



OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Relations Committee

Thursday 7 September 2017

Session 5



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CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
19th 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 (Ettrick, Roxburgh and Berwickshire) (Con)

*Richard Lochhead (Moray) (SNP)

*Stuart McMillan (Greenock and Inverclyde) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ellen Leaver (Scottish Government)

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

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 7 September 2017

[The Convener opened the meeting at 09:47]

Decision on Taking Business in Private

The Convener (Joan McAlpine): Good morning and welcome to the 19th meeting in 2017 of the Culture, Tourism, Europe and External Relations Committee.

Our first item of business is a decision on whether to take agenda item 3 in private. Are members content to do so?

Members indicated agreement.

Withdrawal from the European Union (Negotiations)

09:47

The Convener: Our main item of business today is an evidence session on the article 50 withdrawal negotiations with the Minister for UK Negotiations on Scotland's Place in Europe. I welcome Michael Russell and his official, Ellen Leaver, who is European strategy manager in the Scottish Government. Would you like to make an opening statement, Mr Russell?

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): As I met the committee last week in an informal session, I suspect that committee members might have heard enough from me in that regard. I would be happy just to answer questions.

The Convener: Okay. Thank you very much.

We have read your letter to Mr Davis closely. It is clear that you are very disappointed with the joint ministerial committee (European Union negotiations) process, and you have pointed out that the last meeting of the JMC(EN) was in February. You mention in your letter that the terms of reference of the JMC(EN) have been breached. Will you go into more detail on that? What aspects of the terms of reference have been breached? What comeback do you have on that?

Michael Russell: There are two areas of significance in respect of the breach of those terms of reference. One of them relates to the wider JMC process and is to do with the memorandum of understanding that governs the JMC(EN). I am happy to provide chapter and verse on that.

On 14 June, the Welsh Cabinet Secretary for Finance and Local Government, Mark Drakeford, and I triggered the process to call for a JMC(EN) by formally asking for one to be held. The memorandum of understanding says quite clearly that the meeting must be held within a month, or a date for it must be set within that period and agreed. That has not happened. There is discussion about a possible meeting in October, but that is a breach.

The terms of reference of the JMC(EN), which were agreed among all the parties, refer to two things in particular. One is to seek to reach agreement on the article 50 letter. That did not happen. The article 50 letter was never tabled or discussed during the entire process. I think that the meetings stopped on 8 February because there would have been a requirement or pressure during February and into March to talk about the article 50 letter. The terms of reference also say

that there should be, in so far as is possible, oversight of the negotiations with regard to the devolved competencies. There cannot be such oversight if the meetings do not take place. That oversight is not happening. We believe that the terms of reference have been breached, and I think that that is the Welsh Government's position, too.

It is difficult to have redress. With an unwritten constitution—even with written parts and a memorandum of understanding—and no means of enforcing it, the United Kingdom Government can simply ignore it, and that is what it is doing. We have made that point forcibly to David Davis, and John Swinney and I have made it forcibly to Damian Green, who will, I understand, now chair the JMC(EN), as he has taken responsibility for the Cabinet Office and devolution. We have also made the point to the Prime Minister, and we continue to make it strongly and in public.

The Convener: You have had bilateral meetings—there was one such meeting on 9 August. Was that useful? Will you update the committee on it?

Michael Russell: It was useful in the sense that we would rather meet and discuss than not meet and discuss. The meeting followed a telephone conversation that I had with Damian Green around four weeks beforehand, I think, and a joint telephone call that he had with John Swinney and me around two weeks beforehand. We had a discussion that was focused primarily—in fact, almost exclusively—on the European Union (Withdrawal) Bill. The Secretary of State for Scotland was there, too. Separate issues are being dealt with with David Davis, although the issues come together in the lack of consultation.

At the end of that meeting, we agreed that, although we had made no real progress, we would meet again. Officials have been endeavouring to find a form of words on the principles that would allow us to start to discuss the frameworks that are inherent in the European Union (Withdrawal) Bill on key issues of intersection between devolved and European competencies. However, we do not have an agreement on them. We have a set of agreed principles between us and the Welsh Government, but there is no agreement with the UK Government on them. Discussions are continuing. I hope that we can convene a meeting again soon, but we would require to have something to talk about, so there has to be some progress on the principles.

The Convener: I am sure that other members will have questions about the European Union (Withdrawal) Bill. The Parliament's Finance and Constitution Committee is, of course, examining that bill. You seem to be saying that that has basically pushed out any opportunity for the

Scottish Government to get information about the negotiations, even in bilateral talks.

Michael Russell: David Davis is, of course, responsible for the negotiations, and there are separate discussions with him. They should come together in what should be the JMC(EN), which has not been meeting.

I have been briefed on each round of talks, but not beforehand. People have not said, "What does the Scottish Government think about this?" In the first round, I had a conversation with Sir Tim Barrow the night after the talks, as I was in Brussels. I received information about them. In the second round, David Davis rang me during the week—indeed, I spoke to him on Monday this week. He spoke to me about what had taken place.

It is fair to characterise what has happened since the election on 8 June as follows: there have been more bilateral discussions, but there has been substantially less—in fact, no—consultation. Information has been given about the UK Government's view of what happened in the talks, but there is nothing else. There is no chance to discuss things beforehand or to look at agendas. That is a very long way from the proposal that we and the Welsh made at the start of the talks that a JMC process should be built into the four-weekly talks cycle. We proposed then that there should be a meeting during the four-weekly talks cycle in which discussion about key issues could take place.

