any additional power. Of course, the European framework operates on the basis of a Council of Ministers and co-decision making between the members, but there has been no discussion of how a UK framework would operate.

I think that there is considerable concern about what is being said even about powers within devolved competencies, let alone, as the paper indicates, other areas where additional devolution is required. Nevertheless, additional devolution will be required for two reasons: first, because leaving the EU will change everything, therefore there needs to be a rethink about the devolved settlement; and, secondly, because, if the transfer of those powers goes ahead, there will need to be other changes to the devolved settlement to allow that to take place, including Scotland being given a distinct legal personality such as Flanders and Wallonia have, which we think is the best way to implement that.

Richard Lochhead: I have one final, brief question. What you are saying is very alarming, and everyone in Scotland should be extremely concerned to hear it. Given your frustrations over the lack of notice of papers for meetings, dates of meetings and so on, in addition to the other frustrations that you have expressed, do you feel that the idea of a bespoke arrangement for Scotland is being taken seriously by the UK Government? Or do you feel that you have been strung along, that the UK Government is going through the motions and is being seen to listen to the devolved Administrations but has no intention whatever of doing anything?

Michael Russell: Well, the engagement is still taking place. To that extent, I want to see it through in the hope that it will produce the results that were promised. The Prime Minister said—as the convener has indicated, it is also in the terms of reference of the negotiations—that there requires to be an agreed position on triggering article 50, and that is what we are endeavouring to get to. It is perfectly possible to have a solution that is based on what is in our proposal. I am still discussing and negotiating.

The lot of any human being is to be frustrated and annoyed from time to time, and not to be entirely pleased with what is taking place. However, there are other advantages, and there are times when we think that things are going well. I do not see this process as going well, but I am going to stick with it in the hope that we will get something out of it.

Emma Harper: You mentioned that engagement is taking place, and that the Secretary of State for Scotland, David Mundell, was here in the Parliament last week. Can you clarify that? Did he call the meeting? What was its purpose? Was there an advance agenda? What were the outcomes and the goals? Where was the fanfare when the secretary of state was coming?

Michael Russell: I am always happy to see David Mundell. He is a former member of this Parliament and I have always got on well with him.

If he wants to chew the fat from time to time, I am happy to do so. He was very keen to have a meeting with Derek Mackay, as cabinet secretary with overall responsibility for the constitution, and with me, specifically to discuss devolved matters in “Scotland’s Place in Europe”.

I had assumed that, in those circumstances, Mr Mundell would come along with a view of our proposals, but no such view was forthcoming. He talked about the need to talk about them. That there is such a need is true, but that did not advance things very far. He told us that there would be a white paper on the forthcoming great repeal bill, and I have formally asked for an advance copy of the draft, as it is so important to us. No doubt we will touch on the great repeal process at some stage.

Mr Mundell indicated to the press afterwards that there would be a legislative consent motion on the great repeal bill, although the formal position on that is that there is no decision on whether there is to be an LCM or whether there is to be Scottish legislation. That is the position that we are in, in informal discussion.

Apart from that, he came out of the room and there were cameras outside, so presumably he had told the press that he was here. He talked to the press and I talked to the press, but I do not think that it took us an inch further forward.

The Convener: Do you think that it was a stunt?

Michael Russell: I cannot see much point in such a stunt, as Mr Mundell had nothing to say but, if he wished to while away an hour in my and Derek Mackay’s company, who is to blame him?

Ross Greer: To be honest, minister, I am absolutely no clearer about what “intensification” means. That is no criticism of you—I do not believe that you are any clearer about what the UK Government means by “intensification”. I am pretty clear about what you want it to be.

Looking at a specific detail, if we assume that a differentiated agreement for Scotland, with some kind of compromise, is still possible—I do not personally believe that, but let us be optimistic—a key part of it involves Scotland being in the single market with the rest of Europe, but in a customs union with the rest of the UK so as to avoid a customs barrier at Gretna.

I asked this question of the expert witnesses that we have just had before us. Have there been any discussions between yourselves and the UK Government regarding its attempts to find a solution for the island of Ireland? We have seen this again this week with Theresa May and Enda Kenny: there was a clear will to find a solution for Ireland, which, it seems to me, could in some way be transferred to Scotland.

Michael Russell: Yes. We are not party to the discussions on Ireland—clearly we would not be party to them—although they crop up in discussions at the JMC and elsewhere. Our view is that very special circumstances prevail in Ireland, and those circumstances need to be understood and respected. Nonetheless, if there is a technical means of producing a completely porous border on what is an external border with the EU and with the customs union—as, presumably, Northern Ireland will not be in the customs union if England and Wales are not in it—and if it is possible to implement that based on freedom of travel, which has been established for a long time, it should be perfectly feasible to do it elsewhere.

