OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 15 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 15 November 2017

CONTENTS

FINANCE AND CONSTITUTION COMMITTEE
27th Meeting 2017, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Ash Denham (Edinburgh Eastern) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Emma Harper (South Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Ivan McKee (Glasgow Provan) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dr Kirsty Hughes (Scottish Centre on European Relations)
Professor Alan Page (University of Dundee)
Professor Rick Rawlings (University College London)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 15 November 2017

[The Convener opened the meeting at 10:00]

European Union (Withdrawal) Bill

The Convener (Bruce Crawford): Good morning, colleagues, and welcome to the 27th meeting in 2017 of the Finance and Constitution Committee. The only business on our agenda is the taking of evidence as part of our consideration of the Scottish Government's legislative consent memorandum on the European Union (Withdrawal) Bill. We are joined by Dr Kirsty Hughes, director, Scottish Centre on European Relations; Professor Alan Page, professor of public law, University of Dundee; and Professor Rick Rawlings, professor of public law, University College London. I warmly welcome the witnesses to the meeting. We have received your helpful briefings. All my colleagues have had a good read of them and we had a discussion before we kicked off this public session. Ash Denham will begin with questioning on issues relating to clause 11.

Ash Denham (Edinburgh Eastern) (SNP): Good morning, panel. I read your submissions with interest. We have been carrying out this inquiry for a number of weeks. I do not know whether you were able to catch our last session, when we heard from Robin Walker and David Mundell of the UK Government and heard a great deal about legal certainty.

Professor Page said in his submission that clause 11

"is not so much about legal certainty as stripping the devolved administrations of the leverage they would otherwise possess when it comes to the negotiation of common frameworks."

Professor Rawlings said that the removal of clause 11 is needed to give

"a measure of constitutional security"

to the devolved Governments, and Professor Page further said that clause 11 has an effect on the intelligibility of the devolved settlements. Will you elaborate on those comments?

Professor Alan Page (University of Dundee): Yes. Could you remind me of where you started? I caught the bit about intelligibility at the end.

Ash Denham: The question was mainly about clause 11 not being about legal certainty.

Professor Page: I was trying to work out the possible justification for clause 11, and I assumed that it is about legal certainty and ensuring that the position after the UK leaves is the same as the position before. I pointed out that, in practical terms, that means that the UK or Scotland will be required to comply with retained EU law as opposed to EU law. That ignores the fact that the existing obligation is rooted in the UK's membership of the EU. It is about ensuring that the UK does not fall foul of its obligations as a member state by dint of things done by the devolved Administrations. If the EU is taken out of the equation, that justification ceases to apply. It falls away, leaving the suspicion that clause 11 is more about stripping the devolved Administrations of any influence that they might have when it comes to the negotiation of common frameworks.

Then there is the fear on the part of the devolved Administrations that the UK Government or Westminster or Whitehall departments would prefer to hang on to repatriated competences rather than pass them on to them. Quite apart from that is the point with which I concluded my submission, which is that proceeding in that way would have substantial effects on the intelligibility of the settlement. We would be substituting an obligation to comply with EU law—which people, for the most part, readily understand; we have been doing it ever since devolution and there is a common understanding as to what that involves—with an obligation to comply with retained EU law, which is a much more amorphous and uncertain concept. I quoted the late Professor Sir Neil MacCormick on the Scotland Act 1978. He said that intelligibility was a quality greatly to be prized in constitutional statutes. The 1978 act certainly did not meet that test, and that will also be the case with the Scotland Act 1998 as it is intended to be amended by clause 11.

With regard to operability, I was simply referring to the fact that the bill will make it much more difficult for the devolved Administrations to pursue a meaningful policy in sectors such as agriculture, which are devolved under the current settlement.

Professor Rick Rawlings (University College London): My approach is that elements of certainty and stability are needed for the purposes of business, consumers and trade negotiations. The question is whether clause 11 is needed to achieve that. My firm view is that the clause is a poor choice of approach to secure certainty and stability. I develop that argument in my paper and put forward several reasons why I think that.

The clause is unnecessarily heavy. As the committee moves inexorably to say that it cannot recommend legislative consent for the bill as drafted, that point will be highlighted. I am sure that the committee will find that a parallel process

is going on in the National Assembly for Wales. Although the focus is on clause 11, it has to be read together with clause 10 and in the context of the powers that the UK Government will take on under clauses 7 to 9. Once clause 11 is read in that context, one can see how unbalanced it is.

Ultimately, the clause is counterproductive. Without being naive about political differences and the scope for political controversy and dispute, there needs to be a modicum of trust and co-operation between the different Governments and Parliaments in the UK. Clause 11 is essentially a banner that says, "We do not trust you." That is not an appropriate place to start.

Dr Kirsty Hughes (Scottish Centre on European Relations): As one of my colleagues said, what has been done in the withdrawal bill on devolved competences—in particular, by clause 11—is extremely crude. It is almost a knee-jerk reaction to the fact that the powers exist at the EU level: the UK Government represents the UK at the EU level and, therefore, it should be straightforward to bring all those back to London and not care about the devolved Administrations and the constitutional implications. It would in any event be an extraordinarily difficult constitutional challenge to find an appropriate solution to the situation, especially under time constraints, but it is extremely important to keep reminding ourselves of the wider political and economic context, which verges on the chaotic and profoundly damaging. We are talking not just about constitutional changes and an appropriate devolution settlement in a static context, but about an extraordinary upheaval, which will be damaging for the country, whatever Brexit we are facing, whether Scotland is independent or in the UK. That is the wider context. Otherwise, I broadly agree with my colleagues.

Ash Denham: My colleagues have questions on alternatives to clause 11. However, if the clause was implemented as currently drafted, what difficulties would that throw up, particularly for Government or for parliamentary scrutiny, given the limitations that would be placed on devolved Governments?

Professor Page: I have alluded to them. Essentially it would make the business of working out what is within the legislative competence of this Parliament and the executive competence of Scottish ministers much more difficult than hitherto. There is a relatively straightforward understanding of the restrictions in the obligation to act compatibly with EU law. That would become a much more uncertain and difficult process when it comes to retained EU law, which is a much more complex and difficult concept to grapple with and to understand. I refer again to the quotation from Professor Sir Neil MacCormick.

In technical terms, a conferred powers model is being grafted on to a reserved powers model. The reserved powers model means that if a power is not reserved, it can be used, but under a conferred powers model, on the other hand, you have to see exactly what you can do by talking about it. That is where the whole process is fundamentally misconceived. We are talking about going through 111 powers and working out which are reserved and which are devolved. Let us assume that a deal is reached under which it is decided that some powers should be reserved but will be subject to exceptions and so on. It is at that point that you would think that this is not the right way to go about it.

I would like to follow up on the final point Professor Rawlings that made about this being an unhelpful start. In summary, clauses 10 and 11 are based on the premise that, rather than being part of the solution, the devolved nations are a problem to be dealt with, similar to delinquent children who, given half a chance, will seize the opportunity to make mischief and ought, therefore, to be prevented from doing so. That is where the legislation starts and where the difficulties arise.

Professor Rawlings: There is a difficulty from a legal perspective with the concept of what is meant by retained EU law. Although at first sight retained EU law may look like a frozen concept whereby we can take a picture of it and there it is, if one looks carefully at the bill, one sees that there is provision for Whitehall and Westminster to change what is meant by it. Retained EU law is, therefore, a moving target. I do my work in Wales, and there is great concern in the Assembly about this issue, because it clearly relates to competence. I imagine that the same applies in Scotland. Lawyers will have to work out immediately whether such and such is within the Government's competence while what is meant by retained EU law may be shifting. Of course, the issue calls into question the role of the Presiding Officer, because he or she will have to make rulings as to whether proposed measures are within competence.

The issue also relates to common frameworks in regulatory fields. Many of the frameworks apply to commercial fields. As a lawyer, I am well aware that where there is money, as there tends to be in the commercial field, there is litigation. That is a particular issue for the devolved Administrations, which does not play the same way in Westminster because of parliamentary sovereignty. Westminster does not have those issues of competence, which we all have to experience in the devolved Administrations, Assemblies and Parliaments.

