



HOUSE OF LORDS

European Union Committee

Corrected oral evidence: Brexit: Devolution Inquiry

Tuesday 7 February 2017

2 pm

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Members present: Lord Boswell of Aynho (The Chairman); Baroness Armstrong of Hill Top; Lord Jay of Ewelme; Earl of Kinnoull; Lord Selkirk of Douglas; Lord Whitty.

Evidence Session No. 8

Heard in Public

Questions 71 - 82

Witnesses

[I](#): Dr Jo Hunt, Reader in Law; Dr Rachel Minto, Research Associate, Cardiff University.

Examination of witnesses

Dr Jo Hunt and Dr Rachel Minto.

Q71 The Chairman: Good afternoon, ladies. I think you know the background to our report. We certainly know you through ECUK and other occasions, and it is a pleasure to be in Cardiff again. Thank you for the time you are spending with us. We are looking, as I expect you will be professionally, at Brexit and its implications for the devolved nations—the impact effects, the negotiating issues, and whether the machinery exists adequately to express a local view and a local input into the Westminster machinery, and on into the European negotiations. In brief, we are looking at how all this will end.

Given that you both have backgrounds in social science and wider than purely legal backgrounds—not that there is anything derogatory to say about a legal qualification—you can expand across that field. We have some pro forma questions, but we basically want to hear your mind on all this. To start, it would probably be helpful if you would just introduce yourselves formally, beginning with Jo.

Dr Jo Hunt: I am Dr Jo Hunt, and I am a member of the Cardiff law school and the Wales Governance Centre, based in Cardiff. I am currently also a senior fellow with the UK in a Changing Europe initiative, which is attempting to make a devolved perspective central rather than devolution being the add-on at the end, where we finally say, “We should consider devolution”. We are hosting an event next week on the repatriation of competences and what might be in the great repeal Bill. If this were next week, it would be post our event. That has been part of the project that I have been working on with UK in a Changing Europe.

Dr Rachel Minto: I am Dr Rachel Minto from the Wales Governance Centre at Cardiff University, and I am currently researching Brexit and UK devolved politics. I started in this post in October last year. My background is actually EU politics and governance, so that is my starting point and the particular expertise that I bring to looking at Brexit and UK devolved politics. I have been shadowing a lot of the work that Jo has been doing on the territorial implications of Brexit: namely, how Brexit will play out differently in the different nations of the UK.

We are also thinking about the intra-UK structures that we have and that we will need to develop during and post Brexit. Jo and I are also in the early stages of looking together at the international dimension and sub-states: that is, Wales as an international actor within the European Union, both now and post Brexit.

The Chairman: Thank you. I do not think that we could have had a more encouraging introduction to your fields of work, because that is exactly what we are interested in. I should just say that there are various discrete strands going on in our work. The underlying motive is to ensure that nothing that should be attended to, and which is in a sense a British responsibility, should be neglected. We are looking sometimes rather kaleidoscopically and even taking evidence on two inquiries at the same

time: issues relating to the Crown Dependencies, although not today; and to the British Overseas Territories, also not today but something in which we take a residual interest, with a specific inquiry into Gibraltar.

Of course, we are also looking at the whole issue of the devolved nations and their Administrations and their political machinery and Assemblies, which you rather hinted at. We were in Holyrood last week. We have of course already reported separately on the UK-Irish dimension, but there will be an interest that we will try to explore, in somewhat difficult circumstances at the moment, in relation to Northern Ireland. We have certainly not ruled that out; we are keeping our minds open to it.

It might be simplest if I kick off with what you might call the pro forma question. I would like to ask you both, in whichever order is convenient, what your own reaction was to the Prime Minister's speech setting out the Government's approach to Brexit, and following that up, to the White Paper produced by the Westminster Government. What, in your views, are the political, economic and legal implications for Wales of the Brexit model that the UK Government are pursuing? Rachel, do you want to kick off on that?

Dr Rachel Minto: Absolutely. What we heard in the Prime Minister's speech was that she was presenting us with a vision of the UK outside the single market and outside the customs union, with a bespoke arrangement, potentially a sectoral approach, for the latter. That is in general.

The other thing that was important to note from the Prime Minister's speech, echoing what had already been said by the Chancellor, Philip Hammond, was that if the UK were excluded from accessing the single market the UK would be in a position to change its economic model. This is a really important point. Therefore, one imagines, the UK would go towards more competitive tax rates, deregulation, and changes to social and environmental standards. Those things are important when we come to consider the particular implications for Wales.

If we look at that vision of Brexit, we can contrast it with certain elements that are represented as being more favourable to a Welsh Brexit. What we are seeing with the Welsh Government's and Plaid Cymru's White Paper is the desire to maintain participation in the single market. We know from research that we were doing, and research that we drew on both in advance of and since the referendum, that Wales has a particular relationship with the single market. It is a small nation, and for small nations the single market has particular importance for securing foreign direct investment. Wales has a particular relationship with the single market given what it exports. Agrifood, for example, is a key industry in Wales, and the European market is a particularly important one.

Beyond those economic implications for Wales, there are the financial implications of leaving the European Union and of a hard Brexit. I am sure we will come on to these later. These questions attach to the fact that at the moment Wales is in benefit of funds from the European Union,

particularly through the common agricultural policy and structural funds. There are financial implications there.

Drawing on this potential vision of a new economic model for the UK, attached to social and employment rights and environmental standards, this is where we could see a dissonance between the policy preferences in Wales and what we could see the policy preferences being in the UK.