Ross Greer: Did you have any discussions with the Northern Ireland Executive, prior to its dissolution, or with the Government of the Republic of Ireland regarding proposals or solutions that they were thinking of and that they thought viable?

Michael Russell: The position of the Government of the Republic is that it is not pre-negotiating with the UK as a member of the EU. However, it has made it clear that the matter is a priority. It is also clear that the EU would be guided by the position of the Irish Government on the matter. That, essentially, is where we are on that.

We have not discussed the proposals of the Northern Irish parties in detail. We have, however, supported the cross-community initiative in Northern Ireland to maintain the open border, and we will continue to do so. It is not our place, and I do not think that it would add anything to the discussion, were we to be involved in that initiative, except to support it. However, we would make the point—fairly, and without overdoing it—that, if a solution can be found in Ireland, surely it can inform a solution in this island.

Ross Greer: Thanks. I have one final brief question. At what point has time run out on that? If the UK Government is not making it clear what intensification means—if it is not genuinely intensifying those options—at what point has time run out on a solution for Scotland that fits with the proposals that you have laid out?

10:45

Michael Russell: The terms of the communiqué say intensify in the run-up to “triggering Article 50 and ... thereafter.”

Intensification means a step change in the process and I suppose that we will know it if we see it. Like you, I am not entirely sure that I know what that beast looks like. Mark Drakeford and I are trying to come to a common agreement with

David Davis about the nature of the discussion that we have when the JMC next meets, so that we can do things differently.

The crucial moment in that is the triggering of article 50. That will tell us not just the starting point that the UK has—it may be high level, we do not know—and also how we will have been involved in that. If the UK Government submits and publishes an article 50 letter which JMC(EN) has not seen and has not been involved in discussing in whatever way—locked in conclave for days to look at it—I think that that will say something pretty significant. That is what happened with the Prime Minister's speech on the single market and with the white paper. If it were to happen a third time—particularly in the JMC(EN)—I think that we would say to ourselves that there is no genuine attempt here. That is a crucial moment.

There will be other crucial moments that come along. This is a very fast-moving and difficult situation, so we do not know. However, I think that that one stands out.

Rachael Hamilton: I want to ask you about Charles Grant's comment that it would be extremely difficult for Scotland to stay in the single market if, as indicated by the Prime Minister, the rest of the UK does not stay in the single market. We have touched on the points why legally, technically and politically, it would be very difficult for Scotland to stay in the single market, the basic point being that we would have one set of business regulations for the rest of the UK and one set for Scotland. There would possibly have to be customs checks at the borders. How do you think that that might work for Scotland?

Michael Russell: I do not think that there would have to be customs checks on the borders—I have made that point. I have given an indication in my answer to Lewis Macdonald of where I think the solution to that lies. It lies in the force of the European market in relation to the rest of the UK. I know that it is not my place to ask a question, but I might gently put the issue back to you: how difficult do you think that it will be for the United Kingdom to negotiate tariff-free access to the EU, given the position that it is in now? I think that the answer to that is: very difficult indeed.

I do not think that we have made any secret in the paper of the difficulties of the position in this negotiation. It is important to recognise the extraordinary difficulty that the United Kingdom has put itself in with regard to those matters. It will, therefore, require a great deal of imagination and flexibility, just as our proposal will require imagination and flexibility. I agree with Charles Grant; I have talked to him on many occasions in his position as a member of the council of experts.

It will be difficult, but the United Kingdom has put itself in a most extraordinary position in which it is thinking of—if I may quote “Alice's Adventures in Wonderland”—a dozen difficult and “impossible things before breakfast.” We just have to accept that we have been landed in this situation, which we did not vote for, and we are going to have to be imaginative, logical and thoughtful in bringing forward proposals, which is exactly what we are doing. We will try to resolve those difficulties, just in the way that I imagine the UK Government wishes to do with regard to its difficulties.

Stuart McMillan: On the two-year timescale, earlier this morning, Dame Mariot Leslie suggested that really detailed discussions will not take place until after the French and German elections. Further, when a few of us from the committee went to Brussels last week and met a number of individuals and organisations, one of the points that came back a couple of times was that the last six months of the two-year period will be difficult for discussions, because those six months are when the deal has to go to the member states for ratification. In theory, therefore, the two-year window for discussions might actually be cut down to one year. Do you think that that is a realistic assessment of the situation?

Michael Russell: Yes, but we have to segment what is going on. There is a set of discussions to be had about the technicalities of the divorce—the money aspect. Those discussions will not be easy and will require considerable negotiation. Sir Ivan Rogers's evidence to a House of Commons committee yesterday indicated the scale of what the EU demands will be. I think that the UK Government hopes that the discussions on the money aspect will take place in parallel with discussions about what a future framework might look like. However, they might not take place in parallel. The best way in which to get a solution with regard to the money is to refuse to talk about anything else until that is sorted.