Professor Page referred to reserved and conferred powers. Colleagues will appreciate that

there is a particular feeling about those things in Wales, given that we have just achieved a move from a conferred powers model to a reserved powers model under the Wales Act 2017, following in the footsteps of the Scottish Parliament. To be confronted with an aggregate model, which includes a conferred powers model, would have a particular context in Wales.

This is not just a matter of law. It is about a sense of trust and collaboration, and about going forward in partnership. We can talk about legislative consent issues, but the matter is broader than that. As an outsider, it is striking that the first question that the committee has gotten into is about clause 11. It is wholly understandable that you have, but it warps the conversation. We ought to talk about the substance and what the common frameworks will comprise, but, understandably, we keep getting dragged back to clause 11. That tells you a lot about why clause 11 is a poor choice of model.

10:15

Ash Denham: We will discuss common frameworks shortly. Do you have anything to add, Dr Hughes?

Dr Hughes: Yes. What is going on is obviously quite complicated, with the EU level collapsing down to the UK level—however that is done, within or without the devolved structures. Directives have to implement what has been agreed in Brussels, but EU membership has allowed the UK some flexibility in implementing directives in the past. That has often led to the UK being accused of gold plating its directives. When complaining about Brussels interference, *The Sun* or others say that the UK always goes too far and that it does not need to accept those extra bits, not all of which come from Brussels, even though the rules come from an EU directive. When EU laws came to Holyrood, the option of exactly how to do it was here. Maybe it is a relatively small point among all the wider points, but how is that going to work? Even if something is agreed at Westminster, the ability to tweak it in Scotland will probably be lost. That is one issue.

On the substantive issues that Rick Rawlings talked about, I would put things slightly differently. There is a huge chicken-and-egg problem in the withdrawal bill as a whole. The intention is said to be to bring EU law into UK law as retained law, but, as a variety of House of Lords committee inquiries have said, without knowing the regulatory structures, agencies and so forth, a lot of that law—in environmental areas, for example—will not work, or will not work in the same areas. Therefore, Westminster, as well as Holyrood and the Welsh Assembly, is being asked to take decisions without knowing about the regulatory agencies—a few days ago, Michael Gove talked about a UK environmental agency. There is an incoherence and inconsistency here that is not only about devolution but about devolved powers. It is part of the problem of trying to re-engineer your whole regulatory and policy system, which is so deeply embedded. Pascal Lamy called it trying to unscramble an omelette. It is extremely problematic.

On a more general point, the EU27 are watching the withdrawal bill's progress closely. They are very concerned about level playing fields. They are also aware that bringing retained law into UK law, without sorting out those profound, detailed regulatory issues, will take a long time, so it is very worrying for the EU27 too.

The Convener: Willie Coffey wants to ask about alternatives to clause 11.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Yes, I want to stick with clause 11 and look at the alternatives offered. Professor Rawlings has said:

"The sooner clause 11 ... is cast aside, the better."

He goes on to say that it is akin to "'Greater England' unionism", which is a lovely phrase. Professor Page talked about "standstill" provisions while the frameworks are worked out. Can you tell us what alternatives to clause 11 might look like, so that we can compare and contrast?

Professor Page: At the beginning of my submission, I say that, when reading the bill, you get the sense of a piece of legislation that has been

"drafted without a proper understanding of devolution law or",

certainly,

"with scant regard to the principles on which the devolution settlements are based."

I had in mind the fact that the reserved powers that are listed in schedule 5 to the Scotland Act 1998 do much of the job that clause 11 is supposed to do in the sense that they reserve to the UK Government or the Westminster Parliament certain powers, with the rationale that those powers concern the UK single market. That concept is built into and secured by the devolution settlement. It seems, therefore, that clause 11 has been drafted without a proper appreciation of the part that the existing settlement plays in securing the integrity of the UK single market.

I have referred to schedule 5 but, in addition, powers of intervention and veto are conferred on UK ministers in section 35, which relates to legislation that is passed by this Parliament, and in section 58, which relates to executive action including the making of subordinate legislation by

the Scottish ministers. That means that, if those powers were to be repatriated to Edinburgh rather than to London, there would be very little scope for making mischief as I described the possibility earlier. That dimension has been completely ignored in the drafting of the new legislation.

Allied to that, I ask myself what it is that you are trying to prevent—what is the concern? As I described it in my submission to the Culture, Tourism, Europe and External Relations Committee in August 2016, shortly after the referendum, the fear is that the four Governments in the UK will ride off in separate directions and, in so doing, compromise the integrity of the single market. That acknowledges that we already have a single market, in contrast to the EU, which is still trying to create one.

It therefore seems that all that is needed is for the Governments to say, "Right—we're not going to do that." They could have a standstill agreement whereby they all agree not to introduce or do anything that could—to go back to the guiding principle that the Prime Minister set out in her white paper—create

"new barriers to living and doing business within our ... Union".

Why do they not all simply agree to do that? It would pave the way for discussions that need to take place—the need is accepted—on where we should have common frameworks, what those will look like, what form they will take, how they will be revised and so on.

We could solve the problem without clause 11. I am completely persuaded of its disadvantageous consequences, which we have talked about. I take as my starting point an acknowledgement that the existing settlement contains in-built protections for the UK single market and that it goes a long way in the direction that we need to go. If the Governments have any concerns over and above that, they should simply agree among themselves that they will not do anything that threatens the integrity of the single market, and they should get on with the business of working out what common frameworks will be needed as a result of EU withdrawal—job done.

The Convener: Can you say a bit more about section 58 of the Scotland Act 1998 and how it might interact with potential future trade deals? There is a mechanism available that effectively enables constraints, if I have got that right. For the record, it would be useful to hear from you some more about that specific bit.

Professor Page: If I recall it accurately, section 58 says that, if the secretary of state is of the view or is persuaded that action being taken by the Scottish ministers would compromise or affect—I forget exactly how it is put—compliance with the UK's international obligations, they may prevent that action from being taken. Conversely, when action is required, the secretary of state may require it to be taken. When the action has taken the form of subordinate legislation, the secretary of state may nullify it. I am astonished that there has been no reference to section 58 of the Scotland Act 1998 in any of that.

The Convener: That is why I am ensuring that the issue is on the record. It is quite an important power.

Adam Tomkins (Glasgow) (Con): Can Professor Page clarify that the power has never been used—as far as he knows—and, indeed, that it has never been used in relation to any of the devolution settlements?

Professor Page: I think that that is correct.

Adam Tomkins: Has the power never been used in Wales?

Professor Page: I am not aware of the position in Wales. Certainly, the power has not been used in Scotland. If it had been used in Wales, I think that I would have picked that up. Nonetheless, the fact that it has not been used should not divert us from its significance or the potential of the knowledge that the power exists.

Adam Tomkins: Absolutely.

Professor Rawlings: I will make two points. First, the convener's question targeted section 58, so we ought to have it on the record that there are parallel provisions across all the devolution settlements—the power covers Scotland, Wales and Northern Ireland. The different wordings in the devolution statutes are interesting. The Scottish wording is that the power can be used if

"the Secretary of State has reasonable grounds",

whereas I believe that the Welsh wording is

"If the Secretary of State considers".

I do not have the statutes in front of me, but I believe that that is an interesting difference that the committee may want to note.

Secondly, my understanding is that those powers have not been used. However, to contextualise that a bit, the powers are about preventing a breach of international obligations and, as long as we have been inside the EU, that issue has had a more limited ambit. One sees immediately that, once we are outside the EU, those powers could become very significant. I echo what Professor Page has said: that aspect is crucial and needs to be factored into the debate.

The Convener: I apologise to Willie Coffey, but I want to tease this issue out further. That power might exist, but, if I understand it correctly, under

section 58(3), the UK Government could instruct the Scottish Government to introduce legislation.

Professor Page: It could do that.

The Convener: The problem is what would happen if the Scottish Parliament did not pass that legislation.

Professor Page: I have made the point that the Government can be instructed to introduce legislation, but that is no guarantee that it will be passed. However, we will not get into that territory.

My other point, after hearing Professor Rawlings talk about the difference between the Welsh and Scottish settlements or provisions, is that the wording says:

"the Secretary of State has reasonable grounds to believe".

The instruction must have a reasoned justification, which opens up the possibility of judicial review. The secretary of state cannot just decide to give an instruction; it has to be reasoned.