The Chairman: As you rightly say, we will be coming back to some of those, but can I just probe one, briefly? If you are looking in the social sciences, conventionally you measure things through sensitivity analysis. I wondered whether anybody, whether you or others, has done academic work as to whether there is a distinctive sensitivity in Wales, say, compared with other devolved nations, or indeed with regions in England, to this? Is there any metric that says, "We stand to lose the most", or as much as somebody else, rather than the overall UK figures?

Dr Jo Hunt: We and others in the Welsh Governance Centre have figures for EU funding. With regard to trade, I do not know. We will get back to you if we find them.

The Chairman: If your colleagues have those figures, that would be helpful. I think it is understood—tell me if my impression is wrong—that Wales gets a very large chunk of EU funding per capita. If you like, and I am not loading this politically, it is a disproportionate chunk. If you have anything else on the terms of market access, that would be helpful alongside that thought.

Dr Jo Hunt: Yes, we have the funding figures, but on market access we will see.

Dr Rachel Minto: Yes, absolutely. Will we talk about funding later on, or would you like us to unpack that a little bit now?

The Chairman: I think we can probably come back to it—or do it now. The clerk says that we can talk about it now. If there is anything you want to say on that, I think we will get it on the record now.

Dr Rachel Minto: You mentioned per capita spend. It is important to note that the funding that comes from the European Union to Wales is needs-based. We can pass information on to you where you can see the key funds coming from the European Union into the UK, split over the four nations in the UK. It looks specifically at common agricultural policy and regional policy. The differential in per capita terms between Wales and England is really striking. This raises some important questions about how it is calculated when we need to find domestic funds to replace the funding that will be lost to Wales. At the moment, the money coming to Wales is calculated through the Barnett formula. However, if the agricultural and regional policy spend were calculated in that way, Wales would stand to lose a significant amount.

The Chairman: That is because the EU funds are set out, in principle at least, to be needs-related.

Dr Rachel Minto: Yes.

The Chairman: Jo, do you want to come in now on the general question?

Dr Jo Hunt: The thing that jumped out at me when I was both listening to the Prime Minister's speech and picking up the White Paper was, of course, what is foreseen to be the role of the devolved nations in decisions on what happens with the acquis. What happens to that body of EU law? We do not yet know how much of that the UK may still be bound by, depending on the sort of trading agreement we reach with the European Union.

Assuming that there is some room for manoeuvre, we know that the great repeal Bill will lock this into UK law initially. I was quite sensitive, in reading the speech itself, to ask, "Where are we recognising the powers of the devolved nations to act?" There were not many reassurances in the speech. The White Paper does that more than the Prime Minister's speech did. There was at least the recognition in the Prime Minister's speech that these powers would not necessarily all be recentralised. I think the language was that the right decisions will be taken at the right level; the right powers will go to the right level. It also said, "No decisions currently taken at a devolved level will be removed from them".

But then, of course, the lawyers say, "What do you mean by 'taking a decision'?" Is the implementation of a policy, a regulation or a directive that has been decided in Brussels taking a decision? There is scope there for a narrower reading, and even on that narrower reading it was made clear that the UK's own internal market will be a significant touchstone for the Government, and rightfully so, when we look at where competences will be located after Brexit.

Of course, we currently have an internal market because of our membership of the European Union. Devolution post 1997, and the scope for regulatory divergence that could be there in the powers given to Scotland, Wales and Northern Ireland, have to be exercised within a framework of EU law that requires free movement of goods and persons. That does the work for the United Kingdom in its own economic union and internal markets. Of course, the concerns are that if we take that framework away, at the moment we have no sort of principle explicitly stated anywhere of an internal market for the United Kingdom.

We can see that there may be a need for that, and there is that discussion to be had. Would we want to have a principle like that? I think there is a lot of support for one. There was a report last year on devolution and the constitution that identified the union itself, the United Kingdom, and focused on the economic, social and political union. The United Kingdom is based on those three different things. If we take that economic union as something that we would like to continue with, we have to decide where powers lie and how they will be exercised when we are outside the European Union. New frameworks may flow from that.

The Prime Minister's Lancaster House speech itself perhaps raised more concerns than assurances about the issue of repatriation of competences. The White Paper perhaps went a bit further when it identified that it would not just be for the Westminster Parliament to decide which laws to keep and which to change. It says, "and where appropriate, the Parliaments in Cardiff, Edinburgh and in Northern Ireland". It has moved on a little from a devolved perspective. Those are the key issues from a legal perspective.

The Chairman: I think we will come back to this later, but there is one point in my mind on your experience so far. I do not want to caricature this, but is there a propensity for this Administration in Wales, and this Assembly, which obviously reflects the views of different parties, to find it easier to go to government in Whitehall and say, "We demand this but we are not getting it", or is it easier to engage in a constructive relationship? Do you think there is a constructive relationship to be had there that does not exist at the moment and might indeed come about as a result of Brexit in an ideal world? Are we being too cynical and unfair about the way in which the relationship works at the moment? Is it easier not to get what you want and resort to megaphone diplomacy, or to try and get what you want, resulting in a better outcome?

Dr Rachel Minto: Are we talking about intergovernmental relations?

The Chairman: Yes, and indeed the whole mindset about what you are doing in operating that relationship from Cardiff rather than from London.

Dr Rachel Minto: So are we specifically thinking about what those might look like in a post-Brexit situation?

The Chairman: If it is easier to talk about it then, yes. I just wonder at the moment whether the relationship is to some extent characterised—or vitiated, if you want—by a sense in which people can sometimes say, as local authorities often do with Whitehall, "We are not getting what we want because the mean Government will not give it to us".

Dr Jo Hunt: That game will inevitably be played to an extent. It is part of a state-building exercise that is going on in Scotland, and we see a more extreme expression of that. You see that in the different White Papers, too: Scotland coming out and asking for things that will be incredibly difficult to deliver legally, politically and economically. Wales has tended to take a more collaborative and co-operative line on this and has not pressed itself. It is seeking positions where it can come together with the UK Government.