I do not want to complicate things unnecessarily, but there is also the issue of the papers that the UK Government publishes. It has now published 16 papers. Those papers are meant to inform the talks process. Some of them deal with areas of devolved competence. For example, yesterday's paper on science and technology is largely about areas of devolved competence, as is the paper on civil jurisdiction. There is a criminal jurisdiction paper. There has been no consultation at all about those papers. We are sometimes told around 24 or 48 hours before the papers appear that they will appear, and we see an embargoed copy. There is not even the ability to dot an i or cross a t. It is intolerable—I used that word in my letter to David Davis—that areas of devolved competence are being discussed and put on the table in the negotiations without even the courtesy of a consultation with the devolved Administrations. That is simply wrong, and my letter says in fairly stark language that it cannot continue.

The Convener: In your letter, you mention details about those papers. How would the papers have been different if you had been consulted in the way that you wanted?

Michael Russell: I thought that you might ask that and, if you turn to the annex—

The Convener: I read the annex.

Michael Russell: —you can see the summary points that we would have made on each of the papers. However, the JMC process was meant to do that. If, for example, migration was on the agenda at the JMC meeting, the process should have been that we came to the table and said what we thought, the Welsh would have said what they thought—that might have been different from what we thought; they are publishing a paper on migration today—there would have been a discussion and, by the end of day, a common position would have been reached.

You can see in each of the papers that we would have had views. When we got to an area of devolved competence, we would have expected the UK Government to say, “This is a matter for you. What are your views and how should it operate?”, and a position would have been reached on that area. For each paper, we can say how we would have done things. We do not disagree for the sake of disagreeing. The papers indicate where we think that there are issues and where there are not.

If you read the papers, you come to the conclusion that, overall, they make a pretty good argument for staying in the European Union, because they stress many of the strong, positive points. In that regard, we might also have said that there are some good things that we need to preserve.

The Convener: Scots law is devolved not just under the devolved settlement but dating back to the act of union in 1707, which enshrined its independence. Is the paper on civil law particularly concerning?

Michael Russell: It is outrageous that a paper on civil law can be published without even a consultation with the Scottish Government or the Lord Advocate. It almost defies belief that such a thing would happen.

We have to make it clear that the UK Government is creating a circumstance in which the negotiations would be based on sand if they were to go on to the area of civil law, because if it is offering to deliver things on civil law, we might not be able to deliver them—they might be impossibilities. Even with regard to the practical nature of this, the UK Government needs to be extremely careful as it enters areas that it does not know about or understand and cannot deliver on.

The Convener: Have you been given any indication as to how the EU negotiators might view the fact that the UK Government is publishing

position papers on areas in which it does not have authority?

Michael Russell: We are making representations to ensure that people know that. When I go to Brussels and speak to people, they treat the issues with incredulity and cannot believe that that is happening. It is a clear breach of the unwritten constitution. The UK Government is presently operating as if devolution never happened, and that is also what is happening with the repeal bill. The repeal bill is actually written for a set of circumstances in which devolution does not exist.

In the UK Government, we have a set of ministers whose knowledge of devolution is very limited—we accept that. However, you cannot simply pretend that devolution is not there, unless you intend to undermine devolution, which might now be a conscious effort on their part. Although we had been asking for the withdrawal bill since January, we did not see it until a fortnight before it was due to be published and, when we saw it, we said that it did not work. We did not simply say that it was wrong and that it undermined devolution; we pointed out that bits of it did not work. In particular, we said, “Please do not publish clause 11—put a placeholder in and let’s discuss how we can get this to work.” We were completely ignored and it was published as is.

That is why, when we publish the legislative consent memorandum next week, it will be impossible for us to recommend that the Scottish Parliament supports the bill as it presently stands, as the First Minister indicated on Tuesday.

Lewis Macdonald (North East Scotland) (Lab): I want to ask about the bigger picture of what the negotiation looks like and the feedback that you are receiving. The UK Government has published a number of position papers on a number of areas, some of which need to be resolved early and some of which are, perhaps, for further down the road. The one thing that is missing is a UK Government position paper on the financial settlement, so your letter to David Davis does not deal with that in any detail. Views have been expressed about the basis for the negotiation. Given that the issue has implications for us all, what can you tell the committee about the United Kingdom Government’s view, as communicated to you, and your own view?

10:00

Michael Russell: Clearly, we do not want to make a bad situation worse, so we have been very restrained in what we have said about the financial settlement. From what I can see and hear on both sides, there is a complete mismatch in the understanding of what obligations there are. The

UK Government seems to accept implicitly moral and political obligations but not legal obligations; the EU is saying that there are legal obligations that have to take precedence over everything else.

It is clear that both sides see the financial settlement as a lever. The UK Government sees it as leverage for getting a framework in place for the future relationship, while the EU 27 want to ensure that it is used to get maximum leverage for future negotiation. That is what happens in a negotiation. The issue will have to be resolved. I suspect that one of the problems in resolving it is the noises off. In particular—not wishing to make too political a point for Rachael Hamilton—the fact that the Tory party conference is looming and a number of people will be unhappy that any payments are made will clearly affect what takes place.

