



OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Relations Committee

Thursday 5 October 2017

Session 5



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Thursday 5 October 2017

CONTENTS

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WITHDRAWAL FROM THE EUROPEAN UNION (NEGOTIATIONS)..... 1

**CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
23rd Meeting 2017, Session 5**

CONVENER

*Joan McAlpine (South Scotland) (SNP)

DEPUTY CONVENER

*Lewis Macdonald (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Jackson Carlaw (Eastwood) (Con)

*Mairi Gougeon (Angus North and Mearns) (SNP)

*Ross Greer (West Scotland) (Green)

*Rachael Hamilton (Etrick, Roxburgh and Berwickshire) (Con)

*Richard Lochhead (Moray) (SNP)

*Stuart McMillan (Greenock and Inverclyde) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lord Kerr of Kinlochard

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 5 October 2017

[The Convener opened the meeting at 10:00]

Withdrawal from the European Union (Negotiations)

The Convener (Joan McAlpine): Good morning, and welcome to the 23rd meeting in 2017 of the Culture, Tourism, Europe and External Relations Committee. I remind members and the public to turn off mobile phones. Any members who are using electronic devices to access committee papers should ensure that they are switched to silent.

Our first item is an evidence-taking session on the article 50 withdrawal negotiations with Lord Kerr of Kinlochard, whom I welcome to the committee. He has indicated that he will not make an opening statement, so we shall proceed immediately to questions.

Lord Kerr, you are often referred to as the man who wrote article 50, as you were secretary general of the convention on the future of Europe. Will you explain the thinking that led to its drafting? Now that it is being enacted for the first time, do you consider that it was drafted correctly? Does two years leave enough time to negotiate the withdrawal agreement? Is there anything that you would do differently now?

Lord Kerr of Kinlochard: Mine was the pen that did the first draft. In that sense, I wrote it, but it was written collectively by a convention of 212 people, who approved it unanimously, so I cannot claim all the credit or discredit. The product of the 2002 to 2003 assembly in Brussels, of which I was secretary general, was rejected in referenda in France and the Netherlands, but bits of it found their way into the Lisbon treaty and so into the operational treaty that is the basis of the European Union now. Article 50 was one of those bits.

In the convention, article 50 was not particularly controversial. The diehard federalists said that it was undesirable and most people thought that it was unnecessary. Very few could contemplate any member state being mad enough to want to leave the EU. Article 50 was popular with the president of the convention, Valéry Giscard d'Estaing, and with people who took the view, which we wrote clearly into the treaty, that the EU was a voluntary partnership of sovereign states that decided that, in limited areas, which we defined more clearly,

the central institutions should be given powers, which they could not extend other than by unanimity.

The essentially voluntary nature of the European Union seemed to require that there should be a procedure for seceding from it if a member state changed its mind and decided that it did not want to be a member. Of course, that was actually unnecessary because any member state could have left at any time. If it stopped paying the bills and turning up at the meetings, people would, in due course, notice that it seemed to have left. That could be done then, but it cannot be done legally now, now that we have an article in the treaty. However, the idea that there should be symmetry between an accession clause and a secession clause was part of the emphasis on voluntarism.

The time limit was introduced because people were concerned about the Eurosceptic argument that the member states were galley slaves tied to their oars and rowing to an unknown destination with no way of getting out. One of the purposes of article 50 was to defeat that argument. The sceptics argued that, without a time limit, a state would be forever ensnared in a web of negotiation. You might say that you want to go, but it is Hotel California: you cannot check out. We wrote in the two-year limit to please sceptics.

I find it rather paradoxical that it is now being said that the two-year limit puts the departing state under extreme time pressure and all the cards in the hands of the Union. We did not think that when we drafted article 50 and I still do not think that.

In the United Kingdom's case, I find it odd that we chose to trigger the procedure without having a clear idea of where we were going to go. We had no agreed definition, even inside the Government, of the end state: our future relationship with the Union that we were leaving. As soon as we had fired the gun, we went off and had an election and so spent three months not negotiating whereas our friends across the Channel had, within one month, prepared their position with the European Council agreement on 29 April.

It is true that, on 29 March 2019, unless something else happens, we will leave whether or not there is an agreement. In that sense, the time limit acts against us, but whose fault is that? If we had been well prepared—if we had done some preliminary work and been to see some of our friends and partners before firing the gun and if we had an agreed Government position or, best of all, had explained that agreed Government position to the country and had an agreed national position—two years would not be too short.