Dr Rachel Minto: I absolutely agree with what Jo has said. If we look at the dynamic that we have seen in intergovernmental relations, this has been the explicit approach that Wales has wanted to adopt. We have seen this with the Welsh Finance Secretary seeming to adopt a more co-operative approach".

The Chairman: A final point from me on this. How much interchange is

there between the Civil Service across Offa's Dyke compared with that across Hadrian's Wall? My impression in Scotland is that the two operate very much separately now. Here will you get bright people, perhaps with a Welsh background themselves, coming here to join the Welsh Administration at an official level, or moving seamlessly to Whitehall? How close are the linkages?

Dr Rachel Minto: I could not give you any figures on that, but I know of people who have done that and switched from London to Cardiff and vice versa.

The Chairman: It is not at all odd. That is what I am seeking.

Dr Rachel Minto: No, it is not odd.

The Chairman: That is very helpful. On that, I can perhaps move to a Scot. Lord Kinnoull?

Q72 **Earl of Kinnoull:** I enjoyed that cross-examination. You made a number of things very clear. Perhaps I could ask for one tiny piece of clarification on this issue of the devolved Administrations all asking for different things. Are you saying that essentially you do not see it as possible? There was a wonderful quote from the speech on 17 January that Mrs May would be "working with the Administrations of Scotland, Wales and Northern Ireland to deliver a Brexit that works for the whole of the UK". Are you saying that, practically speaking, it is an impossibility to try to satisfy everybody? That is a fairly obvious question to answer.

Dr Jo Hunt: The Brexit process and its political repercussions will be part of our currency for decades and beyond. In terms of how that may be used, it could be fuel to a fire; it could be support for an independence campaign. It depends. What do we want from Brexit? What would be a successful Brexit? I do not think there is agreement on that. What would satisfy people? There is still no clarity on what success would look like.

Earl of Kinnoull: Perhaps I could relay to you something very interesting that was said to us this morning, which is that maybe one approach would be for the UK Government to operate on the basis that when somebody asked for something, as long as it was reasonable it was either accommodated or mitigated. If someone said, "Unless you do something I am going to suffer terrible economic damage in the wool factories", there could be a mitigation, if that ends up being the case. How do you feel about that as a principle? Do you think that would play well?

Dr Rachel Minto: We have seen that up to a certain point. In relation to agriculture, for example, we will have to see a certain amount of what one could argue was either mitigation or accommodation. Outside these European frameworks, there are particular challenges for Welsh agriculture. In the post-Brexit deals being presented to us, there will be those challenges, so people are seeking that financial flow in order to mitigate the damage to those industries.

As a matter of principle, I have not thought about this approach (i.e. mitigation) in the context of the UK and the extent to which it could be useful to try to find a solution that would best fit everybody.

Dr Jo Hunt: Other than the very obvious calculable impacts that may come from funding streams being cut off, how do we assess that damage has been done? At what point do we make that assessment? When we talk about the different claims that might come, there will be multiple competing claims, whether on a regional or sectoral basis. Would that assessment be made some way down the line after we have made the agreement and are in a post-Brexit era, where we can see what the consequences are? Legally, it does not feel as though it could work, but I can recognise and understand the political impetus to make those claims.

Earl of Kinnoull: I do not think mitigation necessarily has precision in it. What you would say is, "There will obviously be a bad effect on sheep farming, so we must do something for sheep farmers". Perhaps I could just move on to my final, tiny little question, which relates to the 11 to 0 part of the judgment on 24 January. I wondered where you thought that left the Sewel convention.

Dr Jo Hunt: One way of looking at it is that it has not changed anything. Sewel is no different now than it was before 27 January. The possible opportunity was there with the Miller judgment perhaps to endorse a more robust reading of the constitution that recognised the evolutionary process of devolution that we have been undergoing for the past two decades. There was at least the potential there. We know that the Scotland Act 2016 had put the Sewel convention on a statutory footing in Scotland. We know that that is also the case, although it has not yet commenced, for Wales under the Wales Act 2017.

There was an understanding that some may have had about what difference that made, but when it came to the judgment and the Supreme Court it has made no difference to its legal enforceability. It has made no difference; it is still a political convention, it still has repercussions in the political domain. If anything, there was a clear recognition of its significance within the United Kingdom structure and the way in which we try to manage relations between them. It did not do what some may have wanted it to do, but equally it has not necessarily rolled things back. It could have had a chilling effect, depending on what we saw coming out. What the court has left open is the interpretive scope. How do we know what is a constitutional convention? We need to have it practised and recognised.

It points to various practices and to the broader interpretation of the Sewel convention, beyond the situation where there are parallel legislative powers at play to where we are talking about any change to the scope of the devolved nations' powers. We have seen practice of legislative consent Motions in those situations. It acknowledges that that broader scope may be possible, but it does not fix it. I would say that it has made no difference.

The Chairman: Can I go back to one area, which is comparing and contrasting the post-referendum situation with now? It is said conventionally that nationally at the UK level there is little evidence of significant change in public opinion, as shown through opinion polling. Are you in a position to break any of that out a bit and see whether people are changing their minds and, if so, in what direction and why? Are they just—unless they are specialists—not engaging on the issues and waiting for somebody to take it to the next stage?

Dr Jo Hunt: We have our colleague, Professor Roger Scully, who I think is coming to London and will give evidence before you in a couple of weeks. He works specifically on this and regularly has polling data on this. My understanding, from the most recent piece I have seen from Roger on this, is that it is not really moving. Public opinion is not really moving in Wales. There are obviously some finer points within that, but he will be able to let you know more about that. He regularly writes on those issues.