The key issue is what article 50 actually says. It deals with the exit and the framework. We could interpret that as saying that those are simultaneous, but it is important that we recognise that, at the start of the negotiations, an agreement was reached between the UK and the EU 27 that the exit negotiations would move forward and that the framework negotiations would kick in once progress had been made with the exit negotiations. That was not imposed; it was agreed, so it is perhaps churlish to complain about it now. It would be best just to try to conclude the financial negotiations as soon as possible. If the UK and the EU 27 are not able to do so, that will colour everything else.

You might have heard Van Rompuy on Radio 4 this morning; it is worth hearing the item if you did not. As a former president of the Commission, he is saying that he does not think that there is any chance of progress being made in October—he thinks that it will take longer than that. He is also talking about finance being the sticking point. I met him some months ago in Brussels. He is clearly a wise and experienced head on what is happening in Europe, and there is a view that progress has stalled.

Progress should be made. We do not want the UK to leave the EU and we do not want to leave the EU, but it is better for there to be clarity in the process than lack of clarity. Therefore, we have been urging both sides to come to a conclusion. We will know a bit more today about the EU position, not necessarily on finance but on the issues on which a set of papers is due to be published after the Barnier press conference. The committee will hear about that when it is in Brussels next week. Some of those papers might clarify matters, but even if, for example, the paper that the EU publishes today on Northern Ireland takes things forward, the financial position will

require wise heads on both sides and a compromise.

I commend a paper that was published last week by Charles Grant, who, as you know, is a member of the First Minister's standing council on Europe. He talked about the need to find a compromise. Of course, the compromise is single market membership. If we were to accept single market membership even as a transition—although I think that it should be steady state—it would change the nature of the negotiations, including the financial negotiations. Therefore, there is a way through the present situation that comes from an acceptance of single market membership and customs union membership.

Lewis Macdonald: I do not want to ask you to go further than you have in expressing a view about the nature of the final financial settlement. Have you taken a view about the legal position, given the fact that the debate is partly about legal obligations?

Michael Russell: No. That is not particularly helpful from our position. Leaving the EU is not like leaving a tennis club, which is a position to which one of the UK Independence Party MEPs likened it; it is the ending of a complex relationship after 40 years. Therefore, there will be elements of law involved, and there will be obligations. If you have committed yourself to the institution's budget for a period of time, the other members will want you to fulfil your obligations, because that is what they thought was going to happen and so they planned accordingly. In the end, it will come down to negotiation and compromise, and it is important to realise that sooner rather than later.

Lewis Macdonald: So this is not a matter that anyone should see in terms of strict legality. A political resolution is required.

Michael Russell: You have to accept that there are elements of legality in it. In that regard, I disagree with the view that this is just about a moral and political obligation and not about law. However, it is also a matter of moral and political obligation and, in the end, politics will rule it.

Lewis Macdonald: You have suggested that three central areas of agreement need to be addressed before we move on to the second phase of negotiations. As colleagues will ask about citizens' rights, I will ask about the position around Ireland and customs. The UK Government has sought to bring forward customs proposals for the future relationship as a way of addressing the Irish conundrum. I note the points that you have made in the annex to your letter to David Davis, but do you believe that there is a way of making progress in that area that does not involve the UK remaining in a customs union with the European Union?

Michael Russell: We will know more when we see the paper on Northern Ireland that will be published today. From what we understand is in it, the EU is sceptical about there being no customs union and there still being no border. There is a view that that is not likely to be possible. Sweden and Norway, for example, have a light-touch border, but it is still a border. It is an issue that requires to be resolved. I know that the Irish Government has expressed scepticism that the technological solutions will be enough, and a lot of issues have been raised around that.

We have always taken the position that the Irish situation is so special and requires such special handling that we want to support a positive solution and are not going to dig in on either side of that. However, if the EU suggests a differentiated solution, that will raise clear issues with regard to our proposals and other proposals for differentiated solutions within the rest of the UK. Indeed, the Welsh have made the same point about differentiated solutions. If a differentiated solution is possible, it should be discussed.

The UK Government's paper on Northern Ireland also raised the prospect of migration being managed in the workplace. We have supported that approach, and I note that the Institute of Directors and the Scottish Trades Union Congress support it, too. The issue of devolving migration responsibility should go on to the table. There are issues to be discussed, but I am keen to see the paper.

On the timescale for the Northern Ireland issue, I should make it absolutely clear that the expectation has been that there would be no resolution during the negotiations in the first part of the exit round. It would be a long-term thing. However, there needs to be continued progress. Indeed, last week, both sides acknowledged that progress had been made on the common travel area. That is crucial, because, after all, the common travel area is an absolutely essential issue.

Lewis Macdonald: Thank you.

Tavish Scott (Shetland Islands) (LD): I want to ask about the repeal bill. Minister, you said earlier that it could be construed that the UK Government was deliberately undermining devolution. Are you sure that it is that clever—or even that united?

Michael Russell: I do not want to make that a key point because I do not know if it is the situation. However, as I have argued in the past—and it is a tolerable argument to consider, even if it is not provable in the end—if you are a passionate proponent of leaving the EU, taking back control and refusing to acknowledge the European Court of Justice's jurisdiction, you will also support the

absolute sovereignty of the UK Parliament. As a result, devolution will also be a bit of an irritant to you, as it is—at least in some areas—about devolved decision making. If you are hostile to the EU and the ECJ, it is odds on that you are also hostile to devolution.