Dr Hughes: I disagree slightly with what Alan Page says about the UK single market. I agree that there are concerns about creating the integrity of a single market around the four countries and areas of the UK. Professor Page said that the EU single market is still developing, which is clearly true: it is not complete in services, for instance, and it is trying to go further in digital infrastructure. However, a large part of the UK single market is simply a part of the European Union single market. It does not exist separately from that with regard to laws, regulatory structures, international trade deals and so forth. That is part of the complexity of Brexit.

A further point is that, if you went for a general statement, such as that you will not introduce new barriers, that could cut across the Scottish Government's policy, which has been supported in this Parliament, of arguing for Scotland to stay in the EU single market and in the UK. That would introduce at least some barriers, although I am aware that the First Minister has said that frictionless trade between Scotland and the rest of the UK could still continue under that model. That opens up a wider set of issues, but they are all relevant. We will come on to more trade issues later.

10:30

The Convener: I hope that I have not cut across any of your questions, Willie.

Willie Coffey: Not at all, convener.

Let us return to the standstill agreement that you have spoken about, Professor Page. That is really about trust, is it not? What you have been talking about is basically the message, "We don't trust you," so the provision is there. Could the standstill agreement stand alone without any legislative framework over the top of it? If it is a matter of trust and everybody trusts one another and acts reasonably, such an agreement could stand alone, but would it need to be backed up by anything legislative over the top of it?

Professor Page: I did not envisage it being written into the bill; I thought that it would take the form of a concordat or understanding between the four Administrations. We have lots of experience of those. They always say, "This is not intended to create legal obligations," so we are not talking about a legal obligation. We are, however, talking about an understanding, which I would expect to be adhered to. If it was not, there would be the option of intervention in the event that the secretary of state had grounds to believe that action should be taken.

You cannot introduce new barriers by the back door or surreptitiously. We are talking about legislation—either an act of the Scottish Parliament or subordinate legislation. The risk of that happening is therefore very slight.

Willie Coffey: Professor Rawlings, your alternative suggestion was to add or change reservations in the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 to reflect the agreed frameworks and enshrine them in statute. Can you expand a wee bit on that possibility?

Professor Rawlings: Surely. In a sense, that goes back to my original set of comments: let us try to move beyond clause 11 or park it to the side. My big message is: "Let's get on with it." That is not directed at the committee, I hasten to say; it is directed at the Governments.

I am pleased with developments over the past month or so. It is great to see that, finally, the joint ministerial committee on European Union negotiations is meeting and is agreeing a set of principles of what common frameworks might look like and how they might be constructed. That is a great thing, and I am really pleased with that. I was also pleased to see the Prime Minister speaking to the Welsh First Minister and then, yesterday, to the Scottish First Minister about precisely those issues. To me, that is exactly what should be happening.

That said, I place on record the fact that much valuable time has been lost. At this stage, there is a list of, I think, 111 areas of intersection between the Scottish devolution settlement and incoming EU competences. There is a list of 64 in Wales, and there is another list in Northern Ireland, although that has not yet been published.

I will be frank. That has taken something like 15 or 17 months—I lose track of how far on we are

from the EU referendum—but, to be generous, it should have taken 17 weeks. We are a year behind where we should be on that. It does not take that long to do the technical job of working out where the areas of intersection are. Nevertheless, we are where we are. There is movement, and that is good.

We need to sit down and negotiations need to happen. I am sure that the secretary of state, Mr Mundell, has it right when he says that the first thing that we should do is look at the lists and identify the areas where we all agree that there must be common frameworks and the ones where we all agree that we really do not need common frameworks. Then there are the areas in the middle, on which we must have a serious discussion. That is the next stage.

As we go through that process, the natural thing to do is get rid of clause 11, and, in discussing the areas in which we need common frameworks, talk about reservations in the devolution statutes. That will get over the problem that Alan Page rightly flagged up around how to join up a conferred powers model and a reserved powers model. It seems to me that that would go with the grain of the devolution statutes. The big message is: "Get on with it."

Returning to clause 11, it seems to me that the exercise of parliamentary sovereignty in the bill is the wrong way round: it is being used up front, and that is not how we need to go about it. I would argue to the UK Government—and I have argued to it—that parliamentary sovereignty should, in a sense, be a reserved power. We should have discussions. As David Mundell has said, we do not have frameworks by imposition; we have them by agreement. There could conceivably be a case—naturally, I have been pressed on this when I have given evidence at Westminster—in which the Administrations just cannot agree and the UK Government believes that a fundamental union interest is in play. It is conceivable that parliamentary sovereignty might have to be exercised at that point, and we would be into Sewel convention territory. I do not think that that would happen, for reasons relating to the mutual interests of the different countries of the United Kingdom. However, if it did happen, one can conceive of parliamentary sovereignty being used as a reserved power in that situation to resolve matters. That is where I stand on that issue.

I want to park clause 11 and go through the process of the work. Maybe I am an optimist in life, but I think that a lot of that can be sorted out. I think that there would be widespread agreement around this committee room that some things in the list really do not need common frameworks whereas some do. There would then be a natural debate about the things in the middle.

Willie Coffey: Thank you very much.

The Convener: Murdo Fraser has some follow-up questions.

Murdo Fraser (Mid Scotland and Fife) (Con): Professor Rawlings, that was a very helpful exposition of your position on common frameworks being the required alternative to clause 11. I know that other members will want to look at the detail of common frameworks later, but I want to address the principle. Do the other two witnesses agree with Professor Rawlings's general approach that the alternative to clause 11 is having common frameworks and, perhaps more important, a mechanism for agreeing those common frameworks?

Professor Page: I agree with what Professor Rawlings said about the need to get on with it, but I would say, "Get on with it and don't make a meal of it." There are 111 intersecting powers. The temptation must be to go through them and see the process as an invitation to rewrite the devolution settlement and to ask whether powers should be reserved or devolved. That would be an enormous diversification and waste of effort. Working out where common frameworks are needed should not be a difficult business: just do it.

Dr Hughes: I think that common frameworks can resolve some of the issue, although, as has been said, the mechanisms for agreeing them are not straightforward. The preceding discussion has illustrated that.

I say in my written evidence that, if we went down a "soft" Brexit route—I always put "soft" in inverted commas because I do not think that there is any "soft" Brexit; as I said, all the impacts are negative—and we were in the European Economic Area and the EU's customs union, which is not a combination that has happened before, there would still be common frameworks at the European level, although that would be just at the EEA level and no longer at the EU level.

The UK Government has made it clear that we are not going for the Norway model, so it is heading for some sort of free-trade deal. It says that it does not want a Canada-style deal, but I think that the EU27 would offer that if the UK rejected the Norway model. Common frameworks work in the context of a "hard" Brexit but, if a "soft" Brexit is wanted, the discussion will go down a rather different route. Once you start talking about having common frameworks, the idea that you can solve these things in ways that are completely neutral to the form of Brexit is clearly wrong.

Adam Tomkins: On the back of Professor Rawlings's comment, I have a lawyer's question for a lawyer. Given what has been said about the importance of common frameworks and of holding

parliamentary sovereignty in reserve, will the common frameworks be statutory? Will they need to be recognised in statute? Is it the panel's evidence to the committee that, once the common frameworks have been agreed—this will apply to some of them at least—fresh reservations will need to be added to schedule 5 to the Scotland Act 1998 and to the relevant schedules to the Wales and Northern Ireland legislation? I want to be absolutely clear about where you are on the relationship between the common frameworks and statute law.

Professor Page: First of all, we would need to work out whether they would be needed and what they would consist of, and then, as you rightly point out, whether they would need to be on a statutory basis and, if so, whether that would be on a pan-UK statutory basis or a mixed basis involving legislation from this Parliament, the other devolved legislatures and the UK Parliament. We would also need to work out—this is very important—what mechanisms there would be for changing those frameworks: how they would be managed and how they would be amended.

On whether the common frameworks should appear by way of, or reflected in, amendments to, in Scotland's case, schedule 5 to the Scotland Act 1998, I have been keen to stress throughout this process that we are talking not just about a withdrawal bill, but about a Brexit legislative programme, which will involve other bills. One of those bills has been published, and we will see others that will be of direct concern and relevance to this Parliament—notably one on agriculture. Rather than putting all our eggs in the European Union (Withdrawal) Bill basket, we ought to look at the issue in the round. We should acknowledge that when we are talking about agriculture we will have a much clearer understanding of where we need common frameworks. That may well involve amendments to schedule 5, and I would expect those to be done on the basis of agreement.