Q73 **Lord Jay of Ewelme:** I want to go back for a moment to something one of you said earlier, which was also said to us earlier this morning: that funds coming from the EU into Wales are needs-based, whereas funds that come through the Barnett formula are not. If you gave up one and relied on the Barnett formula, you would be worse off here. In your view, does it follow from that that there needs to be a different kind of formula, other than the Barnett formula, once we leave the European Union and move to a different system, if Wales is to continue to benefit, or at least to not suffer?

Dr Rachel Minto: Yes, because if we followed the Barnett formula model, Wales would be significantly out of pocket. We can send you on the data we have for that.

Lord Jay of Ewelme: That would be helpful. Have you had any thoughts as to what kind of formula there would need to be, or might be, after Brexit? Has some work been done on that?

Dr Rachel Minto: Work has been done on Welsh public finances that I am sure will engage with this question. We can follow this up with our colleagues and report back to you. There have been suggestions of adding an amount of money on to the block grants and not putting it through the Barnett formula. That would mean calculating how much Wales would have received were it to continue to be part of the European Regional Development Fund and the common agricultural policy, and calculate the additional amount of money Wales ought to receive based on that.

Q74 **Lord Jay of Ewelme:** Do you have any sense that either the Government here or the Government in Westminster are thinking about these issues?

Dr Jo Hunt: I think the Government here are. There are clear statements in the White Paper which is the joint paper between the Government and Plaid Cymru.

Dr Rachel Minto: Since the referendum result, there have been very clear calls from the Welsh Government that funding that would have come from the European Union to Wales ought to be coming from the UK to Wales. That has been very consistent. In the first instance, funds were secured that would come to Wales as part of the current EU funding round, which goes up to 2020. Now the focus is on post Brexit and post 2020.

Lord Jay of Ewelme: Thank you. My other question, which in a way leads on from that, is whether, both from the UK point of view and that of other member states, one could envisage a Brexit result that led to the devolved Administrations having a different sort of arrangement from England. Can you see that happening?

Dr Jo Hunt: Something like the Scottish White Paper, which asked for a continued membership or participation in the EEA for Scotland, were that not possible for—?

Lord Jay of Ewelme: Can you see something of that kind being possible, or do you think there has to be a settlement for the United Kingdom as a whole, perhaps leaving aside Ireland and Northern Ireland and the question of the border, which is probably a separate question?

Dr Jo Hunt: Legally, politically and economically, it is incredibly difficult to see how that could work. It is not impossible, but it would generate internal consequences for the UK if there were a divergence in law. Wales has not called for anything as extreme as Scotland has, in terms of having its own membership of the EEA, should the UK leave and we have a hard rather than a soft Brexit. At the moment, however, there is that potential at least for the continued participation in various international networks, to the extent that Wales or Scotland has the capacity to do so.

There could be continued engagement with the European Union in various ways. To the extent that there are the devolved legislative powers to act, where it is possible we could continue to see perhaps Wales pitch its laws according to EU standards, such as on the environment, within the scope of devolved powers. If we are assuming that environmental powers come back to Wales and can be freely and fully exercised there, if there is any difference or rollback from the UK there could be that scope for Wales to maintain and have that differentiation in law. I do not know if you want to pick up on the paradiplomacy.

Dr Rachel Minto: Yes. I do not know whether this was a point that you wanted to explore later in the session, because certainly even if it were not possible due to legal capacity issues for, say, Wales to have a distinct relationship with the European Union, that does not mean that it will be absent from the broader political system. Perhaps we will discuss later the extent to which sub-states—in this case, Wales, Scotland and Northern Ireland—can assert themselves in different political arenas.

The Chairman: Although I suppose that is subject to the caveat that typically the experience is sub-states within member states dealing with

other EU institutions, rather than sub-states of a state that is no longer a member of the EU.

Dr Rachel Minto: Yes, but that is not exclusively the case. Certainly, there is a huge difference between whether we are talking about a region within a member state or a region beyond a member state. However, you do see regions that are not part of member states but are present within this broader European political system.

The Chairman: I think I am right in saying that there is quite strongly developed machinery within the EU—it may go wider than the EU and be within the Council of Europe—for the interests of regions to be considered.

Dr Jo Hunt: There is REGLEG.

The Chairman: Yes, and there are people you meet, such as from Alto Adige, or whoever, and talk over that, and no doubt complain about the Governments that you all endure as a superior Government.

Dr Rachel Minto: Within the European Union it has its institutional architecture, which is set up to deal with the regions.

The Chairman: The Committee of the Regions.

Dr Rachel Minto: Yes, exactly: the Committee of the Regions. Also, there are spaces for Wales (as well as MEPs) in the European Economic and Social Committee. We can discuss this now, or it may be a question that you wanted to come on to later.

Q75 **Lord Whitty:** We have touched on a number of issues relating to the future relationship between the Government of Wales and that of Westminster once Europe is out of the picture, particularly on the large funding issues such as agriculture. You described just now a situation where you have either a revised Barnett formula, or where in effect the UK Government gave you what the EU previously gave you. The alternative is that that money rests with the UK government, and the UK Government just takes over what the EU used to do, devises a UK-wide agricultural subsidy policy, and allocates it to devolved levels.

Otherwise, you will get to a situation where Wales appears to have a whole financial settlement changed as a result of the change in agricultural payments, and to a lesser extent in regional and structural funds. You seem to be talking, Dr Minto in particular, as if the money would one way or another come to the Welsh Government to dispense. There is an alternative model whereby Westminster, or Whitehall, takes what was previously the EU's responsibility and attempts to co-ordinate that across all Administrations within the UK.