It is also that there is a lack of knowledge of devolution. Although it has been operating for 18 years now, many UK ministers will have had limited engagement with devolved competences. Not many areas straddle the jurisdictions, so there will be a lack of experience. I do not think that Damian Green has been in a Government job that has required him to be deeply involved in devolution. Given that lack of knowledge of how devolution operates, it will be important to remind the UK Government from time to time that other ways of working have been established.

Tavish Scott: Given that the UK Government cannot sort out its position on most aspects of what is going on, whether it be the transition or whatever, the idea that it has worked out its position towards Wales, Scotland and Northern Ireland is completely beyond me.

On the process, have officials in your department and in the Government more broadly been kept up to date in any sense on the construction of the repeal bill, which will have its second reading in the House of Commons today?

Michael Russell: No. Before I answer that question more fully, I will make a point about planning. We know that Liam Fox, for example, has made it clear that he does not want the devolved Administrations anywhere near issues of trade. There is a reasoning behind this in some parts, and it is based largely on the comprehensive economic and trade agreement, on which the Flemish Parliament created difficulties.

Liam Fox does not want any restriction on his ability to trade things. That is one of the reasons why, as Tavish Scott will know very well because of his constituency interests in fishing and farming, the UK Government is keen to have a UK framework, because then it can trade away issues in those areas. For example, in farming, access for Brazilian beef is an issue. I therefore think that, in some areas, this is a deliberate policy.

As for the question of consultation on the bill's construction, the answer is no, officials have not been kept up to date. It is difficult to remember when we started to ask about it, but I remember that I raised the topic at the Cardiff JMC plenary at the end of January. I asked the Prime Minister specifically for access to the draft bill and the bill's timescale. She did not know that there was going to be an election then—I presume that she did not, anyway. We went on asking thereafter; I know that

the issue was discussed at the JMC immediately after that.

At the January JMC, I also had a conversation with Ben Gummer, who was at that stage the Cabinet Office minister, in which he said that he wanted to come to Edinburgh and sit down and talk about the bill and how it was to be constructed. That never happened. Then there was, of course, the article 50 process, at which point everything went dark, and then we had the election process, during which nothing happened. We continued to press for access to the bill and in the end, we were given access on—as I seem to remember it—the first Friday in July, and the release date was around about 18 July, I think. We were given about two weeks.

Tavish Scott: And the Welsh and others got it at the same time.

Michael Russell: Yes.

After seeing the bill, I spoke the following week to David Davis on the phone and explained to him the difficulties that we had with it, and we agreed that we should meet face to face. We were then in recess. I went to London in the second week of July, I think, and met him to talk about it, with officials and lawyers. I asked him to drop clause 11 from the bill and put in a placeholder while we worked on the alternative, but that did not happen.

I had another phone conversation—I think that it was the following week—with Damian Green, again about the bill and the difficulties that it presented, but by then the bill was published. Mark Drakeford in Wales did the same.

Tavish Scott: Is your expectation of the timescale of the bill that it will go through the Commons probably until Christmas, and then it will go to the Lords, and by the time that there might be a chance of royal assent, whatever that might mean, we will be well through 2018?

Michael Russell: Yes. Of course, it is also the first of several bills. It opens the door for agriculture, fisheries and trade—a whole range of things, including increasingly, I suspect, the environment. One of the areas that has arisen in the messages that we are getting from the UK Government about the UK framework is the environment, which is, of course, very concerning.

Tavish Scott: On the issue of the framework that the convener was asking about, no mechanism has been agreed for the devolved Administrations to discuss with the UK Government how a framework is to be drawn up.

Michael Russell: That is correct. We have said—and the Welsh have said this, too—that the best way to do this is to have a set of principles indicating that the framework should respect the

devolved settlement. That would be the start of it. However, there is no framework.

The bill says that there would be an order in council process. If there is to be no UK-wide framework, once the powers are transferred back to the UK, they will be referred back to the devolved Administrations through an order in council. However, there is no time limitation on that. Once those powers are back, they are back. At the start of the process, we asked whether one of the solutions to this, at least in part, would be a sunset clause.

Tavish Scott: What public scrutiny is there of an order in council?

Michael Russell: None. Well, it would have to be approved by both houses, but essentially it would just happen.

Tavish Scott: So it is a ministerial fiat.

10:15

Michael Russell: The second point on parliamentary scrutiny is that the Henry VIII powers that the UK Government is awarding itself not only come without scrutiny but operate in devolved areas, including the Scotland Act 1998. That lack of scrutiny needs to be discussed, and the fact that the powers that are being granted to us are lesser ones should, again, be scrutinised. However, the UK Government could unilaterally alter the Scotland Act 1998 without Scottish Government and Scottish Parliament involvement.

Tavish Scott: It is clear that some Conservatives have that worry, too, as I heard on Radio 4 this morning.

Michael Russell: Yes, and I share it. Indeed, I share with many people the worry about the fact that there must at least be a framework for supervision of the powers. We need to define what that appropriate framework is. That will be a big issue as the bill goes through.

Tavish Scott: I have one more question. The immigration proposals that emerged earlier in the week were said to have been produced by an official and had not been seen by UK ministers, but has the Scottish Government been told the UK Government's formal position on those proposals? Are those proposals the UK Government's negotiating position vis-à-vis immigration?