I think that, when the discussions get into the technical details of what will happen next, it will be very difficult to reach a conclusion. The final six-month period to which Stuart McMillan referred is also the period in which the European Parliament will vote on a yes/no basis. That vote will take place in the last six months of the present parliamentary mandate, as it is called. History shows that, in that last six-month period, the European Parliament is inclined to do anything, so that is a really difficult period.

I agree with Sir Ivan Rogers, who is an expert on the matter. Dame Mariot Leslie knows the system very well too. They have made it very clear that the timescale is not realistic and that things will take a lot longer. The question then is how long the transition period will be. If there could be

heads of agreement on where things are going, agreement could be achieved on what a transition period might involve. However, there will also be the parallel process of the repatriation of legislation, which is not a small process. The Government has announced that there will be a great repeal bill, but we now know from the Government that there will be quite a number of other bills that will deal with the detail of that. There will therefore be a pretty big legislative logjam to get through so that, on the day of exit, whenever it is, there will not be a gaping black hole where there is no legislative provision.

Those are all tall orders at the present moment. Even the most generous commentator says that there will have to be something at the end that is unresolved. That would be a problem, depending on what the something is and how it is handled. In our terms, it would be a problem if it meant that there would be a hiatus in our membership of the single market, which is why we have produced proposals to ensure that that does not happen.

That is all about the macro level, but I will just touch on the micro level. Many organisations are dependent on European funding through a range of things, including the Scottish rural development programme and infrastructure funding. I hope that tomorrow, weather permitting, I will be on the island of Luing in my constituency, where there has been substantial discussion about the possibility of a bridge. The obvious places to seek part of the funding for such a bridge would be rural development funding or infrastructure funding. However, no one has any idea what will happen post 2019 to such funding. Even with the best will in the world, there will be a hiatus while somebody works out where that money will come from, and that issue will trickle into every aspect of our lives. That is why my view is that Brexit is a foolish thing to happen. However, it is happening, and it is therefore important that we try to ensure that Scotland is protected to the best degree possible.

Stuart McMillan: That takes me on to my second question, which is on the transition period. It was suggested last week that the longer the transition period, the less likely it becomes that Brexit will take place. It was said that there could potentially be a transition period of up to 10 years but that the EU member states would not agree to that or to the UK keeping similar arrangements to those that it has now with the EU for that length of time. In terms of the transition period, how do you see the discussions taking place? Have you had any discussions on that with the UK Government through the joint ministerial council?

Michael Russell: No. The transition period has been mentioned as an issue that we will have to discuss, but it is not yet on the table to any degree.

I have heard an opinion being expressed in some Tory circles at Westminster that says that, if transition was allowed to take place in that way, that would just give the civil service and others encouragement to think that we will not be leaving the EU, and that, therefore, what has to be done is to ensure that, if there is a transition period, it is as short as possible so that there is no illusion about staying in the EU. That is pretty brutal, because industry will require a much longer transition period.

The political dynamic means that some harder Brexiteers are pushing for a very limited transition, and the reality is that the hardest Brexiteers—a group that no longer just includes UKIP, although at times it looks as if UKIP is running the UK Government—are saying, “We should get out as quickly as we can.” I heard one UKIP MEP say that it is just like leaving a golf club—you just send in a letter saying, “I’m off and I’ve stopped paying my subscription.” At best, that could be described as a naive view.

Stuart McMillan: On the point about funding, it has been suggested that the UK Government’s financial liabilities will be between £40 billion and £60 billion. Do you think that that is a fair assessment?

Michael Russell: I have to say that I have no idea whatsoever. Not only is that above my pay grade, but it probably has an element of complexity that none of us in the room—with the exception of Professor Keating—could understand. However, that is being talked about as a ballpark figure and, as Ivan Rogers mentioned it yesterday, I suspect that it probably has the ring of truth.

There is also the question of what we will go on paying. That is essentially the divorce settlement, but we have to consider whether we are going to stay in, for example, horizon 2020. If so, there is a formula for paying for that. Are we still going to be involved in things that we can subscribe to? We then get into murky waters.

The Convener: Minister, you talked about the blinkered nature of some of the Brexiteers that you have encountered. How far up does that attitude go? In Europe, it was pretty clear to us that all the Europeans were looking at a sequential arrangement and that they did not think that a free-trade agreement was going to be agreed within two years. As someone said earlier, that is for the fairies, but my discussions at the UK level suggest that people honestly believe that they can agree a free-trade agreement within two years. There seems to be a complete disconnect on that.

Michael Russell: I hope that, at the most senior level, there is a level of reality on that. Transition will be required—there is no question about that.