Dr Rachel Minto: This speaks to the question about where policies return to when they are repatriated to the UK. The approach that has been taken in Wales (by the Welsh Government) is that agriculture is

devolved. Therefore, if the European framework is lifted, Wales is able to exercise its powers in this area.

Lord Whitty: Up to a point. In no way is it likely that in agriculture you will exercise hugely differential animal health or animal movement issues. We would not then have a single market in the UK.

Dr Rachel Minto: This is where we need to think about the intra-UK mechanisms that we have in order to be able to address these particular issues post Brexit. I am not a lawyer, but as it stands, as I see it, when this European framework is lifted there is potential for policy divergence amongst the four nations. We will think about the ways in which this policy can be co-ordinated. Did you want to add to that, Jo?

Dr Jo Hunt: If we use the internal market impetus as a touchstone, we should still recognise that it is not necessarily absolute. If we look at EU law, there are situations where difference is still permitted and where justifications can be raised to say, "It will be different here than it is there". There are obviously some very clear cases that we may see playing out in a United Kingdom situation that at the moment are framed by the EU context. For something like GM, if we take agriculture as an example, there are very different positions across the United Kingdom. At the moment, that can be accommodated in EU law and the recognition of regions within that.

Will that survive those powers coming back? We may say that that internal market may pull things back, but there should still be recognition within that, as there is in EU law, that on certain points there may be justification for having difference across the United Kingdom. Decisions will have to be made about how this is going to work and who makes those decisions. The Welsh White Paper makes clear that the Welsh Government and Plaid Cymru are not calling for the repatriation of these powers simply so that they can use them differently. They recognise that it makes sense to have common frameworks in certain areas for certain purposes, perhaps for a market position, but that these should be decided as a group of equals, respecting the principle of subsidiarity within this.

It is that scope for acknowledging that, just as the EU permits that differentiation—although it is not necessarily always acknowledged that it has the scope to do so—so any system that we have within the UK should have some tolerance for differentiation.

Lord Whitty: At the moment, our devolution settlements effectively say, "This is devolved. Everything else is reserved". It is binary, really.

Dr Jo Hunt: Yes, absolutely. We do not have that. Within the EU we have shared governance.

Lord Whitty: Whereas within the EU structure there are forms of shared competence. Do you think that should be introduced within the devolved sector, that there should be shared competencies between the devolved

Administrations and the UK Government, of which agriculture may be one?

Dr Jo Hunt: The Welsh White Paper calls for a constitutional convention, where maybe we settle this along more quasi-federal lines. We need something that gets away from the binary, "Everything that is not devolved is here, and you make the decision or we make the decision", rather than recognising that decisions on the same point may have a series of decisions and responsibilities within them. There may be scope for a common framework but divergence within that, just as we see with EU measures. Within the common agricultural policy, there is still scope for quite a lot of differentiation.

The Chairman: Just thinking aloud, if one takes state aid policy, for example, nobody has ever said that there may be no state aids. They have to be conditioned and are potentially contestable, rather than simply being a matter of reaching agreement as to what you would like to do because of your political situation.

If we take that a bit further, I suppose the first question is scope. We have talked about agriculture quite a lot, not least because two or three of us have either had a past interest in departments, in farming, or both. I do not think we need declare another interest for that purpose. Do you see other fields other than agriculture in which this might be important for at least a discussion?

Dr Rachel Minto: The other heavily Europeanised and devolved policy area is environment, and obviously that speaks to agricultural policy as well.

Dr Jo Hunt: The areas that are devolved are the clearest. To go back to the internal market point, outside those areas there is no competence to adopt legislation on product requirements and so on. Those things are reserved. However, there is some competence on agricultural and environmental matters. How strong a principle will this be? If we see how free movement of goods has been interpreted on an EU level, what measure has equivalent effect to a quantitative restriction? We have gone far beyond things that are obviously protectionist or discriminatory. With clear product requirements, we have gone far beyond that and reached into rules on product use and beyond.

In regulatory terms, very little is shielded from the reach of that internal market principle of free movement at EU level. What sort of reach would that principle have at a national level? I have had a very, very brief look at what happens elsewhere, and we have a very limited number of effective comparators. If we look outside the European Union, you have Canada and Australia, and very different, much stronger federal structures. You do not have as effective a common market as you have in the European Union. You have a lot of regulatory divergence. Canada took action last year and had a new piece of legislation.

In some ways, the CETA agreement benefited European Union traders, and was more open to them, than it did internally from state to state within Canada. Looking for comparators is problematic. In terms of that scope, there are obviously the devolved areas, but there is again a claim that it will not just be in areas that are devolved. There is a very real concern and interest in feeding into decision-making processes, and highlighting particular areas where policy divergence may emerge post Brexit.

Lord Whitty: In Scotland, for example, we have what I guess is an unsurprising demand that employment legislation and consumer legislation should be devolved. Is there any similar push in Wales?

Dr Jo Hunt: Yes. That horse has—whatever metaphor we want to use. We had that moment where some legislative competence was possible for Wales in relation to employment law and employment rights. We saw Wales taking a different line on the Agricultural Wages Board, and getting competence, under a conferred powers model, through agriculture. There was some discussion about the fact that the same approach could be used to get at employment through public services and regulating health and other public services. That is Wales taking a different line on trade union legislation and refusing to give legislative consent to the Trade Union Act, saying that it wants to introduce its own legislation.

That could have set up a prospective model for at least some differentiation in legislation, whether on working time, atypical workers, or maintenance of those standards, if there is any rollback. We are hearing assurances from the Government that there will be no rollback. The new Wales Act will amend our current devolution settlement. Until this point, Wales's model has been one of conferred powers. It has been the other way around from Scotland and Northern Ireland.