Michael Russell: The proposals are, according to the UK Government, the early thoughts of officials. They bear an uncanny resemblance to speeches that Amber Rudd has made, including at the Tory party conference, but apparently they are merely the musings of officials.

We are pretty used to this happening. A document appears; we are told that it has been

leaked and that it is just the musings of officials; and then another document that is pretty much the same appears. People become desensitised to the proposals and then they happen.

The UK Government is hard line on migration; to be blunt, the Prime Minister—the former Home Secretary—is hard line on migration. The proposals reflect mainstream UK Government thinking, but they are, again to be blunt, an absolute abomination as far as we are concerned.

Tavish Scott: So the process is now so bad that no one has had the courtesy to phone up any of the devolved Administrations to say what the status of those proposals is.

Michael Russell: We had to inquire, did we not?

Ellen Leaver (Scottish Government): We did inquire. Yesterday, our officials spoke to Department for Exiting the European Union officials to find out what was happening. We were assured that the document was leaked and that an inquiry was under way.

Tavish Scott: A leak inquiry. It reminds me of “Yes Minister”.

Ellen Leaver: We were told that the proposals would come out in due course, and we reiterated our desire to be fully engaged in developing them. However, we have yet to be so engaged.

Richard Lochhead (Moray) (SNP): Good morning, minister. You must have the most frustrating job in the Scottish Government. It is 15 months since the referendum on Europe and we have not had a joint ministerial committee meeting since the triggering of article 50.

Michael Russell: No, we have not had one since 8 February, which was six weeks before article 50 was triggered.

Richard Lochhead: We have also been unable to attract David Davis to speak to the committee, although we have made several requests, and here you are having to write letters to say that you find the situation intolerable. Does your gut instinct tell you that the UK Government has no intention of listening to Scotland at all throughout the whole process?

Michael Russell: I would not be that pessimistic. I am always hopeful that there will be a change in behaviour. The present evidence is that the UK Government is desperate to avoid the involvement of any of the devolved Administrations if it can, because that has proved to be challenging. It does not like accountability and it certainly does not respect devolution. That is my view at the moment.

I do not see my job as a frustrating one. My job is to constantly remind the UK Government of the

Scottish position and to ensure that it is well understood in London and elsewhere. That is what we are trying to do.

Richard Lochhead: On the options available to you to force the UK Government to listen to us, you mentioned the Scottish Parliament withholding consent for the repeal bill. You might not wish to disclose them now, but are you pursuing other options? There must be a whole range of legal issues to consider, such as whether civil law will be affected, which would presumably be a breach of the treaty of union. There must be other options and I hope that the Scottish Government is looking at them.

Michael Russell: It is not a good idea for politicians to spend too much time in courts. That said, of course there are options that we consider and thoughts that we have. We are in uncharted waters—we have been for months.

On Tuesday, when we publish a legislative consent memorandum that says that we do not find it possible to bring forward a legislative consent motion at this stage, we will be in unique territory. That has not happened before. The situation will go on. We do not want to be in this position, and we think that there is a way to cure the bill.

From the beginning, I have made it clear to David Davis and others that, because this is a technical process and we do not want to have a cliff edge, we would rather be involved in finding the right way forward, but it takes two to tango.

However, you are right that there is a range of possibilities and we will discuss them with the committee and others at the appropriate times. We welcome any thinking that takes place, because we would like to get to the stage at which the discussion is about the substance. We are trying to do that through publishing papers. We have published on migration and other subjects, we will publish more in the autumn and we will go on doing that. Unfortunately, we have found ourselves grounded upon a withdrawal bill that is the worst bill the UK Government could have thought of and which it has produced without consultation, thought or consideration. That has to be sorted because, if it is not, we will be voting for a very substantial and permanent diminution of our powers.

Richard Lochhead: As the UK Government is ignoring the result of the referendum in Scotland, the devolution settlement and the will of the Parliament and will not send ministers to the committee, I hope that the Scottish Government will explore all options.

I have a brief final question. On the financial settlement, do you envisage a situation in which

the EU accepts that the UK does not have to pay compensation for exiting the European Union?

Michael Russell: No.

Richard Lochhead: In other words, the European Union will insist on compensation.

Michael Russell: I cannot see a resolution without money changing hands—put it that way. Both sides would like to find the appropriate formula without declaring the figure at this stage, largely because the figure would be difficult for the current Government to explain to its more passionate supporters. That is difficult to do when negotiations are in the light of day and there is transparency, at least on the European side of the negotiations. However, there will be a financial obligation—that is not in doubt. The question is about the solum that is eventually reached.

Richard Lochhead: So there would be a double whammy, as we would lose out on European funding and have to use Scottish taxpayers' money to pay the EU for the right to leave.

Michael Russell: The whole process of Brexit makes no sense, and it certainly makes no financial sense. It is utterly pointless. As for the claim about £350 million a week coming back to the health service, that just expresses the complete bankruptcy of the case that was made.

Stuart McMillan (Greenock and Inverclyde) (SNP): In your letter to David Davis yesterday, you touched on the UK Government's science paper, which makes no mention of Erasmus plus. I was fortunate to go through an Erasmus scheme when I was at university, so I genuinely recognise the importance of the scheme for individuals in Scotland. How important do you consider the Erasmus scheme and other aspects of science to be in the discussions that are taking place, and for the future of individuals in Scotland?