The Convener: Has any more progress been made after the Florence speech? What is your view of the Government position post that speech?

Lord Kerr: The tone of the Florence speech was certainly an improvement on last year's Conservative party conference speech, which was quite a surprise and a shock to most people in continental Europe, and the Lancaster house speech in January. Of the Prime Minister's European speeches, the Florence speech is the one with the friendliest tone.

The move on money, although insufficient, at least gets movement started. The problem with the money dossier up to now is that, although the other side has aggregated everybody's bids and ended up with what is clearly an overbid, we have put no counterbid on the table and have put in no papers at all. Therefore, the process of finding a middle ground—a compromise—has not started. It is good that we have hinted at something in the region of €20 billion. It will not settle at that, but at least that is a hint. I hope that, next week, that will be underpinned by a paper that will provide some sort of basis to start a negotiation. I do not know. I should say that I speak only personally; I have no idea what is going on inside Government.

There has definitely been advance in the tone and on the money. The talk of a transition is a difficult area. What has been said at the Conservative Party conference this week about transition still leaves us in considerable difficulty. The main defect in the Florence speech as seen by our foreign friends is that the Prime Minister still has not said what she envisages as the long-term, permanent, steady-state relationship between Britain and the European Union. She has told us what it is not: it is not the Norwegian relationship—a European Economic Area-European Free Trade Association type of relationship—because that, she said, would impose too much of a constraint on our sovereignty, and it is not the Canadian relationship.

The Prime Minister has ruled out two forms of relationship but has not addressed what we do want, and our foreign friends really do not know that. They are left worrying that she may still be where she was at the party conference in 2016 and in the Lancaster house speech in January 2017, wishing to cherry pick bits of the single market and, possibly, bits of the customs union and set up some sort of hybrid. That is not a popular concept among the 27.

So there is still uncertainty. We have not come forward with the framework for the future relationship—and nor has the EU, of course, but it thinks that we are a demandeur and so it is up to us to propose what we want.

The Convener: As I understand it, paragraph 2 of article 50 allows for discussion of a future framework, but the EU is clearly sticking to the phased approach in which the exit deal has to be agreed before the future framework can be discussed. What is your view of the phased approach?

Lord Kerr: I think that it is a mistake. The problem of the relationship between the divorce talks and planning for the future relationship was discussed in the European convention 15 years ago. Clearly, the EU cannot in two years work out the detail of any deep and comprehensive future relationship—and I hope that that relationship will be deep and comprehensive. The agreement with Canada took seven years, and our agreement will be much more complex, detailed and comprehensive than that. It is going to take a considerable time.

As a result, we invented the framework concept in which the divorce lawyers would take account of who would look after the kids in the future and what the relationship between the two parties would be once they had separated. However, we did not define that framework—or “cadre” in French, which is the language that we negotiated in—or say what it was. My view was, and still is, that it was an architecture for co-operation, but we have made the mistake of not producing in the annex institutional proposals to the European Council, in which the British representatives set out their explanation to the European Union before they decide in the main Council building the policy of the Union not just in trade and economic areas, but in diplomatic areas such as foreign policy, antiterrorism, anti-environmental pollution and global warming.

There is a wide range of areas on which I am sure that we will want to co-operate with Europe; indeed, we will probably be its closest partner. I hope that we will want to go on consulting Europe as we do now before we vote in the security council and that we will want to go on sharing intelligence with it on terrorism or whatever. It seems to me, therefore, that there is a positive proposal that we have not made, but it requires an architecture; you need to explain how you see that working and put a proposal to the EU. Europe could have done the same, but it has not; as I have said, it thinks that we are demandeur, that we have created the problem and that we need to come up with solutions. It does not know how closely we want to work with it any more, so we need to tell it.

The sequencing decision that the EU took was a mistake. It was a mistake to say, “We need sufficient progress on divorce before you can start to talk about the framework.” That is legally defective because, as you know, given the way in

which the article is drafted, the divorce lawyers have to take account of the framework. Nobody has drafted a framework, but that will have to be done. If there is no framework to take account of, the divorce agreement will, when it is reached, be legally defective. That was a mistake on the part of the EU.

I also think that it was a mistake for Michel Barnier to secure the impressive unanimity of the 27 other members now by accepting ad interim everybody's bid for what the British should be required to pay. Those are two negotiating errors on the part of the EU.