The Welsh Assembly has the power to legislate in areas that are conferred upon it, and everything that is not conferred remains at the centre, but there can be expansion in the reading of those conferred powers. With the new Wales Act, it now becomes a reserved powers model, and an attempt to insert into it powers over employment did not succeed. The little sliver of legislative competence that was there on employment following the readings on agricultural wages has gone, or will go, once this piece of legislation commences.

- Q76 **The Chairman:** To go back to the first point, we heard some evidence in Scotland the other day in relation to the devolved powers, or powers that are devolved other than those that are reserved. You mentioned the Prime Minister's undertaking not to claw back any of those powers as part of this settlement. The argument that we heard in Scotland was, "We know that there may be a case for some framework, but it is we who should be re-offering those powers in order to effect it, power having been devolved to us, rather than having them stopped at source". Are you getting that sort of argument in Wales on this?

Dr Jo Hunt: Yes, there is that political impetus.

The Chairman: The second question on this is whether there might have been a more constructive negotiation, had the Prime Minister not effectively shut that route off, instead of a constitutional discussion that said, "This is not quite what we need now, and it would be better because of the need for a negotiating framework on agriculture, say, to have this within a shared competence. We will think about employment as a *quid pro quo*". I say this hypothetically. Could you have a better discussion like this, rather than people coming from prepared positions?

Dr Jo Hunt: The White Paper talked about potentially more devolution and the devolution of more powers. I do not know whether that has been shut off.

The Chairman: No, but what has been ruled out is the re-acquisition of powers at the centre, the clawing back. I was just asking whether it would be a more grown-up discussion if you said, "You ought to have more of this, or we will tolerate that, but we would need a better handle on, say, the international conduct of fisheries policy", for the sake of argument? Maybe that is too hypothetical. My only point—I know that Lord Kinnoull wants to come in in a minute—is that it sounds, from what you are saying, as if there is a case for re-examining the whole of this area. Is that more or less what you are leading up to?

Dr Jo Hunt: What is the rationale behind the devolution in these areas in the first place? There is a certain lack of thinking through from first principles. In Wales, we have not necessarily seen a package, and with the new Wales Act, with nearly 200 reservations, there has been some lack of an ability to centre that on a clear principle about what is reserved and what is not. We are where we are now, but in an ideal world we would like an opportunity to think these things through from first principles.

Q77 **Earl of Kinnoull:** Thank you very much. My question follows on the same theme and came up again in Scotland last week. We looked at a Parliament with 120 people, which was right-sized for a certain amount of power that was given to it. Now that a lot more power is being given to it, there are problems with scrutiny. There is a Scrutiny Committee looking at the scrutiny problem. While the UK Government are looking at more devolution, we detected, among some people involved in the parliamentary structure, some enthusiasm for looking at the structure of the Parliament.

We have just been watching First Minister's Questions. There are only 60 people in this Assembly. Those who are not directly involved in government will be run off their feet in scrutiny terms. Is there any movement to think again about how the Parliament has done? What is the mood for that? Do you think that it is sensible to think again?

Dr Rachel Minto: Work is going on at the moment on the size of the Assembly. Again, Professor Roger Scully—

Earl of Kinnoull: Is that by academics or politicians? Who is doing the work?

Dr Rachel Minto: This is work that our colleague, Professor Roger Scully, from the Wales Governance Centre, has been involved with.

Dr Jo Hunt: An expert group has just been set up. An expert group has also been set up under the chairmanship of another colleague of ours, Professor Laura McAllister. (Please see <http://www.assembly.wales/en/newhome/pages/newsitem.aspx?itemid=1680>) That group has been drawn from across the UK generally, not just within Wales, to look specifically at this. This debate has been taking place for some time and has gone quite a distance. There is recognition that there are problems at the moment with the 60, and if this is to lead to a real increase in power and responsibilities it makes looking at this issue all the more important. That discussion is definitely taking place in Wales at the moment.

The Chairman: It occurs to me that increasing the number of elected members is not, on the whole, a particularly politically easy task at the moment. Secondly, just coincidentally, the number of Peers involved in membership of the EU Select Committee and its sub-committees is larger than the total population of the Welsh Assembly. If you are going to do scrutiny properly, you need a lot of people to do it. You would have to consider how you reconciled those.

Q78 **Baroness Armstrong of Hill Top:** I wanted to talk about the structures for work between the Assembly here in Wales and the UK Government, and whether you think that they, as originally designed, will be sufficient for the future. The main arena of general discussion is the meeting here last week.

Dr Rachel Minto: The JMC.

Baroness Armstrong of Hill Top: Yes. I wondered what your experience was, and whether you think that is successful or whether more powers or structures are needed.

Dr Rachel Minto: I would say that post Brexit a new structure will have to be put in place to facilitate intergovernmental relations within the UK. As you say, at the moment we have the Joint Ministerial Committee structure, and there are a number of different formations of this. The plenary session was the one that met last week in Cardiff. At the moment, there is no statutory underpinning to the Joint Ministerial Committee. That has meant there have been periods when various formations have been dormant and inactive. The JMC (E)—JMC Europe—is generally considered to have been the most successful of these, having met in advance of the European Council meetings. It was very focused in terms of the timeline within which it worked. Now, in the context of the UK withdrawal negotiations, we have the JMC (EU Negotiations). Here, there has been a commitment to meet monthly. What has been quite interesting to see is that, since the launch of the JMC(EN) at the end of last year, and the agreement to meet monthly, there has also been a re-ignition of the JMC Plenary, which has met on a number of occasions and is due to meet again before the end of the year.