On the one hand, I am saying that we should get on with it, but on the other hand I am saying that we should not lose sight of the bigger framework. Some of that, but not all of it, may well be statutory, and will ultimately be reflected, in Scotland's case, in amendments to schedule 5.

Adam Tomkins: Thank you—that is helpful. Do you agree with that, Professor Rawlings?

Professor Rawlings: Yes, I do. Ahead of today's session, I read the evidence from your meeting last week. I do not want to engage in semantics, but one matter on which I found myself disagreeing with the secretary of state was how he classified different approaches. He talked about areas where you would not need frameworks, areas where you would need frameworks and areas where you might have concordats or memorandums of understanding. My approach is somewhat different from that. I see the idea of frameworks as sometimes involving reservations and statute law, but softer measures than those can be taken. In other words, I would not start off by distinguishing frameworks from the idea of memorandums of understandings and concordats.

Over the years, I have done a lot of work on EU governance and administration. When one looks at sectors of the single market, one finds creative mixes of what lawyers like to call hard formal law and soft concordat-type law.

Adam Tomkins: We have heard enough about hard and soft. [*Laughter*.]

Professor Rawlings: I can imagine.

To return to your question, it is not either/or—there is scope for creative mixes.

The Convener: Before we move on, does Kirsty Hughes want to add anything?

Dr Hughes: I am fine, thank you.

The Convener: I hope that we have not trodden too much on the area that Alexander Burnett was going to explore.

10:45

Alexander Burnett (Aberdeenshire West) (Con): No. Thank you, convener.

In previous evidence sessions, we have heard people's views on the number of common frameworks and on the areas that frameworks would cover—agriculture, energy and the environment. Just for completion's sake, could I get your views on that, very briefly? Could we then move on—with what I hope that you have been wanting to talk about nicely teed up—to the substance of common frameworks? Professor Rawlings, would you like to start?

Professor Rawlings: I do not know whether the committee has done this, but it might be helpful to compare the Scottish and Welsh lists. That is quite an instructive thing to do, because what you immediately find, if you are taking the Welsh perspective, is that the Welsh are in the multilateral game. I say that because every single item on the Welsh list is on the Scottish list. Of course, more powers are devolved to Scotland than to Wales, so that is where Scotland gets the extras.

It is worth placing on record where those extras are, and they tend to be in two big areas. Although one would anticipate them, they are worth emphasising. The first is around justice. In Wales, we share a legal system with England. In a sense, we already have a common framework with England, which is expressed through the justice

system in England and Wales. There is a lot there that you have in Scotland that we do not have in Wales. That immediately opens up the prospect of bilateral discussions between the Scottish Government and the UK Government, in which the Welsh would not be directly engaged.

The second area where you see difference, which is related to the first, is around data sharing and data protection. There are significant extras there that, again, do not bite in Wales.

I make that point because it immediately helps to contextualise what we are talking about in relation to common frameworks. What are bilateral common frameworks and what are multilateral common frameworks? The list for Northern Ireland will be worth studying when it is eventually published, because it may open up the question whether we are talking about UK common frameworks or Great Britain common frameworks. We know that some economic sectors in Northern Ireland—energy, for example—are heavily integrated with the Republic. That is a really important starting place. I hope that that is helpful.

Alexander Burnett: It is indeed.

Dr Hughes: There is a clear issue: unless and until we know the sort of deal with the EU27 that we are going to have—if we are going to have a deal—how do we design the common frameworks? In the past week or so, we have heard the argument that Northern Ireland should remain in both the customs union and the single market. That would put Northern Ireland in a very different position in terms of frameworks from the position of the rest of the UK.

That would also cut across all the most obvious areas—agriculture, the environment and so on. I refer again to Michael Gove's suggestion that there will be a UK environment agency. In a sense, that is already taking a decision, or at least indicating the direction of travel for a decision, with respect not only to the devolved nations but to how any future EU27-UK deal might work.

There is also a timing question. I am not sure that I am as optimistic as Alan Page is about how easily you can resolve this and establish the common frameworks. However, the EU27 have made it very clear that, if we have a two-year transition period after we leave the EU at the end of March 2019, that transition should, in some sense, mean a prolongation of the EU's acquis. It is not clear to me exactly how that will happen. Would the UK get temporary membership of the European Economic Area plus some other prolongation of the EU's customs union? That has never happened before; as we know, the customs union with Turkey applies only to industrial goods. In any case, at what point do the withdrawal bill and the UK common frameworks start? We must also remember that during that transition period we will still be attempting to negotiate the final trade deal, even though, if there is a deal by next autumn, there will at least be an outline and a political declaration of the desired future set-up involving the EU27 and the UK.

Another potential problem is what happens at the end of the two-year transition period. What if it cannot be prolonged? Will there be an intermediate period in which a certain set of UK common frameworks will be in place, with things changing again two or three years later once a Canada-style trade deal, or whatever it is, is finally agreed?

All those levels are, to some extent, interdependent. It seems as if the discussion that is taking place is very much about what will happen between the UK and Scotland—or the UK and the devolved nations. Given the complexity of the situation, that might be one way of having a first go at the matter, but it presumes that we know what is happening or is going to happen at the level above.

Professor Page: I just want to add a couple of points. First, Professor Rawlings has invited us to compare the Scottish and Welsh lists—he and I found ourselves engaged in that exercise at another committee meeting. One of the things that I have found instructive about such a comparison—and it is worth bearing in mind when the committee thinks further about this—is that the Welsh list is set out much more helpfully than the Scottish one. By that, I mean that it is set out by department; it is, if you like, a shopping list made by Whitehall departments, whereas the Scottish list is just a list of 111 powers, set out, I think, in alphabetical order, with no indication of where they come from or who has highlighted or flagged them up as areas of devolved competence that intersect with EU responsibilities.

I simply mention that, because a look at schedule 5 to the Scotland Act 1998 shows that it, too, is a shopping list that is set out—under "Head A", "Head B", "Head C" and so on—by individual Whitehall departments of the things that they thought should be reserved. I appreciate that the nomenclature and the names have changed over the years, but the list should map to that. I think that that is instructive.

The question that arose for me when I wrote the paper for the Culture, Tourism, Europe and External Relations Committee is this: at what level of generality should this be pitched in order to make it meaningful? I tried to pitch it in a way that I thought was meaningful, but the great danger is that you end up descending into such detail that it ceases to be meaningful or becomes so technical that you just say, "Oh, well—we'll just have to

leave this to the lawyers, because we can't exercise any meaningful degree of control over it."

As for the substance, I will give you, in no particular order, certain issues that I picked out of the list in schedule 5: "financial assistance to industry" or state aids; powers to control the movement of

"food, animals, animal products, plants and plant products"

and

"animal feeding stuffs, fertilisers and pesticides";

"product standards"; public procurement; animal health and welfare; food safety, food labelling and food composition; fishing; and the environment. It sounds like a long list, but it is a lot shorter than 111, and is where I would expect the principal focus to be.

Alexander Burnett: That was very helpful. Indeed, this is the first time that we have heard the suggestion of comparing the Welsh and Scottish lists. We have heard Professor Page's wish to get on with this, but have you done any work beyond that on what a draft framework in one of these areas would look like?

Professor Page: We have not had that pleasure yet.

Professor Rawlings: I will make two points. You will have seen that, in the evidence that I presented to the committee, I tried to do the next step beyond the JMC communiqué. The communiqué had some valuable high-order principles and I tried to create a practical list of questions that the policy makers—the officials—could usefully bear in mind when they are devising frameworks. I tried to create a template and a set of policy tools, which are the kinds of things that one needs to consider when devising a framework. That was the next step that I tried to contribute.

We are very much in accord with regard to the further step, as that is where we should already be. The first thing to do was to create the list, as the secretary of state explained; and then to classify, as he suggested. When we have got to the point of working with a category for which there is general agreement that we need common frameworks, the immediate next step is to draft some—to sit down, have some discussions and sketch them out. I have been frank that I think that we should have already done that and should have some draft frameworks out there.