On our part, there has been a small negotiating error in that we have not been willing to put any money on the table until now or to explain how the money will be calculated. In my view, there has also been a very big negotiating error in that we could have broken the problem about sequencing if we had produced our framework—that is, if we had had our vision and its architectural underpinning—but we have not done that, at all.

Following the Conservative Party conference in Manchester, it seems to me that we are still not quite clear about what the United Kingdom Government wants. Both sides have made mistakes, but the situation is retrievable. I speak as an old ex-diplomat, so it is a case of “*Mais où sont les neiges d'antan?*” It would all have been much better in my time, I can tell you. [*Laughter.*]

The Convener: That was very interesting. I now hand over our questioning to Lewis Macdonald.

10:15

Lewis Macdonald (North East Scotland) (Lab): Perhaps we can follow that point through. It was interesting to hear you formulate the problem as you have: both the European Council and the UK Government have made fundamental strategic errors in their approach to the negotiations. You say that the situation is retrievable. I am interested in your view of the European side of that equation—whether it is possible for Michel Barnier or his team to achieve a different approach, given that they have made that decision about sequencing and a global bid for compensation as regards the financial settlement. What can the European Council or the other member states now do to retrieve the situation and create a realistic basis for concluding the current stage of the negotiations?

Lord Kerr: They think that the ball is in our court. A lot will depend on what David Davis says next week, particularly on the money front. Personally, I think that the chances of there being agreement, on 21 October, that sufficient progress has been made are very low indeed—verging on zero. There has been no progress at all on the

Irish dossier, as far as I can see. On citizens' rights, there has been real progress and the gap is quite narrow. However, on the money, the bargaining has not started although it may start next week.

So far, that is not really impinging on political debate among the EU27. We need to remember that we are not the big show in town. Angela Merkel and Martin Schulz debated for 90 minutes and neither Britain nor Brexit was mentioned. Emmanuel Macron went to the Sorbonne and spoke for 90 minutes—much of it about the future of Europe—and Britain was mentioned in one sentence, when he was describing his concept of a future Europe consisting of inner and outer circles. He said, rather touchingly, that the British might find a place in the outer circle one day if the UK changed its mind.

The things that they want to talk about in the European Council are Trump, Putin, possibly now Catalonia, Poland—which is a very big issue, with the possibility of article 7 of the Treaty on European Union being invoked, which is about action against a member state that is not observing the values of the EU—the banking system issues and the possibility of the Germans accepting some of Emmanuel Macron's ideas for further integration in the eurozone and for eurozone governance. Those are the big issues.

The hired gun—Michel Barnier—has been sent away to deal with the difficult British. I guess that most of the heads of government are not expecting that the European Council meeting in October will do any business on Brexit at all, because their ambassadors have reported to them that the British still cannot make up their minds about what they are asking for, and their permanent representative in Brussels will have reported that there does not seem to be much going on in the talks between Barnier and Davis. They are not preparing for a big decision; they are expecting to hear a progress report from Barnier and to agree to hear another one in December, which is what is likely to happen unless something dramatic happens next week.

What should we do to break out from that? The requirement to explain what we see as the relationship in 10 years' time is very important. The Prime Minister has not set out her blueprint, and she did not say anything about that in Manchester yesterday. Boris Johnson has talked about his blueprint, but he has talked principally about transition.

Various other models that we could think of following are on the table, but I do not think that many of them are on offer. For the EU, the Canada model or the Norway model are the easy ones, as they are off the shelf. The Ukraine model probably comes closest to what the Prime Minister

may be hinting at, partly because the Ukrainians do not have free movement of persons, as nobody wants 40 million Ukrainians pouring in, and partly because the Ukrainians do not pay. However, they do not pay because their per capita gross domestic product is lower than that of any EU member state. It seems to me that the Ukraine model is unlikely to be easily applicable to the United Kingdom, but it involves partial membership of the single market and it gives the Ukrainians things such as the banking passport—things that are important to the City—so perhaps we ought to think about it.

Some people in the City of London think that the Swiss model might be the answer. That model involves 131 separate sectoral agreements. The European Union decided many years ago that it did not work and that it would never have that model again with anybody else. That is probably still the position, but I do not know whether that has been tested.

No off-the-shelf model is available if we reject the two obvious ones. The Turkey model is another that we could look at, but that involves partial membership of the customs union and is, again, for a very different economy. It was designed for a country that, at the time—like the Ukraine—was thought to be converging with the European Union. It is more difficult to devise something for a country that is going to diverge from the European Union.