Those communication channels in the context of the Brexit negotiations exist, and it seems that there is information going backwards and forwards, but the extent to which they are effective remains to be seen. There are certain issues attached to the JMC structure, as I said. It does not have a statutory footing. There are questions to do with reporting, which is very minimal, but the argument is that this is to ensure confidentiality within that meeting arena. Obviously that puts a curb on the extent to which one can undertake public and parliamentary scrutiny of the work that goes on there.

It is considered to be useful in building relationships, but post Brexit there would have to be a rethink about how best intergovernmental relations would take place. In part, this is because, given the way the JMC is organised at the moment, it is not a meeting of equal partners. The UK is very much the dominant partner, and the devolved nations are seeking to influence this UK position. If we are thinking post Brexit of areas such as agriculture, which we have spoken about on many occasions, here we would see more of a meeting of equals negotiating a framework, perhaps. This would require something new.

Baroness Armstrong of Hill Top: Would you see that as being a body that could take decisions? At the moment, the JMC cannot take decisions. Does that not push us towards a more federal structure?

Dr Rachel Minto: These are certainly questions that need to be addressed, but as it stands at the moment the strongly UK-based JMC that we have, with the devolved nations seeking to influence it, will not be fit for purpose, given what the UK will need post Brexit.

The Chairman: I was just going to say that I take it at that point there might need to be revisiting of the extent of Parliamentary involvement. Clearly, by definition, we are not in the JMC, but we have our own machinery, as you know because you came and addressed us last time on ECUK. If you have a different kind of decision-making body across the UK, ergo you also need parliamentary monitoring of that.

Dr Rachel Minto: Yes.

The Chairman: Thank you. What were you going to say, Rachel?

Dr Rachel Minto: I wanted to add another point about intergovernmental relations that I was going to mention right at the beginning. We also need to think about whether the vision of Brexit that has been presented of the UK outside the customs union will mean that the UK will be in a position to establish these international trade deals. Therefore, we also need to think about how the devolved nations are included as part of that process.

The Chairman: I will make a very simple point on that and then bring in James, if I may. If you are negotiating trade deals—people in the British discourse have complained that we have lost capacity because it has all been left to the EU—presumably the same problem, or the same

argument, could arise. You are negotiating a deal on sheep meat, shall we say, with some other country, for example in the Middle East or wherever—

Dr Jo Hunt: Or New Zealand.

Dr Rachel Minto: New Zealand, yes.

The Chairman: This is understood in Whitehall or in Defra, yet the Welsh industry, which is close to this industry, or the Welsh Administration, is not involved. Is that the danger?

Dr Rachel Minto: Exactly. That is an important point that we need to hammer home.

Q79 **Lord Selkirk of Douglas:** May I ask two questions? The first is: what are the current mechanisms for direct engagement with the devolved Administrations and the EU? The second is: how would these be affected by Brexit?

Dr Rachel Minto: There are three strands that we can think about here. First, if we look at the existing EU institutional architecture, there is scope for regions—and in the context of EU integration, Wales is a region—to participate in decision-making. We have specific bodies, such as the Committee of the Regions. Wales also has representatives in the European Economic and Social Committee and in the European Parliament, where there are four Welsh MEPs. We could even say that within the European Commission there are officials who come from Wales.

Post Brexit, that ceases to exist. Also, and this is the same for Northern Ireland and Scotland, Wales has its own outpost over in Brussels. It has seven representatives from the Welsh Government, representatives from the National Assembly for Wales, Welsh Higher Education Brussels, and the Welsh Local Government Association. They are involved in various activities around influencing policy and intelligence-gathering. It is a direct form of engagement. On Brexit, it would be left to those organisations to decide what kind of representation they wanted to continue in Brussels. This would certainly be dependent on the nature of the relationship between the UK and the European Union, and on the policy preferences of Wales at the time and where they wanted to use their resources.

The final strand, which is important to think about and something that Jo touched on earlier, is that within this European political system we have a number of different networks and partnerships. This is where we see Welsh actors, including but not limited to the Welsh Government and the National Assembly, who will participate in these European networks. Some are reserved for EU member states, or regions within these, whereas others are broader and will include EU member states but also go beyond them.

They will be involved in exchanging information and best practice, as well as lobbying activity and working on specific projects. Again, post Brexit, it will be to the various actors within Wales to decide how they would best like to use their resources.

- Q80 **Lord Selkirk of Douglas:** Thank you very much. Can I make an associated point? I became aware of an inquiry going on, arranged by the Presiding Officer of the Scottish Parliament, which, like this Parliament, has no second Chamber. They want to improve their procedures. It seemed to me that the danger point in that programme was that, on Report or in the other final stages of a Bill it is very difficult to change it and to insert new ideas, because the Whip comes on and they have considered it so far.

At the beginning, the Committee acts as a Select Committee taking evidence, but the last stages of the Bill are an area where improvements are needed if new ideas are to come in and be seriously considered. I suspect that Europe will be full of new ideas on the territory. Have you come across thinking about procedures with regard to this Parliament?

Dr Rachel Minto: I do not know whether this is a correct response to the question, but certainly if one is seeking to influence a policy, getting in as early as possible is the best point at which to engage.

Lord Selkirk of Douglas: If you engage later, it is very difficult to get a change.

Dr Rachel Minto: It is more difficult. The early policy formulation stage is where you can have most effect.

Lord Selkirk of Douglas: This may be of limited relevance, but I think it is worth being aware of that point.