Michael Russell: It is very important. From the beginning, we have said that we want Erasmus plus to continue. Winnie Ewing was one of the founding mothers of Erasmus. We believe that it is an important programme, so we want that to happen. I have been approached by several academics who were just about to start work on an Erasmus application and wanted to know whether they should bother. I said yes and that Erasmus should continue. We will very much support its continuing.

In all the papers, there is an element of unreality. Things are missed out and bizarre assertions are made. The science paper makes an assertion about an "ambitious ... agreement", which implies that the UK will continue to influence EU decision making on programmes such as horizon 2020. People in Brussels will look at this

and think, "What a cheek! You want to leave, but you still want to be part of the decision-making process." They will think that it is just not real. We are either in or out.

The paper also misunderstands the nature of scientific decision making on such programmes, which in this country are governed by the Haldane principle. Politicians do not make those decisions; they are rightly made on the basis of academic excellence and other such criteria.

Had we helped to draft the paper, we would have said, "Hang on a minute—this is an unrealistic expectation, so let's discuss it." However, the paper just appeared. We would also have said, "Think about Erasmus." It is like the article 50 letter, which missed out any mention of Gibraltar. If we had seen a draft, we would have said at some stage, "Hang on a minute, you have forgotten something in here." However, because we are not given the opportunity, we cannot, in the Samson sense, save the UK from its own mistakes.

Stuart McMillan: Regarding the science paper and other papers that have been published, do you get the impression that the UK Government fully comprehends what is at stake for business as well as individuals?

Michael Russell: No. I think that there is an increasing realisation on the part of business, industry and academia that the UK Government needs to wake up to what is taking place.

There is a sort of nostalgia in some of the papers for the benefits that are about to be lost. People should read those papers and recognise that, although there are valid objections to certain aspects of membership of the EU, when the scales are filled, they come down very heavily on the side of the advantages. That is what the papers show.

Stuart McMillan: You mentioned Wales, and some colleagues have also raised issues about Wales. The approach of the UK Government to the devolved Administrations seems to be one of complete and utter intransigence, and it seems to be trying to ignore the devolved Administrations. However, the Welsh Government has put forward a proposal to have a UK council of ministers. Would you welcome that? Do you think that the UK Government would consider that to be a helpful proposal?

Michael Russell: I welcomed the proposal on the day that the paper was published. It is a useful contribution. A number of constructs can be put together for how the process could move forward and how such a council would work.

The Welsh are saying something that is very true. In Europe, the basis of decision making on

issues such as agriculture and fisheries is one of co-decision making. Therefore, if you are going to replicate the European structure and you feel that you need a UK framework—we would accept that there should be some UK frameworks—you should put together a structure that is based on co-decision making. The Welsh have planned out such a structure and have set out in some detail how agreement on decisions could be reached when there are disagreements and how those issues could be worked out. The Welsh approach is a good one, but it is only one set of proposals. The UK Government would have to accept co-decision making in those areas, but it shows no signs of doing so.

Yesterday, during questions on the finance and constitution portfolio, Professor Tomkins asked what preparations we were making for the sharing of some sort of responsibility—I do not think that he used the term “power sharing”—within the UK. However, the UK Government has made no such proposals. It has never tabled or even mentioned such proposals. If it were to say that such frameworks were to be based upon equality of decision making, with people sitting around the table as equals, I think that we could probably move moderately quickly to establish areas in which that would be required. However, that is not what is being discussed. What is being discussed is an agriculture policy that is run out of London.

Stuart McMillan: Earlier, you talked about Liam Fox not wanting to have any input from the devolved Administrations. That is a good example of what you were talking about.

Ross Greer (West Scotland) (Green): You mentioned the Scottish Government’s intention to publish more of its own position papers. Could you flesh out a little the timescale on which you plan on doing that?

Michael Russell: We would hope to start publishing those papers from roughly the end of September or the beginning of October. Obviously, we wanted to see other material appearing. We have our own thoughts and ideas about issues, and a lot of work is going on.

The expectation was that in October, things would move into the second stage in Brussels, so that seemed like an appropriate time for us to start publishing papers on some of the detail, accepting that, although we have views on the exit issues, we would not necessarily intervene with them unless we thought that it was necessary to do so, as we felt was the case in relation to migration and European citizenship.

We anticipate publishing the papers in the autumn and running on from there.

Ross Greer: I imagine that you will be consulting closely with the Welsh Government,

and perhaps even coming up with joint proposals. What level of consultation do you plan to have with the UK Government in advance of publishing your papers, recognising the difficulties that you are having with the reverse of that situation?

Michael Russell: It has always been our practice to ask the UK Government whether it would like to think about the issues that we are thinking about and have input into the process. However, that will be appropriate in some cases but not in others. For instance, some papers will be reactions to the papers that the UK Government has published, so that process will take the form of a debate or a discussion. Remember, these are not formal negotiating documents; they are contributions to the process.

The documents that we are talking about coming from the UK Government are formal negotiating documents that are issued on behalf of the UK. They deal with areas of devolved competence, but the devolved Administrations have had no input into those documents. There is a substantial difference in the publication process, but we always want to consult and discuss.

There is also the issue of the structures by which we could make a contribution. We have been not only denied the opportunity to contribute, but denied the structures that would allow us to do so.