There is a kind of vacuum until we can say what we want. I am sorry that we are spending so much time now talking about the transition, and I am sorry to hear cheering at the idea of a two-year transition. A transition as discussed so far by the British is not a transition at all. We do not know where we are going, where the other pillar of the bridge is or where we will land, so we cannot build a bridge to that. It is not a transition nor an implementation period, because there will be nothing to implement in the interim; rather, it is a deferral period—a stay of execution. The cliff edge is still there, it just comes two years later.

If it is a transition à la Philip Hammond—if he has won his battle with Boris Johnson and the transition is a status quo transition—that is reasonably easy to negotiate with the European Union, and I can see that being done perfectly well within the two-year period. What is not to like from the European Union's point of view? The Brits would be saying that they would give up their judge, their seat in the European Council, their seats in the European Parliament and their commissioner but that they agreed to follow all European Union laws except the rulings of the European Court of Justice. The EU would think, "Fine. We don't have these difficult Brits with their ghastly ambassadors in the Committee of

Permanent Representatives being finicky about the detail. We just tell them what to do and they do it. Why not?" The possibility of that is laid down in the 29 April European Council guidelines for Brexit negotiations, which spell out very clearly that an extension of the *acquis communautaire* is possible. The guidelines say:

"Should a time-limited prolongation of Union *acquis* be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply."

If we accept that, a two-year transition is absolutely not a problem and one could envisage that, even without a framework or an idea about where we are going, we could still agree that. Do not call it a transition, though; it is merely deferring the cliff edge—it is as though a prisoner is going to be executed not next week but in two years' time.

I am not sure that that is what is wanted, and I am not sure that Philip Hammond has won his battle inside the Conservative Party. Boris Johnson is saying that he could live with two years—not a day more—but that the ECJ rulings must not apply during that period and that, of course, we would not accept any new laws coming out of the Brussels sausage machine. However, that flies in the face of a position that the EU will stick to. Further, this week, in Manchester, the immigration minister said that, although the immigration legislation is delayed, we should not worry because the Government will put an end to the free movement of persons on 29 March 2019. However, if you are in a status quo position, you cannot do that.

Tavish Scott (Shetland Islands) (LD): How likely do you think it is that there will be a hard Brexit in 2019?

Lord Kerr: I think that it is quite likely. I used to try to produce spurious percentages, which some people took seriously, but I will say that I think that there is an almost 50:50 chance. The Government has raised expectations in this country unrealistically. When David Davis says—as he has kept saying—that we will enjoy the exact same benefits as we did when we were members of the single market and customs union, Michel Barnier is right to say that that is impossible and Angela Merkel is right to say that it is not feasible. At some stage between now and March 2019, the penny is going to drop and it will become clear that Boris Johnson, roaring like a lion, is not delivering anything in Brussels and that what we were told in the referendum campaign and since about having our cake and eating it is not proving to be the case. The longer that that moment of penny dropping is deferred, the bigger the disappointment and the feeling of being let down will be in this country. Of course, what happens will be blamed on the foreigners not having given

us what we want, and no one in Britain, except this committee and me, is familiar with the agreed position of the EU27.

With regard to the money, a mistake was made by the EU—that is, by Michel Barnier, although he is a good negotiator—in aggregating everybody's bid, because there are going to be diminished expectations on that side, too. For some, such as the Poles, that will be painful. The answer is not going to be our €20 billion, but nor is it going to be their €100 billion. The sum will be somewhere in between, so there will be some disappointment among the member states, too.

There is quite a high possibility of a hard Brexit deferred by two years, which is almost the worst possible outcome. There would be some implementation during those two years, which would give businesses and enterprises the time to implement their plans to relocate to Ireland, Frankfurt or wherever. I am personally more interested in the alternative proposition, which is that, as the penny drops in this country and as people realise that having their cake and eating it is not on, people will begin to wonder whether it really does make sense to leave.

10:30

Let us consider the transition period. We will have all the responsibilities of membership but none of the rights to involvement in decision making and policy making. Is that a good deal? As you may have guessed, I was a keen remainer, and it seems to me that public opinion in this country might move. Even though most of the economic effects of Brexit will not be felt until after Brexit, it will be clear that something has gone wrong and that it is not quite what Mr Johnson, Mr Gove and Mr Fox told us was going to happen.