Indeed, to be fair, some very senior figures—I am not going to name them—whom I heard five months ago talking about there being no transition now seem to be reconciled to transition, so I think that there has been a change.

The length and nature of transition are important. There is no great repeal bill yet, and we are, at the very most, two years away from leaving. There is a massive job to be done to put in place a great repeal bill, whose provisions have to come into effect as the clock strikes midnight when the UK leaves the EU. Otherwise, there will be whole swathes of national life where nobody has the faintest idea about what is going to happen and there will not necessarily be law that covers them.

That is a big issue for this Parliament, too, and the work that will be required to tackle it over the next two years will be considerable. Even with an LCM, there will be a major workload for this Parliament to take that forward.

The Convener: On the transition that you say will have to happen, have you had any indication of whether the European Union would agree to transition? In particular, would it agree to it on the UK's terms? Presumably, the EU is not going to agree to a transition that gives the UK all the advantages that it has at present.

Michael Russell: We are hearing a great deal from the UK Government about what it wants, but we are not hearing anything much, apart from principles, on what the EU's response is. That is significant in itself. I suggest that the harmony between the EU 27 continues to be in place in relation to what their proposal will be.

The answer to your question is that we do not know. Transition is to everybody's advantage if it can be made to work, but it is clear that the principle that no country that is not in the EU should get terms that are better than or equivalent to those of a country that is a member will govern both this question and the whole process. That needs to be borne in mind, too, because some of the rhetoric, even in the Prime Minister's speech, seems to imply that nothing will change in relation to the advantages, and that cannot be true.

Lewis Macdonald: On that point, surely the fundamental thing that happens at the beginning of the transition is that the UK loses its political participation in the decision making, so there is immediately a loss relative to the current position. I presume that a transition arrangement starts with, for example, the single market and other arrangements being in place, and the judgment and the negotiations are then simply about how far and how quickly they will cease to apply.

Michael Russell: Yes, that is a fair assessment of how it might work. The question is how quickly

we could move to other arrangements with regard to, for example, the business of trade. I noticed yesterday a significant concession by Liam Fox who apparently now says that the £1 trillion export target cannot be met.

11:00

Yesterday morning, I read the Hansard report of the article 50 debate and I was struck by the absolute absence of detail on where these alternative trading opportunities lie. Never mind the £1 trillion target; it is difficult to find any specific, concrete examples of a trading opportunity that could be taken up outside the EU that could not be taken up inside the EU. That is a crucial issue that the committee might want to think about, because the rhetoric around this—and it was true in the article 50 debate—is that there are these extraordinary pots of gold that lie just outside our reach because we are tethered to the EU, and the moment that we are not tethered, they will fall into our hands.

The only example that I have heard quoted in recent years is India and access to the Indian market because of the length of time that an India-EU trade deal has taken. However, it has been absolutely obvious from the Prime Minister's visit onwards that the condition of a deal with India will lie in the area of migration, particularly the migration of skilled younger people who want to get experience in other countries. If there is no concession on migration—I refer to Mr Scott's earlier point on the primacy of migration in UK Government thinking—there will be no deal. Therefore I remain very sceptical.

Fishing is a separate area where there is a clear beneficial advantage for the fishing and catching community—although not necessarily for the processing community—but it is very difficult to find any other advantages, and I do ask for them.

The Convener: Thank you very much, minister. Before you go, I want to check a point of detail. In your last letter to the committee, you said that the next JMC(EN) meeting would take place on 8 February. Can you confirm that? Also, do you expect another JMC(EN) meeting after that, given the speculation that article 50 will be triggered on 9 March?

Michael Russell: There is one meeting on 8 February and there is another pencilled in for 16 March, I think—the middle of March, anyway. I do not know whether that March meeting will be brought forward. I know no more about the date of triggering than anybody else does, which perhaps speaks volumes. I have seen the speculation that article 50 will be triggered on 9 March and the speculation that to trigger it towards the end of March would coincide with the anniversary of the

treaty of Rome, which is seen as the wrong thing to do.

There is certainly a meeting next Wednesday and there will be another one in March. There continues to be official engagement and I would expect to have a number of bilaterals in that intervening period given that—as Ross Greer indicated—whatever the word “intensification” means, it should probably mean more bilateral engagement on the specifics of the paper. Ian Mitchell might want to say a word about “intensification”—I know that he has a view on it.

Ian Mitchell: As I pointed out earlier, there have been frustrations with the process but I think that it is fair to say that Monday’s JMC has given officials a spur to engage on a bilateral basis and this week that process has started—you could say that it has intensified. We are certainly making good efforts with UK Government officials leading into next Wednesday’s meeting and beyond that, so engagement has intensified.

The Convener: Okay. Thank you very much for that. We will now move into private session.

11:03

Meeting continued in private until 11:28.

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