10:30

Ross Greer: I am struggling to imagine what the endgame is. You have mentioned that we would be in totally uncharted territory if we got into the potential rejection of a legislative consent motion. Can you envisage the negotiations getting to a position in which the UK Government has reached an agreement with the European side that, in the Scottish Government’s view, interferes in devolved areas and violates the devolved settlement and, as such, you would have to recommend that members of the European Parliament, or at least Scotland’s MEPs, vote against the deal?

Michael Russell: That is feasible. I have learned in the past year in this job not to construct too many scenarios, because we could construct many different ones. I would like to avoid what you outlined if possible, but it is a potential outcome.

I still think that no deal is a potential outcome. The moment of maximum difficulty and pressure in that would come if it was clear that a strong majority was developing for continued membership of the single market. The extremists who want out at any price might try to push the no-deal scenario. Remember that the no-deal scenario has always made an assumption that the EU would throw its hands up at the same time as

the UK. That is not necessarily the case. The UK could walk out of talks but the EU could conceivably say, "They have another year and a half to run, so nothing is going to change. We are just going to sit here. If you want us, we are at the table." That would be a period of complete hiatus.

There are lots of scenarios. I am keen on trying to get us into a sensible space in which dialogue takes place and there is mutual respect. I will go on trying to do that.

Ross Greer: I wish you luck with that. I am not sure how you will get on.

Mairi Gougeon (Angus North and Mearns) (SNP): We have talked a bit about the leaked paper on the status of EU nationals, and you talked about the potential for a differentiated system for Scotland. Have there been any discussions with the UK Government to sound out how that might be received?

Michael Russell: Differentiation is in "Scotland's Place in Europe", the paper that we published last December. I presented that paper to the January JMC, so differentiation was discussed on that occasion. The Welsh paper, which also deals with differentiation, was published in January and presented to the February JMC. I and others raised the topic in most of the discussions in the JMC.

Remember that there was a strong, repeated statement from the Prime Minister that we entered the EU as one UK and would leave as one UK. That was wrong because it did not acknowledge that devolution had happened in that time and that therefore a very different UK was operating.

I have raised the topic of differentiated migration with David Davis on a number of occasions and with the Secretary of State for Scotland. We continue to believe that differentiation would be a reasonable option, but I cannot say that I have ever had any encouragement from the UK Government that it thinks that differentiation is a goer, except in Northern Ireland, where differentiation is at the basis of the discussion. As I said, it looks as if the EU paper that will be published today will present a view that differentiation should be the basis of the agreement.

Mairi Gougeon: The thing that I find particularly concerning in the document that was leaked is the fact that it states:

"The government will take a view on the economic and social needs of the country as regards EU migration, rather than leaving this decision entirely to those wishing to come here and employers".

Such people would obviously have a stake in that. Given the way in which the Home Office has handled various things recently, such as the letters

that were sent to certain EU nationals, apparently by mistake, what faith can people from the EU who live in this country have in the system and the Government? If everybody has to apply in a couple of years' time for settled status, whatever that means, rather than having the automatic right to be here, how will the Home Office handle the surge of applications that it will get?

Michael Russell: Freedom of movement is a sensible solution for many reasons. It is the least bureaucratic solution. In that paper yesterday, we saw a very bureaucratic construct. Many employers, particularly small ones, have never had to deal with migration as an issue. If they employ European citizens, it is an easy process. Those who have any memory of the managed system have a pretty gloomy view of how it could be reintroduced. Freedom of movement is the best solution in that regard.

It is also the best solution for us. Very often, the discussion is entirely about people who come here, but lots and lots of Scots go and live elsewhere, and their interests are best served by freedom of movement continuing.

Scotland has a distinctive set of labour requirements; indeed, there are regional labour requirements. Therefore, we are better placed to say what is necessary here.

For all those reasons, the minimalist position would be a Scottish system of migration, managed in Scotland. We have made that point and, as I indicated, it is supported by the Institute of Directors and the STUC. The widest group of people now believe that that would be possible. The UK Government's paper on Northern Ireland anticipates a system of migration managed through employment, which again is something for which we have argued for a long time and that operates elsewhere in the world.

It is all doable and possible in Scottish terms if the UK does not want to do it. The trouble is that we have a Prime Minister who is a hardliner on the issue, who does not want to compromise on it, and who sees a one-UK solution. In those circumstances, the losers—apart from the Scottish economy, the richness of Scottish culture and our diversity—are the individuals, who are very worried. I spend some of my time talking to EU nationals. Last week, for example, I was in the Polish club in Glasgow, talking to its members. There is real concern and a lack of knowledge. Those people go to the UK Government website and cannot work out what is going to happen. Some of them went through an 85-page form and applied for settled status but have since discovered that they did not need to do that and that there will be some other form. What is taking place is very disturbing and it needs to be resolved quickly. It is still not resolved.

Rachael Hamilton (Etrick, Roxburgh and Berwickshire) (Con): Good morning, Mr Russell. You have questioned the experience in the Government of devolving powers. As we know, the UK Government has a proven track record of devolving powers to nations, regions and cities. Will you explain your comment a little bit more? Surely we can use this situation and the experience that we have of devolving powers from one Government to another to our advantage.

Michael Russell: I am sorry, but I do not get your point.