Tavish Scott: Is the only way in which the 50:50 calculation will be “retrievable”—to use your own word—if the UK Government sets out what model it wants for a future relationship between a UK that has left the EU and the EU, and if does so in pretty short order?

Lord Kerr: I think that that is what the Government should do. Of course, whether that does any good depends on what the Government says. If it goes back to the party conference speech and Theresa May's consistent line ever since that the ECJ must have no sway in the United Kingdom after March 2019, it will not do much good. That line on the ECJ has led to all sorts of strange contortions. The only reason why we have to leave Euratom is because the ECJ has a supervisory role, which is all very odd in my view.

If Theresa May again says that we will pick bits of the single market that we will stay in or if she

adopts what seems to be Philip Hammond's line that regulatory equivalence will be ensured in the future by some sort of bilateral mechanism between the European Union and the City of London, that will not fly either. It seems to me that, if we make an unrealistic proposal, that will not help, and the risk of the hard Brexit cliff edge will remain just the same.

I understand the problem for the Government, which has to take on the problem of diminished expectations if it makes a proposal for a framework that might actually fly with the EU27.

Tavish Scott: At that point, Liam Fox will have to resign.

The committee has gathered that the real issue around money is that the member states will have to pay more into the overall EU budget otherwise, conversely, some will lose even more. If that issue was solved by David Davis coming up with an offer that we all understood next week, whereby there was at least a direction of travel on the money, would that move matters on considerably?

Lord Kerr: Yes. I imagine that Mr Davis will spell out—I hope that he does it on paper, with numbers—what Theresa May meant in Florence when she said that nobody was going to be out of pocket for two years. However, I do not think that that cracks it. It starts a process, but the *reste à liquider*—RAL—is a big bill; it is much bigger than €20 billion. Some of that goes on running projects in member states—the building of roads and railway lines, for example—and some of those projects stretch well beyond the two-year period. We have signed up to that. There is also the issue of pensions. People live quite a long time—at least, I hope they do. I do not know what the final number is.

You asked whether such an offer would start a bit of momentum, and I think that it will. I also think that the money dossier is perfectly soluble. What worries me is that, if the solving of the money dossier and paying quite a lot coincides with the realisation that we cannot have our cake and eat it—we cannot cherry pick the *acquis*—there could be fairly short-fuse territory inside the Conservative Party and anything could happen.

Mairi Gougeon (Angus North and Mearns) (SNP): Your answers have covered quite a lot of what I intended to ask about, but I have a question around the transitional arrangements, which you have discussed. You said a bit about political decision making in the EU during the transitional period. Can you clarify that the UK will not have any role in political decision making in the EU during that period?

Lord Kerr: On everybody's definition, the transition follows departure; it is not a transition to departure. We will leave the European Union in

March 2019; we will elect no MEPs to the European Parliament in May 2019; and from 1 May 2019, we will have no representatives in the Council and our commissioner, Julian King, will come out. That all follows departure: if we are not a member state, we cannot have a seat at the table.

I do not think that that is widely understood in the discussion about transition. My worry is that it might not be really understood until it has happened, in which case it will be too late to do anything about it. Article 50—beautifully drafted—points out in its last paragraph that once a member state has left, it has left. If it wants to come back in again, it can come back in only by the front door marked “accession”, and it cannot argue that it would like a budget rebate, please, or that the various privileges that it secured in the past when it was a member should be recreated for it.

Up to March 2019, we are full members of the European Union and we should behave as full members. I think that we made a mistake in self-isolating, that we should have gone to the big anniversary summit in March in Rome and that Mr Johnson is wrong to stay away from the foreign affairs council when he thinks that it is going to be critical of the Americans. Those are mistakes, because we should be in there playing a role in every dossier; instead, we are concentrating on the Brexit dossier and standing away from our partners, which is—as a minimum—bad diplomacy.

Up to March 2019, we should behave as full members. If we change our mind before March 2019, we can take back our article 50 letter and continue as full members. Some on the continent hope that we will do so. In that situation, there would be no question of losing our budget rebate or anything like that. We are full members and would remain full members, and the rebate could be changed only by unanimity among members.

However, once we are outside—at midnight on 29 March 2019—all our privileges and rights as a member disappear, and it would involve an accession negotiation if we ever wanted to come back in again.