- Q81 **The Chairman:** I think that we ought to draw the session to a close. I have one little question for you at the end. I was prompted by something you said a moment ago. Most of your remarks would properly be classed as post Brexit; I would read them that way. We do not have perfect machinery with the JMC (EN), but we have what we have. During the conduct of the negotiations, therefore, presumably it would be wise for the Welsh Government, and Welsh interest generally, to push every button they possibly have within the network—to mix metaphors—in order to make sure that the interests of Wales are considered. You are anticipating that, I suspect, often informally. Is that right?

Dr Rachel Minto: Jo and I are doing some work at the moment looking at the ways in which Welsh actors based in the European Union are deploying their resources during this period. When we think about the extent to which Wales, Scotland and Northern Ireland could influence the Brexit negotiations, we have to remember a couple of things. The first is that the European Union does not involve itself in the internal politics of member states, and it has been very careful about that. That is really the headline takeaway argument.

Certainly, the activity that has been undertaken by Wales up to now will raise the profile of Wales as a distinct nation that is active in this European space. I imagine that it is strategically aligning itself with where it wants to see itself post Brexit. We have to remember, however, that those negotiations will be between the UK and the European Union, and the European Union has been very strict about this.

However—and if you have not come across this I recommend that you have a look—last week the European Parliament Committee on Constitutional Affairs heard from representatives from Gibraltar and Scotland. The European Parliament has to consent to the final deal, and every indication is that it will be very vocal as part of those Brexit negotiations. Here, it is interesting to see that there is one EU institution among those that will be involved in the EU negotiations that was receptive to hearing those voices from beyond a central UK.

The Chairman: Thank you. I saw the record of that.

Lord Whitty: Just on the question of Welsh influence on the negotiations, I asked this question of one of the AMs at lunchtime. Are you aware of the number of Welsh civil servants who have been seconded into the Department for Exiting the European Union centrally?

Dr Rachel Minto: No, I cannot respond to that question.

Dr Jo Hunt: I would imagine not many.

Lord Whitty: She said she knew of one; in Scotland, the answer was none. That is quite interesting.

The Chairman: As a closing point, we want to express our thanks for the very thoughtful way in which you have put that, and the fact that you have put a huge amount of thought into these questions before they became fashionable? That is always a good test. You have a good track record. I would like you to give us a closing reflection in a moment, if you have one, but given that this is a House of Lords UK-focused inquiry, one point that we should at least record is the issue of the implications of Brexit for other nations and regions of the UK. I include regions, because one can imagine a situation where Cumbrian sheep farmers might be having arguments of the type, "In North Wales they have this, and we do not".

Of course, there are also the more obviously administrative distinctions with the other devolved nations. Do you have any thoughts about how their interests and concerns can be taken into account? Going back to the Prime Minister's headline phrase about a Brexit that works for all parts of the United Kingdom, Hilary, this is obviously your question. Please do ask it.

Q82 **Baroness Armstrong of Hill Top:** My question on that is a techy question. I come from the north-east of England. One of the things we know is that our population voted to leave. We have very few migrants, or a low proportion of migrants, a bit like Wales. However, the estimate is

that over the next 20 years, because our young people tend to leave the region because of the nature of employment, the population will become increasingly elderly. We will not have a skilled population of young people to fill the jobs that are there, or to be the entrepreneurs of the future. Having social scientists in front of us is very important to me. I do not know what the position is in Wales. In a sense, the north-east is a lot like industrial Wales. It is not as much like the rural bit, although we have our rural bits, but we are very alike to industrial Wales.

Dr Rachel Minto: When we look at the data in Wales, it is certainly the case that EU citizens make a notable contribution to particular industries such as the agrifoods industry—

Baroness Armstrong of Hill Top: And health.

Dr Rachel Minto: Yes, in the public sector—in healthcare. This is why in the White Paper from the Welsh Government and Plaid Cymru they have been very clear that freedom of movement remains important. They do say that this needs to be attached to employment, or student status or the ability to support oneself, but, yes, there is that acknowledgement that the freedom of movement is valuable in order to underpin those industries.

Dr Jo Hunt: Just to pick up on that thought about the Welsh White Paper, Wales, the Welsh Government and Plaid Cymru, in looking for EEA membership, are looking for a soft Brexit. The White Paper talks about free movement of goods and services. Perhaps there is concern about using the language about the free movement of people because of the way in which it is perceived. Essentially, what is being asked for or promoted in the White Paper on migration is the free movement of people as it currently stands in EU law. It has not always been properly reflected that it is not an absolute right, and it comes with all sorts of limitations and conditions. As you say, they tie it to work, study or the ability to support oneself. That is pretty much what we have in the citizenship directive, and post being in one place after three months that is lawful residence. It is not always captured. It is not called that in this paper, but I think that shows a certain sensitivity about the use of that language.

Baroness Armstrong of Hill Top: Is the Welsh population fairly stable? Young people are not by and large leaving, are they?

Dr Jo Hunt: I think there is quite a lot of inward migration from England.

Dr Rachel Minto: I can give you the figures on that. We can have a dig around and provide you with something, but certainly there has been acknowledgement that the contributions, both economic and to the community, made by EU citizens through freedom of movement is important to certain industries and sectors in Wales.

Dr Jo Hunt: I think that around 20% of people in Wales were born in England. It is rather different in makeup from Scotland, where I think it is about 8%. I am not entirely sure.

The Chairman: Indeed, including one of the AMs we met at lunchtime.

Dr Jo Hunt: And two of your witnesses this afternoon.

The Chairman: And most of us. We did not quite bottom out the question about the different parts of the UK, and I think we should not reopen and extend this, because you have been very generous with your time. I would like to record our thanks and say that I think this should be a living relationship. We have met each other in various places and on various platforms, and if you have material to share with us at any stage, or developing thoughts, we would be very much in the market for hearing from you. We have been delighted that you have been able to come today. Thank you.