That is not an impossible demand. I go back to the making of the Wales Act 2017 in which we were changing from the conferred powers model to the reserved powers model. The original UK Government white paper "Powers for a Purpose: Towards a lasting devolution settlement for Wales" first listed areas for which it was thought that reservations would be needed. It then gave some worked practical examples of what a detailed reservation might look like; I believe that it was on road traffic, and it was very carefully done.

For a number of reasons, that is where we should be. First, it would help to take the constitutional heat out of the situation, which would be valuable. Secondly, from a parliamentary perspective, this Parliament, Westminster, the National Assembly for Wales and the Northern Ireland Assembly—if it was sitting—should by now have some drafts to look at and on which to ground their discussions. I understand that the first report of this committee will be published before Christmas and, if I was contributing to it—if I can be so bold—I would be pushing for that and saying, "If we are to have a discussion on the European Union (Withdrawal) Bill and the common frameworks, we would like to see what some of those frameworks look like." As parliamentarians, it is your job to scrutinise them.

On another level, you will agree immediately how important stakeholders are. In talking about common frameworks, we focus naturally on the relationships between Governments and Parliaments, but the common frameworks will, ultimately, have end users such as businesses, consumer groups, the voluntary sector and citizens. They will all operate on the basis of those common frameworks, so the sooner there are drafts out there, the sooner we can have real participation and consultation from all the people who are likely to be affected. That is part of the democratic process.

I am disappointed about how far behind the curve we are from where we need to be, and I would really push to speed that up. I disagreed with what the secretary of state said to the committee last week. He had a three-fold classification, the list and the idea of fixing the process. Then he said to the committee, "Ah, but we won't have time to deal with any content ahead of the European Union (Withdrawal) Bill." I would really want to question that.

Kirsty Hughes is clearly right that we will not be able to know everything, because that partly depends on what we end up with. However, there are some things that we ought to know. We ought to be able to get some of the substance, and we should certainly be able to get some of it in draft, for all the reasons that I have suggested.

Alexander Burnett: Thank you—that was helpful.

11:00

The Convener: A lot of intergovernmental machinery is required to get all that done and

there has to be a lot of discussion. What is the role for the Scottish Parliament in scrutinising that, or what should its role be?

Professor Rawlings: Is that question for me?

The Convener: It is for whoever. I am just throwing that thought out there, before we move on.

Professor Page: Clearly, there is a role for Parliament in scrutinising the process, and not just for one Parliament but for more than one, which raises the question of co-operation between them. You need to consider whether you are going to do it separately or independently of one another or whether you will take into account what is being done elsewhere and, if so, how. I have talked about that to the Delegated Powers and Law Reform Committee, where I think Monica Lennon asked a reasonable question about how that committee, with a very small number of MSPs, will scrutinise all the work. My answer to that, or part of it, was that that makes the case for interparliamentary co-operation.

I was given to understand by one of the clerks of that committee that discussions are on-going, and I think that the deputy convener of this committee may have participated in some of those discussions. It is essential that the issue of parliamentary scrutiny is faced up to, recognising the resource and time constraints that apply to each Parliament, and that it proceeds on the basis of a co-operative relationship between them.

The Convener: Just for the record, I point out that an interparliamentary forum has already been formed. That is an embryonic process that might well grow up into what you suggest. The deputy convener and I have been involved in those discussions.

Professor Rawlings: I support what Professor Page has said most strongly, but I want to make one point on that—again, you will see where I am coming from, given what I said about comparing the Welsh and Scottish lists. When we talk about common frameworks, that immediately gets us into multilateral arrangements around the United Kingdom. To me, that suggests that, as well as good and effective multilateral forms of intergovernmental relations, we need good and effective multilateral forms of parliamentary relations. In scrutinising from the perspective of Scotland a common framework that we are all going to share, it must be sensible to have an appreciation of how that framework will look from Northern Ireland, Wales and England. That seems to me to be the logic of the situation.

Dr Hughes: On top of all that, there is a broader bandwidth problem about the amount of scrutiny that is needed. As well as common frameworks, there will be new regulatory frameworks at UK level that used to be at EU level, and that will have profound consequences across the UK. Obviously, a lot of that will be for Westminster parliamentary scrutiny, but Brexit poses an extraordinary problem in terms of civil service time as well as political time and time taken by other forms of accountability. That is not the only reason for some of the certain inconsistencies through to chaos that we are seeing as we try to re-engineer our whole system in an extraordinary hurry, but it is certainly one of them.

Ivan McKee (Glasgow Provan) (SNP): I thank the panel for coming. I want to go into a bit more detail about the interplay between trade negotiations and the common frameworks. Dr Hughes talked about the timing, which sounds variable. We do not know what common frameworks there will be or when they will be in place. It is unclear whether they need to be in place before March 2019 or whether they can be developed through the transition period. Obviously, the relationship with the EU, whether it is soft, hard or something in between, will determine what the common frameworks look like.

I want to take us beyond that. We imagine a common framework as being something static, whereby once we have figured out what it is, we will implement it and that will be that, but the reality is that we will have negotiations on the trade relationship with not just the EU27 but every other country in the world. Every time we do a deal with Australia, Canada, Japan or wherever, there will be non-tariff barriers and regulatory issues that might impact on all the common frameworks that are in place. How will the dynamic aspect of that be managed on top of everything else that we have talked about?

When the UK Government is negotiating with a country such as Japan, it will want to say that its non-tariff regulations in a particular area are X and that, on that basis, it can do a deal. However, if part of that is tied up in a common framework in which the devolved Administrations have some say, how do you see all that coming together? How will the devolved Administrations have an input into those negotiations?

Professor Page: I addressed that point in my submission. Another point that I have been keen to stress from the outset is that this is a much broader issue than one that involves simply those EU competences that are devolved and which—on one view, at least—ought to fall to the Scottish Parliament. There is the much bigger question of all the other competences that have implications for Scotland, Wales and Northern Ireland, foremost among which is the one that you highlighted, which relates to the negotiation and conclusion of trade agreements with the EU and, as you rightly said, with all non-EU countries.

As I said in my submission, that highlights the need for a much more thoroughgoing system of intergovernmental relations that encompasses that and ensures that the interests of the devolved nations are properly taken into account in the negotiation and conclusion of those agreements. The truth is that the limited experience that we have of that is, in Scotland's case, quite bad. Scotland was simply forgotten about when Tony Blair did his deal with Gaddafi on the prisoner transfer agreement; he forgot that the criminal justice system was a devolved responsibility.

We need to begin to address that whole new dimension of intergovernmental relations. As I indicated in my submission, the words are there on paper, but there is no effective machinery to back them up, and I can well imagine that there are interests in ensuring that there is no such machinery. The UK Government would prefer to get on with the process undisturbed or unfettered by the claims of the devolved Administrations. That is why I think that the issue needs to be highlighted now.

Dr Hughes: It is a very good and important question, which shows how difficult and big the issue is. When the EU negotiated a trade deal with Canada, it ended up in the Walloon Parliament, because such deals are often mixed agreements that have to conform with the constitutional arrangements of the member states. Will we have something that says that the UK Government or Westminster just decides, or will it be the case that, once we have set up the new structures, we will have non-tariff barriers and regulations that are structured across the devolved Administrations and Parliaments? I think that we have a very big problem.

We talk about a transition that will potentially be very short, but the EU27 cannot speak for the 60-odd third countries with which it has trade deals. As you know, in the Trade Bill, the UK Government is trying to say, "We don't need to bring all this to Parliament—just give us the powers and we'll go off and negotiate these on our own." That will be difficult in some cases. It will be time consuming. The *Financial Times* estimated that, apart from those crucial trade agreements, there are more than 700 international arrangements and treaties that may also need to be renegotiated or replaced in some way—I am sorry that I cannot remember the exact number. These issues are going to come up straight away, for both the transition from where we are as well as any future deal. This might take us into the area of another committee, but that raises the question of how you prolong the customs union. The question of how that can be done even for, say, two years needs an answer. Further, would it be enough to prolong those agreements for at least two years with those 60 other countries? If not, we are going to get into these issues extremely quickly.