Mairi Gougeon: Thank you. I want to touch on another point. You spoke about movement in certain areas of the negotiations. One of the main stumbling blocks still seems to be whether EU citizens’ rights will be subject to the European Court of Justice and what its role will be in that regard. How likely is some movement on that? What alternatives do you see as being feasible and could satisfy both parties in the negotiations?

Lord Kerr: I am not a lawyer, so I am not particularly good on this area. However, I thought

that the offer that we made on EU citizens’ rights was much the best of the papers that we have put forward. It was a perfectly reasonable offer and it contained real content, which some of the papers do not.

The 27 other member states are overbidding when they say that the rights of non-UK EU citizens who are resident in Britain after we have left the EU must for ever be protected by the European Court of Justice. It seems odd to me that the ECJ should hold sway in a non-member state in disputes between people who live in that country and its Government. Some kind of hybrid judicial structure is a more likely solution. Alternatively, there is the solution that is being talked about now, which involves embedding the rights of EU citizens in this country in the withdrawal treaty, thereby writing them into British law. I think that such gaps are bridgeable.

I also think that there are mistakes on the other side, which we can put right. It is said that the rights of the British citizen who is resident in Spain will remain provided that he remains in Spain but will not apply if he goes to live in France. That seems odd. Either he has rights that are derived from the treaty, in which case they apply wherever he is resident, or he does not. To say that he has rights that are derived from the treaty that apply only in the country in which he happened to be resident when the British left the EU seems a bit odd.

That issue is resolvable. I worry much more about the lack of progress on the Irish dossier. There seems to be a complete lack of progress—I do not see that anything at all has happened on that.

The Convener: Lewis Macdonald has a quick supplementary question.

Lewis Macdonald: In response to Mairi Gougeon’s first question, you said that it would be straightforward to withdraw the article 50 letter. Article 50 does not contain any reference to how it might be withdrawn. Can you explain briefly the basis for your certainty on that matter?

Lord Kerr: That was the legal advice that I got while drafting the article. There would have been a sixth subclause if I had not been assured that there was no need to include one. If it does not say that you cannot withdraw your letter, you can withdraw it—that was the legal advice that I had, and I am sure that it is right. That has also been confirmed by Tusk, Juncker, Merkel and Macron.

If the United Kingdom turned up at a European Council and said, “Listen, this is all very embarrassing but we have wasted your time—we have changed our mind,” people might say under their breath, “Oh, my God—these British,” but they would be rather welcoming. They do not

particularly want us to go. They do not think that they can interfere in our internal affairs, so they are not going to campaign for us not to go. However, if we were to decide that we did not want to leave, that would be welcomed.

There is legal dispute—you are quite right. There are some who say that sending an article 50 letter is an irrevocable act. They are, I assure you, wrong. Nevertheless, one of them could take a case to the ECJ and say, “Hang on. They can’t do that, can they?”, although I think that we know what the outcome of that would be. Let us suppose that there is a European Council, the British say that we would like to stay and the European Council unanimously says—as it would—“Thank God for that.” If, a couple of months later, a case is brought about whether the British were within their legal rights to do that, and, two years later, it gets to the European Court of Justice, the court will take five minutes to say, “Go away.” If there is a political agreement among the 28 leaders of Europe, that would stick.

Lewis Macdonald: Thanks very much.

The Convener: We are straying into the area of politics, but what needs to happen for the article 50 letter to be withdrawn?

10:45

Lord Kerr: Ah, well, that is for you lot to say; it is not for me. I am independent and have no views—I am a political virgin. I have spent my life innocent. I think that it would require an election.

The UK Parliament will spend the next six months debating and amending the withdrawal bill. It will be amended—although, in the end, it will be carried—in a number of respects, including in the area that is most important to this Parliament.

There will have to be changes and they will be made. Some of the amendments that are down in the order paper in the House of Commons have 12 Conservative names on them, and that is enough. Some of the amendments that people such as me made to the European Union (Notification of Withdrawal) Bill on having a meaningful vote to ensure that the Government would have to come back to the House of Commons with any deal before we left the EU were struck out in the House of Commons, but they would not be struck out by the members in the House of Commons who were elected in this year’s election.

There will therefore be changes to the withdrawal bill. That is what we will be doing this autumn and the country will not pay much attention to that. The *Daily Mail* will say that we are trying to obstruct Brexit, but we will be trying to improve a bill that is defective. That is the drama

for this autumn and—for the House of Lords—this spring.