Rachael Hamilton: You said earlier that you were worried that the UK Government does not have experience—you mentioned Damian Green. Surely the UK Government's experience and proven track record of devolving powers to cities, nations and regions could be used to our advantage.

Michael Russell: I was reflecting on the fact that, after 18 years of devolution, the present members of the UK Government will have limited experience of devolution, because they have not had to deal with it in their departments. I am long enough in the tooth to have experience of political life before devolution. Many UK ministers and others experienced political life before devolution, went through devolution, saw what happened and saw the extension of the Scottish and Welsh Governments' powers. There was a grain with which they went, and they understood it.

The minimum difficulty that I could point to is that present members of the UK Government have not had that experience, and therefore they do not quite know how the system works. I was struck—and I continue to be struck—by the fact that the European Union (Withdrawal) Bill does not seem to understand the basic principle of devolution, which is that those powers that are not reserved are devolved. That has been a very interesting dynamic of devolution.

An example would be climate change. Devolution took place in the run-up to 2000. Climate change was not a huge issue in the 1990s, so it was not included in the list of reserved powers. I suspect that, if devolution had taken place 10 years later, it would have been, but it was not, and that has allowed the Scottish Parliament to take a very distinctive view of its responsibilities and to operate in a particular way.

That is the richness of the pattern, and I do not think that there is much understanding of it. Politicians have short memories and they live for the day and the next day, and what is coming next. That is a general observation, not a criticism. In the current UK Government, we see a lack of knowledge of devolution and of how hard won devolution was.

Andrew Dunlop was vociferous about a criticism that I made of an intention of the UK Government to undermine devolution. He said that there were many people like him and others in the Government who were strong devolutionists. I do not deny that. However, there is no such thing as continual progress. We have seen in the past 20 years a growing transfer of powers to the devolved Administrations. I think that the European Union (Withdrawal) Bill is a substantial indication that there are people who are trying—wittingly or unwittingly—to put that transfer of powers into reverse, because the effect of the bill will be to undermine devolution and to diminish the powers of the devolved Administrations. I would hope that, if people in the current Government were committed to devolution, they would recognise that issue and work with the devolved Administrations to ensure that it does not happen. That work is presently not happening.

Rachael Hamilton: I believe that there is a commitment to deliver to devolved Administrations. However, it seems that the stumbling block is an administrative one in the terms of the meetings that you are asking for. I cannot see any reason for that stumbling block other than just a practicality in relation to the meetings.

Michael Russell: I have heard that said; let me make it clear what I think the situation is. I am not hung up on the present structure of the JMC(EN). We agreed the terms of reference together, which is important. However, Mark Drakeford and I wrote to David Davis just after the election with a comprehensive set of proposals. We said that we accept that the JMC(EN) as it is presently constituted has not worked. There are too many people at it. There are at least eight to 10 UK Government ministers at it. The agendas are not worked out well enough in advance. There is not enough involvement from officials from all the Administrations. There is no action focus. However, we have an opportunity here, because we are going into a monthly cycle of negotiations. Let us plug the JMC(EN) into a regular date in that cycle, reduce its membership and focus it on the agenda items that are coming up for the negotiations. Let us do it in a new way.

Nothing has happened. The UK Government is attempting to resolve the issue of multilateral involvement by bilateral discussion. That cannot be done. There needs to be a multilateral discussion about changes. Meanwhile, the UK Government has published a withdrawal bill that undermines devolution itself. You cannot then be surprised that the devolved Administrations say, "Hang on a minute—what's going on here?"

I would go tomorrow, as I am sure Mark Drakeford would—I cannot speak for him but I

know him well enough to think that he would—to sit down with the UK Government if the agenda item said, “JMC(EN) monthly meetings within the cycle—let us work out how to do this”. That has not happened. We still do not have a meeting planned. There is a discussion of a possibility in the week beginning 16 October but nothing has been set as yet.

The Convener: The experiences of the Scottish Government around engaging with the UK Government that you have outlined are reflected by the committee’s experiences. As Mr Lochhead said, Mr Davis had, at an early stage, indicated that he would come to see the committee, but he has now reneged on that promise. He managed to fit in the Edinburgh festival, but he could not fit in the committee.

Tavish Scott: Who asked him to go to that?

The Convener: Since then, the committee has seen the Secretary of State for Scotland, who assured us that he would keep us updated. We have now found that the Secretary of State for Scotland is not able to come to see us again before November. You said that you met the Secretary of State for Scotland. Can you give some indication as to whether you think that he is closely involved in the negotiations? What is his role? Is he in a position to bat for Scotland? Indeed, has he batted for Scotland?

Michael Russell: I would want him to answer those questions. I do not think that I should do his performance appraisal at the committee. I am sceptical about the role and I might be sceptical about some of the performance, but it is fair to allow him to speak for himself.

Our job is to make sure that we scrutinise what is happening, get ourselves heard and make our decisions according to our powers. Presently, we are having difficulty because of the actions of the UK Government, of which he is a member, so I would like to see him expressing his dissatisfaction with the process rather than criticising others.

As for David Davis, it is up to him to appear. I will just point out that I managed to appear in the Alex Salmond show and before the committee, so it can be done and I am sure that he would quite like to do it.

The Convener: I thank the minister and Ellen Leaver very much for coming. I now move the meeting into private session.

10:44

Meeting continued in private until 11:06.

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