I have another comment on the time horizons. As I understand it, the view in Brussels is that you cannot have a long transition because there would start to be legal challenges to whether that could be agreed to under article 50. If you are going to have a four or five-year transition, it would start to look like a quasi-trade deal, in which case it should be agreed under article 218 and other articles of the treaty. Even if the EU were open to it, it is not necessarily in the EU's gift to have a long transition period.

There is another wrinkle, which is whether it could be part of the article 50 agreement that there is a possibility to extend the transition—in other words you set it up as a short transition but you then extend it. The significance of that is both whether that can be decided by a majority in the European Council or by unanimity and whether it has to go back to member states, Parliaments and so on.

The question of how the split of non-tariff barriers between UK level and devolved level feeds into trade negotiations is extremely important and very difficult to resolve. It is not just a long-term problem but something that needs to be resolved as we head—perhaps—towards a transition phase.

The Convener: Professor Rawlings, can I draw your attention to something that you mentioned in your paper. You suggested some potential new machinery to deal with some of that, such as a JMC on the domestic single market. That is the first time that I have seen that suggestion. Such a JMC would have an interplay with trade deals, but the suggestion raises some questions in my mind. The architecture may be there, but if there is a dispute, how would we resolve it? At the end of the day, does that come back to the fact that the UK Parliament is sovereign so it is the one to make the decision? That seems to be the nub of the issue as far as Scotland is concerned.

Professor Rawlings: I suggested two bits of machinery in that paper. The first was just a sentence, which mentioned the idea of a joint ministerial committee on international trade. I did not develop that idea because it was something that had been suggested by the Institute for Government. My suggestion was a joint ministerial committee on the domestic single market.

That picks up on the first part of the question. It is all very well to establish some common frameworks, but they will be living instruments and there will be regulatory challenges and change, technological innovation and so on. I wanted to put a marker down that it is all very well to have a revivified JMC on European Union negotiations,

but at some point those negotiations will stop. I wanted to suggest that we would need on-going machinery in that area. If we are going to have elements of shared governance, there will have to be a continuing process of negotiation and fine tuning. I thought it important to introduce the idea of having some form of standing machinery to achieve that. We can make some common agreements, but things happen and we have to have machinery in place to deal with that.

We then come to the vexed question of how we resolve disputes. Naturally, with my Welsh perspective, I am aware that the Welsh Government has developed a set of proposals in its paper "Brexit and Devolution". That goes into great detail about voting rules and how to decide disputes. Attractive though that is, it has no political traction in Whitehall and Westminster. It is just too much of a jump for the UK Government to accept. My proposal was more modest, frankly, because the UK Government will not take that kind of approach.

11:15

The Convener: If there is a dispute, how do we resolve it?

Professor Rawlings: Ultimately, it has to be done to the greatest extent possible through consensus and agreement. However, I am driven back to the fact that we are in a union, at least for the time being, and ultimately the UK Parliament will have to take a view.

Ivan McKee: Earlier we talked about section 58, which is about the UK Government's rights with regard to devolved Administrations and international deals, but it does not say whether those are existing international deals or new ones. Is there a scenario in which the UK Government wants to do a deal with somebody and it has to play the section 58 card to railroad it through?

Professor Page: No. Section 58 is about existing international obligations.

Ivan McKee: Okay.

Professor Page: I will follow up what Professor Rawlings said. I said earlier that all this points to the need for a more thoroughgoing system of intergovernmental relations. What I did not add but what I have in mind is that, in certain cases, that will have to extend to joint decision making. That is the nettle that must be grasped, but it is not going to be grasped as a general principle for exactly the reason that Professor Rawlings has indicated, which is that the UK Government will not wear it as a general proposition. When you get into the nitty-gritty of working out what the common frameworks are, there will be questions of different levels of importance to the devolved Administrations, and some should certainly be that we are not going to change, other than on the basis of agreement. I would be looking to pre-empt the possibility of disputes arising by having provision for joint decision making in relation to certain key issues.

Professor Rawlings: That is the position that I expressed in my paper.

Patrick Harvie (Glasgow) (Green): I want to start with a question that follows on from Ivan McKee's line of questioning about trade agreements. Dr Hughes, your submission clearly suggests that you anticipate something like the trade agreement with Canada. Whether the UK Government has that in mind or something else that it has not told anyone about yet, we do not know. However, we know that these things can be controversial, particularly around issues such as investor state dispute resolution mechanisms.

There is a general argument that such mechanisms transfer what should be democratically accountable power for Governments to regulate and legislate to unaccountable bodies such as tribunals. Within the EU, that is not such a problem because there is a level of European democracy to which those decisions are accountable.

If the UK goes in that direction, there will have to be something like an investor state dispute resolution mechanism. Is it possible for such a mechanism to respect the devolved competences of Governments within the UK in relation to their legislative areas and the jurisdiction of Scottish courts and tribunals? How much influence will the devolved authorities have over such mechanisms and the decisions that they can make? How can we hold them democratically accountable?

Professor Page: My brief answer, while Dr Hughes is thinking about the question, is that Patrick Harvie is absolutely right that those are all issues to be addressed. I do not pretend to have an answer, but the issues that he highlighted are of the first importance and should not be lost sight of.

Dr Hughes: Yes, you are absolutely right. It is a huge question. The investor state dispute settlement mechanisms have come in for a huge amount of attention, scrutiny and criticism recently—rightly, in my view. The Canada one was tweaked to take account of that to some degree. The transatlantic trade and investment partnership has gone on to the back burner—or into the dustbin, in some people's view—but the issue was clearly going to remain very sensitive in that. On the other hand, in a Norway-type situation, there would be the Court of Justice of the European Free Trade Association States. My colleagues are probably better qualified than me to talk about how

devolved courts and legislation relate to the EFTA court, which is a rather important and interesting question.

This is slightly to one side of Patrick Harvie's question, but I will add it while we are on the issue. We do not know what the Prime Minister means by a "deep and special" agreement that is not based on the Canada or Norway agreements, but we can guess that she very much hopes for a trade deal that will give much more access to services than the Canada or South Korea deals have. That looks highly unlikely if you talk to people in the EU27 or in Brussels, which obviously has very serious implications for Scottish exports.

The National Institute of Economic and Social Research has talked about a greater than 60 per cent fall in services trade in the case of a Canada-style trade agreement, and the latest line out of Brussels is not just that they will not give the UK that, but that they cannot, because of most favoured nation clauses in the Canada and South Korea deals. Those clauses mean that, if the EU gave such an agreement to the UK, it would have to offer it to those other countries as well. That is obviously a bit to one side of the dispute settlement issue, but it is very important for the wider issues.

Patrick Harvie: The regularity with which I have heard the phrase "deep and special relationship" suggests to me that it just means, "Please don't hate us for doing this." It does not seem to have developed any more meaning than that, so far.

Are any of the witnesses aware of any trade agreements among the range of possibilities that exist, such as that with Canada or with other countries, that take account of different levels of jurisdiction within a country? In Scotland, the courts and tribunals are separate in relation to legislative authority. Are there any examples of trade agreements in which a country has managed to achieve recognition that authority and democratic accountability can be exercised at different levels?

Professor Page: I do not know, but you can and should ask your question with regard to the position of the devolved Administrations in relation to the EU and its rules on standing—the rules on who can bring actions before the European Court of Justice. I am digging deep into the recesses of my memory at this point and I may not be entirely reliable, but I think that it is only the UK Government—not the devolved Administrations—that can litigate before the European Court of Justice.

For example, if Scotland had an issue with something that was being done by the EU or, by analogy, under some as yet to be concluded international trade agreement, the question would be whether Scotland, of its own motion, could pursue that concern or issue through whatever dispute settlement mechanism had been established, or whether that would be in the hands of the UK Government. I think that I am right in saying that that principle was not conceded in relation to the EU—I see that Professor Rawlings is nodding his head. Going back to what we were saying about all issues to be addressed, that is a critical one.

Patrick Harvie: I appreciate that point. The difference is that there is a level of democratic accountability in the EU. Scotland has parliamentarians elected to represent us in the European Parliament.

Professor Page: I would not set too much store by that.

Patrick Harvie: Well, it is at least an attempt.

Dr Hughes: I would set a lot of store by the powers of the European Parliament.

Professor Page: I meant Scottish representation.