Autumn 2018’s drama will be about the deal or no deal situation, and I cannot see any negotiable deal now for which there will be a majority in the House of Commons. It seems to me that there are enough hardline Brexiteers to make it very difficult for the Prime Minister to compromise sufficiently to get a deal in Brussels; and if she gets a deal, those people might vote it down. There is certainly a majority against there being no deal; a large majority in both houses now agree that the approach of “no deal is better than a bad deal” was wrong and that the chaos of there being no deal would be very bad.

In November or December next year, the outlines of the deal or no deal situation should become clear. There will be a requirement for a parliamentary vote, even if that is for no deal, because an amendment to that effect will be carried in the withdrawal bill this autumn. At that stage, we could be quite close to an election.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I have a number of questions. Barnier was very positive about the Prime Minister’s Florence speech and said that the talks were useful. After the fourth round of talks, he said that there had been a constructive discussion—on Ireland, for example—and that progress had been made. What makes you disagree with Michel Barnier?

Lord Kerr: I never disagree with Michel Barnier. He was in my convention and he is a very good diplomat—he is a better diplomat than I am, and, in the remarks that you quoted, is more polite than I am. On the Ireland discussions, I think that he was talking about the ways of making sure that the Good Friday agreement is not damaged by Brexit, and I believe that progress has been made on that.

However, the big issue with regard to Ireland is the frontier. There are two kinds of frontier and, for the frontier of persons, it is for us to say how hard it will be. If we take the decision to change our immigration policy and make it more related to employment than to frontier checks, we will not mind if an EU citizen from, say, Riga flies into the common travel area via Dublin airport, takes the train to Belfast and ends up in Edinburgh without passing through any frontier. That is fine, as the European Union and the Irish republic will not say that that person cannot do that. The question of the frontier for people and that frontier’s hardness is entirely up to us.

The converse applies to the customs frontier for goods and services. We can say as much as we like that we do not mind what comes in from Ireland and that we do not want to check it, but the

frontier across Ireland will be the external frontier for the European Union and it is down to not the Irish, but the customs committee in Brussels to decide what checks are necessary.

I think that that committee will probably be generous about small-scale stuff such as cross-border smuggling of cows over the moors or cigarettes in the back of a white van. That all went on extensively in the days when both countries were not in the European Union, so bits of that will probably start again—and so what?

However, what the committee will be very firm about is the idea that third countries could get their goods or services into the European Union by flat-pack delivery to Belfast or somewhere else in the United Kingdom and then entry into the European Union after final assembly with no rules-of-origin check. The lorries will have to be stopped. They do not necessarily have to be stopped at the frontier; they might be stopped a couple of miles down the road, or there could be cameras on the frontier. However, there is no technological fix to the need for the external frontier to be a frontier where the declarations that have been made are checked against the goods in the truck.

If you go to Niagara and look at the Canadian-US frontier, or if you go to the Swedish-Norwegian frontier, you find that the lorries are stopped—not all the lorries, but a sufficient number of them to satisfy that committee in Brussels. For the Polish member, the Hungarian member or the French member of that committee, there is no particular incentive to be nice to the Irish. That is not what Mr Varadkar wants, but he is only one voice among the 27 that will decide the issue. We cannot decide it.

The Prime Minister says, as Mrs Villiers said during the referendum campaign and as Mr Brokenshire goes on saying, that there will not be a hard frontier and that nothing will change at the frontier, but that can be true only if we remain in the customs union. If we leave the customs union, it cannot be true.

Rachael Hamilton: I want to clarify your earlier comment about Barnier's negotiating error in pressing the views of the EU27. When we went to Brussels and met Didier Seeuws, he seemed to be encouraging a unified position from the EU27. Can you clarify your comment? Do you not think that, if the EU27 had a unified position, there would be much more room for manoeuvre and negotiation?

Lord Kerr: Barnier is the agent of the 27. He is bound by his mandate and cannot move unless his mandate changes. He could ask for his mandate to change, but my view is that he is unlikely to ask for that at this European Council, because the 27 have told him that they do not want him to do that until he can report sufficient

progress, and I doubt if he will be able to report sufficient progress.

What I was trying to say is that Barnier's big mistake was to settle for an easy life in the short term by agreeing on the money dossier in which to put forward all the suggestions that were made to him, which took the bill up to around €100 billion. It might have been easier, with some of the dodgier elements of the bill, to have a debate and to disappoint some member states there and then, because the disappointment is going to come in the end.