Dr Hughes: On Patrick Harvie's question, there are obviously multiple levels. At the stage of actually agreeing a deal, different constitutional arrangements in EU member states have come into play—as I mentioned, the Walloon Parliament held up the EU-Canada trade deal—and I cannot see why such an arrangement would not operate for the UK if we chose to set one up in that way. Looking at the powers of the Walloon Parliament, I do not know how such an arrangement would operate in any dispute subsequent to that.

Professor Page: In case I am thought to be unduly dismissive of the European Parliament, I should emphasise that I was making the point that we have six MEPs in a Parliament of 751 MEPs.

Professor Rawlings: I have two points to make. First, the direction of the previous two questions was spot on, because it seems that the area of international trade and its relationship with devolution will be a controversy that will run and run. If I may say so, Ivan McKee and Patrick Harvie are both absolutely right to focus on that aspect.

Secondly, there is a very considerable distance to travel on the issue. I do not know whether committee members have had a chance to look at the new board of trade that the UK Government has established in the past month or so and the related briefing documents. You will find that it involves what is very much a top-down approach in which the devolved Administrations, far from being represented on the new board, are treated very much as stakeholders along with a lot of other stakeholders. It seems that the UK Government is sending out quite a negative set of

messages in that regard, and I am personally very disappointed about that.

Patrick Harvie: I also want to ask about Dr Hughes's paper in relation to—

The Convener: We will come back to that.

Patrick Harvie: Okay—I will store that question for now.

The Convener: We have been dealing with the issue of international trade, and we now move to more mundane but nevertheless important matters of ministerial powers. I want to get some of that stuff on record, and I know that Emma Harper wants to ask some questions about it.

Emma Harper (South Scotland) (SNP): Good morning, everybody. Professor Page, in your paper you state:

"ministers will gain far-reaching powers to legislate in the devolved areas, powers which are said to be justified by the scale of the challenge represented by Brexit and the shortness of the time within which"

we have to negotiate. You go on to say that that is a

"radical ... departure ... from the principles on which the devolution settlement is based".

Will you expand on that a wee bit, please?

Professor Page: Yes, indeed. When I first saw that part of the bill, I looked askance at it. In particular, I looked askance at the proposition that the UK ministers should not only have the freedom to legislate in the exercise of the powers to be conferred by clauses 7 to 9 across devolved as well as reserved areas, but that that should be subject only to a non-binding requirement for consultation with the Scottish ministers, with no provision nor requirement for their consent, and no provision for Scottish Parliament scrutiny or approval of the regulations resulting from the exercise of those powers.

What may have been lost sight of, or not sufficiently picked up—which is why I stress it in my submission—is, as Emma Harper pointed out, how radical a departure that is from the existing devolution settlement. In the 1998 act, there is—in contrast to provisions for the power of the Westminster Parliament, which as you know remains sovereign and can legislate for Scotland, as the act specifically states—no equivalent provision in relation to the power of UK ministers, who have only very limited powers to make subordinate legislation. Their most significant power is set out in section 57(1), which allows UK ministers to implement EU obligations in the devolved areas. As a general rule, however, they have no such power. The power belongs to the Scottish ministers, for the perfectly understandable and correct reason that they are responsible in those areas.

11:30

What we are proposing to do—the question has been picked up and it certainly merits highlighting—is to assess how radical a departure that is from the principles on which the devolved lawmaking system is based. I used to say to my students that the European Communities Act 1972 began with two blank cheques: one in favour of the EU institutions to write laws and the other in favour of UK ministers to implement EU obligations. I am tempted to say that it will end with one blank cheque that will be in favour of UK ministers to legislate across devolved and reserved areas. That is simply unacceptable. I looked—possibly not as closely as Professor Rawlings did—at what the secretary of state said in evidence to this committee. There were a lot of warm words there, but I did not get any sense of movement towards conceding the principle of Scottish ministerial consent to the exercise of the powers. That principle is absolutely fundamental and it needs to be considered.

Emma Harper: Will you explain a bit more the options for proceeding that you alluded to in your written submission?

Professor Page: We need Scottish ministerial consent as a precondition of the exercise of powers by UK ministers in the devolved areas; if the principle of Scottish ministerial consent is not conceded, we need those powers, or the clause 10 analogous powers, to be exercised by Scottish ministers. That is the first step. I did not go into this in my written submission, but for practical reasons—reasons of resources as much as anything—the temptation will be to go with what the UK proposes. We will be seeing a lot of UK or GB-wide legislation for our devolved areas when it comes to ensuring that the statute book functions properly after we have left the EU.

That is the first of my three options: that Scottish ministers are able to grant consent. However, there has been another set of warm words and assurances from Scottish ministers—one in particular—that, yes, the Parliament will be informed about all of this. The point that I made indirectly in my written submission but did not spell out is that those assurances tend to be easily given and are equally easily forgotten about. I did some work on the transposition of EU obligations and the circumstances in which the Scottish Government had relied on UK legislation in the transposition of those obligations. The Scottish Government was remarkably quiet about that and did not say, or could not say, anything about it. When I went to Brussels on another matter I spoke to Scotland Office and Scottish Government

representatives who said, with regard to that Scottish Government practice, "Oh, yes, we do it all the time." The only people who did not know about it were those in this Parliament, notwithstanding any commitment made by several Administrations of different political complexions that the Parliament would be kept informed.

That commitment was just forgotten about and allowed to go by the by. I raised the matter with the European and External Relations Committee, after which I think that it was picked up again. However, for whatever reason, the commitment was forgotten about. If it is the case, as I suspect it is, that we are going to be relying heavily on UK subordinate legislation to tidy up the statute book to ensure that it operates properly, then this Parliament needs to know about that and needs to be certain that it is being told about it and that it is not just being allowed to go by the by. That would be my first step.

Then there is the question of the scrutiny of UK or GB-made regulations and what provision there is for this Parliament's input into that scrutiny. That takes us back to the question of interparliamentary co-operation. Are we just going to leave it to the UK Parliament to scrutinise as best it can, or is there going to be provision for this Parliament to know about it and voice any concerns that it might have about what is being done?

The last of my three possibilities is that the Scottish ministers would make the changes and then it would be the job of the Delegated Powers and Law Reform Committee to take up the question of scrutiny. I have gone on at length, but that is what I had in mind.

The Convener: I am glad that you have for the record. Does anybody else wish to comment?

Professor Rawlings: As one would expect, similar concerns have been expressed in Wales. I would like to place on record a particular set of points. I am sure that the committee has considered them, but it is worth putting them on the record again. I refer to constitutional protection of the devolution statutes. Clauses 7 to 9 relate to the UK ministerial powers to deal with deficiencies, compliance with international obligations and implementation of the withdrawal agreement. At the moment, those powers could be used to amend the devolution statutes. In a way, it is a sidestep of the Sewel convention, with legislative consent not being required because the convention is not engaged.

I draw the committee's attention to clause 7(6), under which amending and repealing the Northern Ireland Act 1998 is, rightly, specifically exempt from the power to correct deficiencies. The explanatory notes outline that that is on the basis that the 1998 act reflects the Belfast agreement. Concerns about the peace process and international obligations are, therefore, in play. That is an excellent set of explanations, but it does not explain why that constitutional protection could not also be extended to the Scottish and Welsh settlements. It should be.

Likewise, under clause 8, the devolution statutes should be specifically exempted from the power to make regulations complying with international obligations. If you want to do that, that should be done through legislation. There is no protection again for any of the devolution settlements under clauses 8 and 9.

This is quite a big set of issues, which I invite the committee to address. They have been covered by the joint amendments. We seem to have a new alliance between the Scottish and Welsh Governments for these purposes, and the amendments proposed by the Governments specifically deal with this matter. They are entirely right to bring forward that set of amendments to protect the devolution statutes.

The Convener: We will move on to slightly broader issues. I call Neil Bibby, but I will come back to Patrick Harvie later.

Neil Bibby (West Scotland) (Lab): What are the your thoughts on article 50? Lord Kerr, who drafted article 50, stated last Friday that it need not be implemented as the letter from the UK Government only declares a notification of intention to withdraw from the European Union. Do you agree with Lord Kerr?