That is a mini version of what we are doing. We have told the country that nothing is going to change. We have said, "Don't worry—we'll get you a deal with the European Union that means we get the best of all worlds," and we are going to discover that that is not the case. Things will be difficult for the Government at that point, and I think that it would have been better—and would still be better—to start making it clear that there are things that we cannot deliver.

That is my criticism of the EU, but the impressive solidarity of the EU and the complete failure of British attempts to get round behind and negotiate bilaterally, particularly with Berlin, is a lesson for us. We have puzzled people, we have insulted people a bit, they are a bit bored with us and baffled by us, and they have other things to do.

Stuart McMillan (Greenock and Inverclyde) (SNP): You spoke about the European Union (Withdrawal) Bill and potential amendments that the Scottish Parliament might be interested in. Can you say why those are so important for the Scottish Parliament?

Lord Kerr: Five areas of the bill are going to need amendment. There is a subset of Henry VIII powers relating to the devolution aspect. In its present form, the bill allows the Government to change a great deal by statutory instrument without full parliamentary scrutiny. In my judgment, Parliament will not pass the bill in its present form.

A subset of that is the devolution aspect in clause 11. I am not a lawyer, so I speak with some nervousness about this, but it seems to me that the concept of retained laws—the EU powers that will be taken back—means retention at the centre of all EU powers in areas such as environmental protection, which is devolved. Your ability to legislate on environmental protection is constrained by the fact that you are required to comply with EU law, just as the UK Government is required to comply with EU law. That limitation will be removed. Once the European Union (Withdrawal) Bill is enacted, the extent to which you can legislate on environmental protection will be affected by how many of the powers in relation

to the environment that are taken back to the centre are subsequently amended by the centre, declared to be defective under the terms of the bill and required to be changed by statutory instrument, how many of them are given back to you and at what stage they are given back to you in what is, according to the bill, a two-year process.

That seems to me, as an amateur, to fly in the face of the devolution settlement and the fact that there are reserved matters but everything else is devolved to you. If the UK Government is now saying that, for a period, it needs to retain powers in relation to fishing, agriculture and whatever else, and might need to change powers, the concept of the devolution of blocks of issues such as agriculture or environmental protection has, for the first time, been broken.

That is why I think that that bit of the bill will be changed by the Westminster Parliament. It seems to me to be fundamentally important.

The Convener: Thank you. We will move on to Ross Greer.

Ross Greer (West Scotland) (Green): It is on a slightly different point, convener.

The Convener: We have three minutes.

Ross Greer: I know.

Lord Kerr, you mentioned the potential disappointment of some of the EU27 because of the way in which our position has been constructed, which takes us to the issue of ratification. A lot of the discussion around any potential drama at ratification has focused on the role of the European Parliament. Is the drama not more likely to be focused within the EU27? You mentioned the Ukraine deal, which was almost derailed by a referendum in the Netherlands.

Lord Kerr: If there is a deal between the EU and the British at the European Council level, the Parliament will be likely to approve it. It might grumble a bit and have a bit of a tantrum but it will approve it. Everybody is aware that, if there is no legal agreement at all, the cliff edge will be dreadful.

I hope that the long-term relationship will be subject to national ratification. The divorce agreement under article 50 is not subject to national ratification. It is up to a qualified majority in the European Council. However, a long-term arrangement cannot be done on the legal basis of article 50. You need to go to the treaty, where unanimity and national ratification will be required. I hope that we will be looking at an agreement that is as wide as the Canadian agreement, which ran into trouble in the Parliament of Wallonia, or even a lot wider and much more comprehensive. However, that will certainly need national

ratification, and the Wallonia problem could arise again.

The areas in which the problem is most likely to arise are those in which we have particularly insulted people. The arch example of that is Poland, which is unhappy about the way in which we propose to treat Polish citizens who live in this country, and there are a lot of them. Poland is unhappy that the country that it thought was its closest friend and patron in the European Union—when I was permanent representative, we were the strongest advocate of Polish admission to the European Union—has turned out to resent paying structural fund money to Poland and having Polish people live here. I expect there to be some bitterness elsewhere in eastern Europe, but particularly in Poland. That would be the greatest risk at ratification time.

However, a lot might have changed by then. The permanent deal will require many years of negotiation so ratification will probably not come up until 2024 or 2025.

Ross Greer: Thank you.

The Convener: Thank you, Lord Kerr, for giving evidence to us today.

11:01

Meeting continued in private until 11:30.

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