Professor Page: I agree. I was asked to write a piece for *The Conversation* and I declined because I have so much going on at the moment. The letter is a notice of an intention to withdraw. The other point that is usually made is that what article 50 means is a matter for the European Court of Justice, but I would assume that notification can be withdrawn, notwithstanding that you might hack a lot of people off if, having put them through all this, you were then to turn round and say that you had changed your mind.

Dr Hughes: The question is whether Brexit can be halted. I think that it can, but it is a legal and a political question. Also, as Alan Page has just said, as a legal question, if it was contested, it could end up at the European Court of Justice; there are disagreements as to whether you can unilaterally withdraw notification. The European Parliament, in its April resolution, said that the agreement of the member states and the Parliament itself should be needed to do that. The European Commission said something similar on the day of the article 50 notification, in a press release that was not that much noted.

There is a huge breakdown of trust between the UK and the EU27. The damage to that relationship

is getting worse almost daily. I find it very difficult at a political level to envisage the UK withdrawing that notification and staying in. Whatever happens here in terms of whether or not we would have to have a second EU referendum, it is very hard to imagine the UK saying that it is staying in in the teeth of political statements of opposition from the EU27. There would have to be some great getting over of this extraordinary hiatus—a great healing of political wounds, with us being welcomed back.

If the UK was still immensely divided, in economic crisis and political crisis, how would we get to the withdrawal of the notification? Has the Government collapsed? Has there been an emergency general election? If we have a second EU referendum in which there is a 50.5 per cent vote to remain, the EU27 will be wary. There is too much of a presumption that we will simply be welcomed back with open arms.

As you know, some EU politicians have said that, if the UK wanted to come back, we would have to renegotiate the rebate, but that certainly does not follow legally. If we withdraw the notification before March 2019, we still have a veto on budget issues. However, that tells you something about the political mood and about the question of where next.

I broadly agree with John Kerr, but the question is both a legal one and, primarily, a political one. It is not just a matter of legal opinion, which is why it may eventually need to go to the ECJ.

Professor Rawlings: I have nothing to add to that.

Patrick Harvie: Dr Hughes, to pick up on something from your written submission, you make it very clear that the bill as it stands is clearly predicated on the assumption that the UK will be leaving the single market and the customs union—the so-called hard Brexit approach—and that in a parallel universe somewhere in which a different position was being taken and a UK Government wanted to stay in the single market, much simpler legislation would be required, which would not be anything like the bill that we are looking at at the moment. Am I right that you seem to be going further and saying that, if the bill passes, a change of position by the UK Government to stay in the single market would then be very problematic? Would it be possible?

Dr Hughes: My view is certainly that the bill could be much simpler. There is that old phrase beloved of economists—is something both necessary and sufficient? If you were going down a Norway and European Economic Area route, a lot of this might not be necessary. Your crunch question is whether the bill would nonetheless be sufficient to allow that route to be taken. I asked Professor Alan Page that question two weeks ago. I put his response into the comment piece that I wrote and referenced it in my written evidence, so I certainly defer to him on whether some of these concepts of retained EU law would be the same in that case.

Keir Starmer raised the issue a couple of days ago when he said that, in his view, the withdrawal bill was not appropriate for a transition involving the extension of the EU's acquis, because of the ECJ. Of course, the issue is slightly different in the EFTA case.

11:45

Patrick Harvie: Let me suggest a scenario. The bill trundles on into the new year, with a few concessions made to the devolved Governments sufficient to win legislative consent. However, bad news starts to leak out of the negotiations; a series of companies starts to say, "We'll move out, and we won't invest any more," and jobs are lost; three or four MPs are forced to resign on grounds of sexual harassment and thumping great majorities are won in those constituencies by explicitly pro-single market or anti-Brexit candidates; and another dozen Tory back benchers join the rebels and say, "We should stay in the single market." In those circumstances, there could be clear unity between votes in the House of Commons, the House of Lords, the Welsh Assembly and the Scottish Parliament, making it clear that Britain should apply to join the EEA. If that were the case, and the bill had been passed, would we then face an equally massive job of correcting a set of legislative mistakes that would not be compatible with the new position?

Dr Hughes: I think that Alan Page is probably better placed than I am to answer that question, but I find it very hard to see how a so-called "soft" Brexit could be sustainable. I think that the sort of scenario that you have outlined could happen, but how long could the UK stay in the single market or the customs union before trade deals and regulatory rules were made on which we would have no democratic say at all? Depending how all of this unfolds—and whether it happens early next year or, if Westminster rejects the deal, next autumn if a deal were to emerge—a dash to the EEA might, short of halting Brexit, be the other option facing the UK. Your question about the withdrawal bill is therefore certainly pertinent.

Patrick Harvie: If only rational things happened, we would be living a very different life at the moment.

The Convener: Listen, Patrick—you talk about being rational after just giving us your dream. [*Laughter*.]

Patrick Harvie: Does Professor Page wish to say anything about how realistic it would be to

change policy, even if it were desired and became possible? Would we face huge problems in implementing such a change in policy in the event that the bill were to be passed?

Professor Page: Yes. Pursuing your dream, Mr Harvie, I think that it might be possible to pass the bill but never bring it into force. That aside, as I said in response to Kirsty Hughes's question, I think that in such circumstances, retained EU law would take on a different meaning. It would not be retained in the sense that the term is used in the bill—in other words, as a body of law, the retention, amendment, revision and repeal of which would ultimately be a matter for the UK Parliament. It would be a body of law over which EU institutions and the EU legal system would have a much greater say than is envisaged under the bill.

Patrick Harvie: So it would effectively become a new description of the status quo.

Professor Page: It would, but one that was fundamentally at odds with the idea of retained EU law as used in the bill. You would be reverting to the status quo as it is at the moment, and that would involve rethinking the notion of retained EU law and the applicability or appropriateness of this particular piece of legislation. We would be back to the drawing board.

Professor Rawlings: It is right to assume that this bill was perhaps not physically drafted but sketched ahead of the UK general election. If one compares the bill with the contents of the UK Government's second white paper, which was about what we would need to do by way of legislation and contained that very short chapter—it was, in fact, four paragraphs long—on relationships with the devolved Administrations, one finds the bill to be very much what one would have expected in light of that document. However, the UK general election happened in between the white paper, which was published, I think, in April, and the introduction of the bill, and perhaps the political assumptions on what the House of Commons might look like have somewhat altered. That is my first—and more political—point.

Secondly, in my view, the idea of a transitional arrangement does not really fit with the bill. Clause 1 refers to the repeal of the 1972 act, but what would be the basis of a two-year transitional agreement once repeal happened? I am therefore not surprised to hear it ventured that going down the route of a transitional agreement would require fresh legislation. Those two points fit together, because I had the sense—certainly after reading the legislating white paper—that before the UK general election the idea of a transitional arrangement was not featuring very highly in UK Government thinking.

Professor Page: I held the same view, but I note the oral evidence given to the House of Commons Exiting the European Union Committee by Sir Stephen Laws, the former first parliamentary counsel, that the answer to that question is to be found in clause 17. In other words, you could leave on 29 March 2019 but exercise the powers in that clause to make transitory provisions in order to accommodate a transitional implementation agreement. I have not read that closely yet, but there is an answer out there.

Professor Rawlings: That is an extraordinarily bold reading of clause 17, which is the kind of clause dealing with transitory and consequential arrangements that one sees in so many statutes. A figure with the authority of Sir Stephen Laws must be taken extremely seriously but, as I have said, that is a very bold reading of clause 17.

Dr Hughes: We have yet to see the EU27's guidelines on transition, but Michel Barnier and others—including the European Parliament itself—have already made it clear enough in the public domain that they see only a transition that involves a full extension of the acquis under all the appropriate supervisory and judicial mechanisms. I cannot see how that would fit with the withdrawal bill, but I find it interesting that the message from Brussels is that they expect the full extension of the acquis, but with the UK out of institutional decision-making structures; they are not talking about an extension of membership. I have asked people in Brussels how they envisage that happening, but I have not had an answer to that question, and I do not think that we know yet.

The Convener: Thank you very much for coming along and giving evidence this morning. You have helped to flesh out some very important wider constitutional matters that go beyond the simple matter of clause 11; indeed, that was the purpose of today's meeting. The situation is complex—that is for sure—but it is fascinating, too.

I now close the meeting.

Meeting closed at 11:53.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba