

Scottish Affairs Committee

Oral evidence: [Scotland's place in Europe](#), HC 595

Wednesday 19 April 2017

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Members present: Pete Wishart (Chair); Deidre Brock; Margaret Ferrier; Chris Law; Anna Soubry.

Questions 294-357

Witnesses

[I:](#) Professor Alan Page, Professor of Public Law, University of Dundee, and Dr Kirsty Hughes, Director, Scottish Centre on European Relations.



Examination of witnesses

Witnesses: Professor Alan Page and Dr Kirsty Hughes.

Q294 **Chair:** Can I welcome both our witnesses for what will be the last formal session of the Scottish Affairs Committee before the dissolution of this rather short Parliament? We are delighted to have Dr Hughes and Professor Page with us this afternoon. Just for the record, could you say who you are, who you represent and anything by way of a short introductory statement? We will start with you, Dr Hughes.

Dr Hughes: Thank you very much. I am Kirsty Hughes. One month ago I set up a new Scottish think tank called the Scottish Centre on European Relations, which is an independent, unaligned think tank and aims to work not only on Brexit but also on wider EU affairs.

By way of introduction, I want to make two brief points, one about the upcoming Brexit talks and one about Scotland and the situation it is facing. I think—and this is a point that has been made frequently—there is obviously very little time for the Brexit talks with the March 2019 deadline. If they start as expected in mid-June, you are going to have about six months for an outline exit deal, a maximum six months for an outline trade deal and then three to four months perhaps for the transition arrangements to allow enough time for ratification. We don't know yet what that outline trade deal will look like. In my view it will only be an outline, so it could take five to 10 years to get to a final trade deal.

I also think that it is quite wrong to say that everybody should unite behind trying to get the best deal for the UK, because I don't think there is one clear best trade deal. I think it depends on your political and economic preferences over environment, over sectors and so on which trade deal you might prefer. That is my comment on the talks; very brief.

On Scotland, we are obviously across the UK in a situation of huge political, economic and constitutional upheaval. At the moment there is no status quo choice. There may be some of us who would like to go back to being in the UK and in the EU, but at the moment we are on a Brexit course. That means Scotland cannot choose to stay in the UK and the EU. It can choose to stay in the UK and be part of it as a third country trade deal with the EU 27. It could choose independence in the EU or the European Economic Area, or in between those two options it could choose to be part of a differentiated deal, as the Scottish Government proposed in its "Scotland's Place in Europe" paper. As I understand it, the Conservative Government appear to have rejected that, but I only say "as I understand it". David Davis has written a letter to the Scottish Government outlining the reasons for that rejection. If I am right on that—I may not be, but I understand that to be the case—it is a little bit curious that so far that letter has not been published.



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In terms of the focus of your Committee, I would conclude by saying that I think the UK constitutional and political system, vis-à-vis the devolved Administrations, is not fit for purpose as far as at least this whole Brexit process is concerned.

Chair: I am grateful. Professor Page.

Professor Page: Good afternoon and thank you for the invitation. I am Alan Page. I am a professor of public law at the University of Dundee. I am a constitutional lawyer. The most recent book I wrote was on the subject of the constitutional law of Scotland, looking at that constitutional law from the perspective of someone living and working in Scotland rather than elsewhere in the UK. That book included a chapter on the EU dimension. In the course of the research, I spent quite a lot of time talking to people within the Scottish Parliament. Then when the referendum result was announced, there was quite a lot of interest in, "What does this mean for the powers of the Scottish Parliament?"

I did an analysis of the implications for the Scottish Parliament's legislative competence for what is now the Culture, Tourism, Europe and External Relations Committee of the Parliament, which was at the time the European and External Relations Committee. That attracted a lot of interest and has provided the sort of starting point for the work that I have done since. I am happy to respond to questions that you might have.

Q295 **Chair:** I was just getting ever so slightly distracted, because we understand that there will be a vote at 2.25 pm and the Committee will have to be suspended for eight minutes until members who wish to express a preference on what is quite a significant vote go down to the Chamber and do so. But thank you both very much for that.

The big issue of the day and the thing that we will be going to vote on is that there is going to be a general election on 8 June. What impact is this going to have on the process, as we understand it, and will this add to any of the time constraints that the Government have in order to conclude its business of leaving the European Union? You could maybe help us with that, Dr Hughes.

Dr Hughes: I don't think the general election hugely changes the Brexit timetable.

Chair: It doesn't change it.

Dr Hughes: There was an expectation that talks would start at the end of May at the earliest or otherwise at the start of June so, with a general election on 8 June, presumably they will start by the middle of June so it is not a big shift. The reason it was going to take that long was because, first of all, the European Council will not agree its guidelines that are out in draft form until 29 April and then, on the basis of that, the Commission draws up a detailed negotiating mandate and the Commission or Donald Tusk—I cannot remember which—has said that should all be done by 22



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May. You could say that if it is ready by 22 May perhaps that has taken two weeks off the timetable, although you would think at that point the UK Government would still want to be doing its own work into its response to those guidelines. It doesn't particularly delay what, as I said, is a very tight timetable.

Q296 **Chair:** I don't know how you feel about answering this, but will there be a change in the political context and culture following a general election? We are looking at the Government doing this in order to pursue and get some sort of agreement around its Brexit agenda. Do you think there is a political issue to what has been done in terms of this general election?

Dr Hughes: As I said already, there is not one best trade deal. There are a range of views on what sort of trade deal the UK should be aiming at, from a WTO-only deal to a Canada-style, Swiss-style or Norway-style deal, or to reversing its decision to leave the EU. I don't think it is particularly healthy if all those differences of view disappear, but I also think there will be more specific differences of view around environment, social issues and the whole range of other issues.

It will depend on the result. Some people are of course predicting a landslide for Theresa May. In that case, if we saw the different options not tested and challenged enough in Parliament, I think that would be disappointing. There will be Opposition MPs whatever the result of the election, so perhaps we should not be too concerned about that.

Q297 **Chair:** Do you have a view about this, Professor Page, just about the impact of this general election on the process or the culture, the discussions, the talks?

Professor Page: The key point is that the clock is ticking and the fact that we are having a general election is not going to change that. I think the issues after the general election will be exactly the same as the issues before the general election. Whether there will be a change in culture, in the sense that Theresa May may gain greater freedom—possibly the freedom that she is looking for is freedom within her own party to pursue whatever course she thinks is most desirable. Whether that is the case or not, I don't know, but I think the issues will remain stubbornly unchanged and the clock will continue to tick.

Q298 **Anna Soubry:** Can I just ask you to look at it a different way, which is that it may not make much material difference to the beginning of the negotiations, but what about the end of it? Do you think it strengthens the Government's hand?

Professor Page: This is one of the points that has been made, is it not, knowing that you were going into a general election in May 2020?

Q299 **Anna Soubry:** There is that, but isn't there also the opportunity then that, if you want to impose or negotiate transition arrangements, it is going to be much more easy to do that because you don't have the hard clock of 2020? On the basis that the Fixed-term Parliaments Act is not



changed, more likely than you have an extra two years, which can give you that time for transition, for things to unfold and unwind.

Professor Page: That is absolutely right. One of the things that I think has become clear since Article 50 was triggered is that this is not all going to be done and dusted by March 2019. The UK may well be out, but there will still be transitional arrangements to take it from that point until the finalisation of the agreement.

Q300 **Chair:** Just on that, I know Dr Hughes is keen to come in and maybe you could help us with this too. We have this date of March 2019 as the conclusion of all the negotiations, at that point we will be leaving the European Union. Is that still a realistic timescale? Will that be done? What happens if it isn't and then what more needs to be done in order to conclude all the other bilateral arrangements that we need with the EU?

Dr Hughes: That is the timetable for the exit deal, so it is the timetable for the end of Article 50. The only context in which you might conceive the unanimous EU 28 would have to agree to extend that might be if talks had broken down completely and we were heading for the WTO cliff, because that would be enormously damaging for the UK but also for the EU. That would be an extraordinary political and probably economic crisis at that point, but if we don't go down that scenario, then I think it will be March 2019.

You have seen in the European Parliament's resolution on Brexit, it suggested a three-year transition period. It is clear that the EU 27 and the European Parliament do not want an open-ended transition. They are concerned that that might somehow give the UK a special arrangement that was never intended to be permanent and could become permanent. So, although three years is ambitious for a transition phase to a fully settled trade deal, fully ratified—we have had the former UK representative suggest it could take up to 10 years—I certainly don't think we are going to see a 10-year transition period agreed.

I am not sure I agree on this question of the next UK general election being pushed back to 2022. I don't see how that helps the transition phase at all, unless the argument is that the UK should transition via the European Economic Area, for instance, and that Theresa May could not get that through the Conservative MPs at the moment. Then that makes a difference, but still, at the start of 2019, you should have ratified an agreement with the EU 27 that says exactly how the transition phase is set out. Even if it is given a period of, say, four years—and not everything will be four years—if you are heading towards a certain sort of clear customs deal, you might need 12 months to set up the bureaucracy, the arrangements on EU citizens or, presumably, it lasts a lifetime, so is that 100 years? But you will have agreed that timing and ratified it by March 2019, so whether you are holding the general election in 2020 or 2022, I don't see, at least in the EU/UK context, that that changes anything.



Q301 **Chair:** We are grateful. We will maybe just move on. I would like to ask this question to you, Professor Page. I note from your evidence—which is very interesting and thank you for it—that the UK Parliament would acquire the majority of the policy responsibilities that would fall to the UK following withdrawal from the EU. I think you made that point when the House of Lords Committee had a look at these issues. I think your assertion is that the vast majority of the powers that will be returning to the UK from the EU will be reserved. Could you talk us through your understanding of the reserved devolved issues, which I think you were able to tell the Lords Committee and perhaps you could help this Committee with some of these things too?

Professor Page: By all means. This is the piece of work that I did for the Scottish Parliament's European and External Relations Committee. The question was: what does this mean for the Scottish Parliament's powers? In order to answer that question, what I did was to map Schedule 5 to the Scotland Act—which, as you know, sets out the matters that are reserved to the Westminster Parliament—on to a list of EU competencies. The idea being that, once I had identified or worked out which ones were reserved, all those that were not reserved would be the ones that would fall to the Scottish Parliament.

Q302 **Chair:** Is that not how it works? If it's not in Schedule 5, it is devolved. Do we have the understanding wrong when it comes to this? If it is not listed in Schedule 5, surely those powers—

Professor Page: It is devolved, that is right. But if it is listed in Schedule 5, then it is reserved. That was why that was my starting point. This was my question: which EU competencies are reserved? Because these are the ones that will go to Westminster, to this Parliament and all the others will go to Holyrood. What I found, rather to my surprise, as I went through my papers here—and I can certainly give you a copy of it—as I went through the long list of EU competencies, the vast majority are reserved and, as I say, they will go to this Parliament.

Q303 **Chair:** Is that because they are in Schedule 5?

Professor Page: To take a very apposite example, the negotiation and conclusion of trade agreements with third countries, with non-EU countries—which is an EU competence—that is reserved. Trade relations are reserved under Schedule 5 to the Scotland Act. I didn't start this work with any particular preconceptions as to what I might find, but that was what I did find. If you then say, "Well, why should that be?", I will go back a step and complete the picture.

In terms of those that are devolved that will go to the Scottish Parliament, the ones that I picked out were justice and home affairs, agriculture, fisheries and the environment. These were the main ones. There are one or two others, but these were the principal ones. Everything else that the EU does is basically reserved. If you say to yourself, "Why should that be?", I think the answer is: because the UK is



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based on a single market in exactly the same way as the European Union is based on a single market, so you have a substantial overlap between reserved matters under the devolution legislation and EU competencies.

Q304 **Chair:** I know Margaret Ferrier wants to come in with a supplemental but, just on this UK single market thing, I had never heard of anything like a UK single market until a few months ago.

Professor Page: Alex Salmond called it an economic union. It was one of the five—

Q305 **Chair:** Yes, this idea that the European Union has a single market so, therefore, the United Kingdom must have one.

Professor Page: We have an economic union.

Chair: Yes. I don't think anybody disputes that.

Professor Page: We can trade freely within the United Kingdom as well.

Q306 **Chair:** What are the dynamics of this single market in the UK? We understand what the European Union single market is. We know exactly what it is because it is a club that is made up by its members. What is this UK single market? What are we talking about when we are referring to this?

Professor Page: What are its origins? Its historical origins go back to the Acts of Union. That was what the Union was about. It was about freedom of trade between Scotland and England and it has just become a feature.

Q307 **Chair:** There was an inclination to call it something and this is why we have ended up with this UK single market?

Professor Page: That is a term I have chosen, but it is not a fiction of my imagination. It is a reality.

Chair: Sorry, we are going to have to suspend the sitting until the conclusion of this vote.

Sitting suspended for a Division in the House.

On resuming—

Q308 **Chair:** Professor Page, you were telling us about the UK single market and maybe you could talk a little bit about it, so this Committee can better understand what you are referring to, what you mean by this and how it all works together in Scotland's interest.

Professor Page: To go back, as I said, an awful lot of powers are reserved to Westminster. EU competencies are reserved and go to this Parliament rather than to the Scottish Parliament. If you look for an explanation for that, which is what I did, the answer is that, like the



European Union, the United Kingdom—and hence the devolution settlements—are based on the idea of an economic union. So powers that might affect the integrity of that union, anything relating to commerce, company law, labour law, these are all the matters that are reserved to Westminster. That is the explanation for why they are reserved. If you go back to the Calman Commission, which contains the fullest discussion of the justifications for reserved matters in Schedule 5, that is one of them. It is obviously not the whole of it, because you have things like foreign affairs, defence and so on, which have a separate justification, a separate rationale—the constitution—but the integrity of the UK economic union is an important part of it. An awful lot of the powers are.

Q309 **Chair:** How is that listed then in Schedule 5? How is it defined? If the Scotland Act is all about everything that is not reserved is devolved, is it a matter of shoehorning some of these things?

Professor Page: If you go through Schedule 5—and now I am trying to remember—part 2 has various sections. The key to it is each section was written by a UK Government Department. Section A was written by the Treasury, so it includes—

Chair: Sorry, we are just looking at the vote. We are having a general election. Sorry, please continue, Professor Page.

Professor Page: Each section was effectively written by a UK Government Department. If you think about the Departments that have economic responsibilities, starting with the Treasury, you can see the imprint on Schedule 5. In section A, fiscal and monetary policy is reserved; the currency is reserved. There are various things: money laundering, finance-related, all regulation of financial markets. These are all reserved under section A.

The next big one is—and I sometimes struggle to follow the changing names of UK Government Departments; I walked along Victoria Street today and it is now called the Department for Business, Enterprise, Industry and goodness knows what else, it used to be the DTI a long time ago—section C and the whole of company law and business associations. These are all reserved matters.

Q310 **Chair:** As a result of all of this, do you think that there will be additions to Schedule 5 of the reserved powers? When we discuss the repatriation of powers and how it relates to Scotland, it has been the issues of agriculture and fisheries that come up. These are the ones that seem to be where most of the conversation is centred around. Would there be a necessity to redraft the Scotland Act and increase the number of reserved powers in Schedule 5 as a result of this?

Professor Page: I think redrafting the Scotland Act overstates what would be required, but I anticipate that there will be some adjustment to the boundary between reserved and devolved matters.

Q311 **Chair:** Some adjustment?



Professor Page: Adjustments as a result of—

Chair: Talk through what that would mean.

Professor Page: If you take the example of agriculture, which is something that is devolved and comes within the Scottish Parliament's legislative competence, that includes things like animal health and food safety. If that is not changed—and I am not talking just about in relation to the Scottish Parliament, I am talking about Northern Ireland, Cardiff, Wales and indeed this Parliament—then you could end up in a situation in which you had different rules applying across the United Kingdom.

Q312 **Chair:** So we are talking about reserving or re-reserving certain powers as a result of this?

Professor Page: I think that is right. The justification for doing that will be to ensure or to preserve the integrity of the UK single market.

Dr Hughes: I agree that these are clearly devolved powers. It seems to me Theresa May has already said that, in the first instance, she sees them as coming back to the UK. I also think, from a political point of view, she has said that in an unnecessarily confrontational way because logically there may be things—you did not expect to be leaving the EU back in 1999—as Professor Page has just said, that make most sense at a UK level. But here we are immediately running into not just the existing devolved competencies but the lack of a clear enough federal structure where there is proper consultation. Whereas the discussion about, “We are in this new circumstance. These powers are devolved to you in Wales, Northern Ireland, but we need to come together and have a proper equal discussion about where we take them next,”—that would be the proper way to address this rather than the way that it has been so far.

Just a brief comment on the single market point: my understanding, from an economic, political and constitutional point of view—rather than a legal and historical point of view—is that the EU single market was the UK single market. As I say, in that sense, there was no UK single market, except for in those areas where EU competence doesn't rule, so a single UK market through the Great Repeal Bill and other measures is going to have to be re-established. Of course, if Scotland went down a differentiated route, then you get into the whole discussion of potential non-tariff barriers, would there be a border and so forth. Obviously, there has been an economic union going back but I think the fact of leaving the EU single market means you have to create anew. There is no status quo, as I said in my opening remarks.

Q313 **Margaret Ferrier:** We are talking about reserved and devolved, and what falls under EU competence at the moment. Two of those areas are employment law and health and safety. Although they are reserved to the UK Parliament, the competence lies with the EU. Do you have any thoughts on whether they would come back to the UK Parliament and they would take control of those or whether they would consider



devolving them?

Professor Page: Again, a lawyer's answer: unless you amend the Scotland Act, these things, in the case of both health and safety and your other example—forgive me, I forget the example that you gave before that.

Margaret Ferrier: Employment law and health and safety.

Professor Page: Employment law and health and safety. These are both reserved at the moment under the Scotland Act and, hence, these will fall to the UK Parliament, this Parliament, in the absence of any amendment to the Scotland Act.

Dr Hughes: I agree with that. I also think, in terms of up until now not seeing the formal UK Government response to the "Scotland's Place in Europe" document, the UK Government wouldn't have to go as far as accepting that whole proposal, which is a very ambitious proposal for Scotland to stay in the single market. I would have thought it was perfectly reasonable, especially if we were trying to get to a UK-wide position on Brexit, to say, for instance—maybe on migration powers—that you would devolve some of those, even though they are currently reserved, if there was a particular case. That would perhaps link to employment at that point. So, a more flexible approach to Brexit would be looking differently at these reserved powers issues rather than just saying, "We are bringing everything back in the Great Repeal Bill," which is obviously also extremely complicated because you cannot immediately recreate EU agencies, so you cannot literally just transfer all the EU law into UK law in a simple way.

Professor Page: If I could make a supplementary remark on that. It is important to bear in mind that we are not just talking about the Great Repeal Bill. The Great Repeal Bill is one Bill among possibly as many as 15 that will make up the Brexit legislation.

Chair: We are going to come to the Great Repeal Bill later in the session, so we will come back to that again. I know that Chris wants to ask another question.

Q314 **Chris Law:** Yes, I want to explore it a bit further. You say at the moment justice, home affairs, environment, agriculture and fisheries are currently devolved.

Professor Page: Yes.

Q315 **Chris Law:** Am I correct in saying that you expect them to get reserved by the UK Government when they are brought back to the UK?

Professor Page: No, I don't expect that to happen at all.

Q316 **Chris Law:** You don't expect that?

Dr Hughes: I said that.



Chris Law: You said that? Sorry, Kirsty, my apologies.

Q317 **Chair:** There is a little bit of disagreement on this, so can I hear both your opinions on what you think?

Professor Page: Kirsty said that Theresa May had taken an unduly or unnecessarily combative approach to this question. I think it is worth unpacking the language slightly. There has been a significant shift in language since this began. Theresa May's original statement in the Lancaster House speech—and I have it written down if you want it word for word—was, "I can confirm that we will not be taking back any powers that are currently devolved." In other words, the clear implication was that those powers that are devolved would remain with Holyrood.

The language now is—and it has been used sufficiently often to suggest to me at least that it is intentional—that, "There will be intensive discussions," which I think is a point that Kirsty missed in her previous answer: "There will be intensive discussions, as a result of which we expect there to be a significant increase in the powers of the devolved legislatures." In other words, nothing is settled yet. All of this has to be discussed, thrashed out, which is why I said at the very beginning that, yes, there is going to be a general election but the issues after the general election are going to be exactly the same as they are. Nothing has changed. The Great Repeal Bill White Paper, which we had the day after Article 50 was triggered, if you read it closely, it is a work in progress.

Dr Hughes: I read this differently to Professor Page. I think, when Theresa May said she wasn't taking back powers that are already devolved, she was talking literally about those areas covered by the Scottish Parliament, given that the EU is taking a lot of decisions on agriculture and environment and obviously those powers, at that point you have a UK Minister sitting in the Council of Ministers. That then fits with what Alan was saying about the next step, where she then says, "We expect some of these powers to then be devolved to the Scottish Parliament". Politically, she is presenting that as if they are new powers. Whereas, from my point of view, I think you could say that they are not new powers. They are powers that in the Scotland Act are Scotland's.

As I said before, there may be a rational, logical need to have some of those powers at a UK level, but that decision on how many are at UK level and how many are devolved first of all needs to be discussed, not, in my view, just decided by the UK Government. I think it is very politically arguable—and that is why we are disagreeing—as to: is this an increase or is it taking away? Before it used to be that you had EU powers that were voted into law in the Scottish Parliament. Some of those powers are now going to end up at a UK level, voted into UK law by the Westminster Parliament, so in that sense at least it is a shift.

Chair: I think we have cleared that up.

Q318 **Chris Law:** The UK Government has obviously been clear it wants to



have a UK-wide framework in order to discuss the responsibility for those powers. I want to know, would legislation affecting devolved areas require a legislative consent motion? Alan, maybe we will begin with you on this one.

Professor Page: The answer is, yes, it would.

Q319 **Chris Law:** It would. All right. I take it there is agreement?

Dr Hughes: I bow to his knowledge.

Professor Page: Yes, any change in the powers of the Scottish Parliament, the legislative competence of the Scottish Parliament or the powers of a Scottish Minister, will engage the Sewel Convention and, hence, will require the consent of the Scottish Parliament under that convention.

Q320 **Chris Law:** Just on that note then, can that be overridden if the Scottish Parliament decides, no, it won't give a legislative consent motion?

Professor Page: Were the Scottish Parliament to refuse their consent, it would still be open to the UK Parliament, this Parliament, to go ahead and legislate to change the settlement.

Q321 **Margaret Ferrier:** Can I ask one more question before we leave this? Do we think that agriculture and fisheries will be devolved once it leaves the EU? Because that was one of the big ticket items that the Leave campaign promised, "You will have control over agriculture and your fisheries," so do we think it is all going to be devolved to the Scottish Parliament or will it come back to the UK?

Professor Page: I said a little earlier on that I had given up the business of predicting but, if I were to predict what I think will happen, it is that the Scottish Parliament and the other devolved legislatures will end up with as much—probably more—decision-making freedom in areas, such as agriculture and fisheries, than they currently enjoy under the EU regime. I think that that is the position that we will end up in.

Dr Hughes: I would see that rather differently. I think not all the powers will be devolved, absolutely not. A significant amount will be kept at a UK level and then the rest will be devolved, so that the UK will take over a number of the EU powers rather than handing them all to Holyrood. There are obviously other questions under that. For instance, fisheries and how that is going to be dealt with in the Brexit talks and in the outline trade deal because it is an extremely important issue, as you know, for the EU 27. So, even ahead of that sorting out of competencies, there may be a deal as part of the outline trade deal.

Q322 **Margaret Ferrier:** It is not as clear as what it was made out to be during the EU referendum debates?

Professor Page: It won't be categorical, black and white, that it all belongs to Holyrood or all belongs to Westminster.



Q323 **Margaret Ferrier:** I want to come on to laws. At present the Scotland Act 1998 states that any legislation passed by the Scottish Parliament isn't law if it is not compatible with EU law. We expect that clause to be removed upon the UK's withdrawal from the EU. Who would be responsible for that? Should it be the Scottish Parliament or would be the UK Parliament?

Professor Page: I would expect it to be removed because it will serve no useful purpose. Whether you are talking about the Scottish Parliament's legislative competence or the executive competence of the Scottish Ministers, I would expect that restriction to be removed. That would mean, among other things, that the Scottish Parliament would be able to legislate in respect of minimum prices for alcohol without having to go through the business that we have been going through over the last five years, where the whisky industry has sought to fight that through the courts. I would expect that to be removed, but it would have to be removed by this Parliament and the Scottish Parliament cannot do that.

Dr Hughes: That also comes back to the question of what the UK Government does about devolved and reserved powers. Is it going to step in for the EU in that case or not? It comes back to the discussion of building a full UK single market, because you don't have a full non-EU/UK single market, so again I would have a slightly different emphasis on that.

Q324 **Margaret Ferrier:** Have we any idea how long it would take to remove the clauses? Is it an easy thing to do or is it—

Professor Page: It could be done. It could be done in the blink of an eye, quite possibly as part of the Great Repeal Bill.

Dr Hughes: What cannot be done in the blink of an eye obviously is, if we are bringing EU environmental law in the first instance into UK law and Scottish law, some of that law says, "How these standards are met and develop over time depends on the judgments of the appropriate EU regulatory agency." How quickly can the UK set up that sort of regulatory agency? Is it a UK one? Does it have Scottish, Welsh and Northern Ireland branches and so on? So, some of these things can indeed be done in the blink of an eye and others will take considerable time. At the end of the day, we have to find out which of the EU's 34 regulatory agencies is the UK going to stay part of, either fully or on a co-operative basis or what.

Q325 **Margaret Ferrier:** That takes me on to the point you mentioned about food safety and animal feed then. Would that mean, if these regulatory agencies were not there, that that would slip through the net and there would be no regulations for people to follow and then it would jeopardise their safety?

Dr Hughes: I doubt it. I am sure that will be part of these 15 Acts and Bills and all the other processes that are going to have to be gone



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through to ensure that the UK has a new and different—but still functioning—regulatory structure after it leaves the EU.

Professor Page: There will be requirements, yes. It will not all just disappear.

Q326 **Deidre Brock:** I want to go back to the legislative consent motion and the Supreme Court's recent decision that the Sewel Convention cannot be enforced by the judiciary. What force does that Convention have other than—

Professor Page: Some of the reaction to the Supreme Court's judgment was to the effect that the Sewel Convention was no longer worth the paper it was written on.

Chair: I think they said it was not worth the vellum it was written on.

Professor Page: I was going to say that, but I thought that was probably a little bit technical and you would say, "Well, that is the sort of thing that professors say, isn't it?" Let's just stick to ordinary language: it is not worth the paper it is written on. I disagree with that assessment because I regard it as politically binding now as it was before the Supreme Court's judgment. Therefore, I would expect the UK Government to proceed on the basis that it would prefer to reach an agreement with the Scottish Parliament over the changes that will inevitably flow from the UK's withdrawal from the European Union.

Dr Hughes: I think I agree with that. There is still a necessity for political consultation and then, if that political agreement is not given, Westminster can overrule, as we have already heard, and at that point you are facing a political and constitutional stand-off. For me, that is all part of how—so far and looking forward—does the UK relate to Scotland, and all the UK Government to Scotland and the devolved Administrations, and how is this process handled given there is not going to be agreement on everything? Are there areas where there can be better consultation and some give and take? At the moment that doesn't seem to be, let's say, the mood music.

Q327 **Deidre Brock:** There is no recourse for the Scottish Parliament should the UK Parliament decide to go down that route, effectively, is there?

Professor Page: That is correct, yes.

Q328 **Deidre Brock:** We do need to start looking at some means of enforcing those constitutional conventions and, if so, what would you think should be looked at?

Professor Page: If you are talking about enforcing the Convention, what you are talking about is altering the nature of the settlement so it is no longer a devolved settlement in which this Parliament remains sovereign and can legislate in the way in which we have been talking about, notwithstanding the fact that the devolved legislature is opposed to what



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it is doing. Instead, you would be talking about some sort of federal settlement in which there were guaranteed division of powers.

Q329 **Chair:** What Lord Keen said at the Supreme Court—just to get your view on this, because it seemed to me to be pretty clear—when he talked about LCMs was that they are simply, “a self-denying ordinance, a political restriction upon Parliament’s ability to act, no more and no less than that”. Then he went on that it was in no sense a “qualification or inhibition upon parliamentary sovereignty”. That seems that it isn’t worth the vellum it is written on if Parliament is always going to be sovereign. That is Lord Keen, Westminster’s top legal Scottish officer when he was at the Supreme Court. This was his evidence then.

Anna Soubry: So, it is not the judgment then?

Chair: This is the UK Government’s supreme law officer. I am sure Professor Page recognises the significance of these remarks, because I think it was a shock to everybody when we heard that. It did seem to suggest that all the Acts that we have passed and all the things that we had said about the Sewel Convention seemed to just disappear.

Professor Page: This is section 28(8) of the Scotland Act, which was inserted by the Scotland Act 2016 as a result of the deliberations of the Smith Commission, which was set up after the independence referendum. What they said was that the Sewel Convention should be put on a statutory footing, in contrast to the recommendation that the Scottish Parliament and the Scottish Government should be made permanent, which provoked a lot of discussion; there was absolutely no discussion about that. But all that the drafter did was to take the Sewel Convention and write it into the Scotland Act. Now, does that make a difference or does it not? I hear what you are saying and I understand what you are saying, but I think it makes a difference in the sense that it is a solemn commitment.

Q330 **Chair:** A solemn commitment?

Professor Page: On the part of this Parliament.

Q331 **Chair:** A legislative requirement, a legal requirement, a commitment?

Professor Page: It is not saying, “We cannot do this, it is a self-denying ordinance,” but it is saying in the most solemn language that is open to a sovereign Parliament, “This is something that we are serious about. We will not normally do this.” It is not saying we will not do it.

Q332 **Chair:** “Normally” is the key word in all of this, isn’t it?

Professor Page: Yes, but there was no real scrutiny of that.

Dr Hughes: No, I think on that, obviously at the time it was done, ahead of the EU referendum, there wasn’t an expectation that there might be so many cases where there potentially needed to be a Scottish Parliament vote and there was going to be disagreement. I would agree that the way



to develop this, in a post-Brexit world, is to look again at federal structures or at least at the structure across the four parts of the UK. That is not where we are right now but if it transpires in the next two years that the Scottish Parliament is overruled again and again by Westminster, then, at the very least, that is going to set up a major political constitutional debate that will presumably open up a discussion, whether it is a discussion about how those structures need to evolve or whether it simply feeds into a discussion around the independence debate depending where that has got to at that point.

Q333 **Anna Soubry:** Scotland's most senior law officer, who I think is the Lord Advocate, who represented the Scottish Parliament in the Supreme Court, am I right in thinking that he himself did not argue with full force on this point, yes?

Professor Page: Yes. That is an interesting point. It was not clear what exactly he was arguing. What he said was that he was not laying claim to a veto or the triggering of one.

Q334 **Anna Soubry:** No, exactly. Isn't that the case because there is no doubt that, when it comes to treaties, obviously Westminster—this Parliament—is sovereign? If Scotland gets its independence that will change but, at the moment, we are a United Kingdom and when it comes to treaties it is this Parliament that decides.

Dr Hughes: Absolutely, but I think we were also discussing the wider issues, like the devolution of agriculture and environment competencies, so that is about Westminster—

Anna Soubry: No, I understand that.

Dr Hughes: —versus Holyrood at that point, and if it keeps overruling what would then happen? Then this solemn commitment is obviously not working very well or at least not in the context of Brexit.

Professor Page: But the language of keeping overruling possibly omits the reality of the situation, which is that arrangements will have to be put in place that will be operable. We will have to have a Scottish agricultural policy come March 2019. There will have to be practical co-operation between the different—

Q335 **Chair:** In the purely hypothetical, an LCM is required as part of the Great Repeal Bill and the Scottish Parliament refuses to give that. It returns to Westminster; what happens then?

Professor Page: There are two possibilities. First, the UK Government could remove those parts of the legislation that relate to Scotland, which would just be a mess. Or they could go ahead and legislate, notwithstanding there is—

Q336 **Chair:** Asserting its sovereignty?

Professor Page: Yes.



Dr Hughes: Or they could seek a compromise through political discussion, which is what you would hope for.

Professor Page: You would anticipate all that to have been done before.

Q337 **Chair:** In that case, it is within the gift of Westminster to assert their sovereignty when it comes to these things, if they are unhappy with something the Scottish Parliament has done in terms of—

Professor Page: In the final analysis they can legislate against the wishes of the Scottish Parliament. That is correct.

Q338 **Chris Law:** Since we are talking about intergovernmental relations, we have a good following topic here. Obviously the UK Government established a joint ministerial committee on European negotiations—I will just read what it says—to “discuss each government’s requirements of the future relationship with the EU” and to “seek to agree a UK approach to, and objectives for, Article 50 negotiations”. Do you have a view on how successful, or indeed unsuccessful, the joint ministerial committee has been in achieving any or all of those ends?

Professor Page: You mean in the context of Brexit?

Chris Law: Yes.

Professor Page: I don’t have a clear view on that. Another way of saying that is: I don’t know but my impression is that that has not happened.

Q339 **Chris Law:** So it has failed?

Professor Page: No agreement has been reached and, therefore, yes, it has failed.

Dr Hughes: My impression is that at a detailed level, let’s say, to some extent it has worked. There have been meetings at an official and political level. There has been exchange of information. There has been discussion of some issues. But my impression is that there has been a serious lack of discussion at the strategic level, in terms of the big decisions, the big choices like whether, for instance, is the UK going to go for a Norway model or a Norway-lite or a Canada style trade deal? What is going to go into the Article 50 letter? So, major issues around the negotiating strategy, the Customs Union. My impression is that these big decisions have not been discussed and, as I understand it anyway, the Article 50 letter was kept very close to the Prime Minister and a small number of people.

Q340 **Anna Soubry:** It wasn’t even discussed in Parliament, never mind with anybody else. We have not even had a debate on the value or otherwise of the single market or the Customs Union, or the free movement of labour. So it could be argued that the Government’s positions towards the Scottish Government are entirely consistent with its view of the UK Parliament.



Dr Hughes: That is right but, as Chris Law quoted, there was this language about trying to create a UK-wide approach and I don't see any genuine effort to create that UK-wide approach with the devolved Administrations on the big issues. Obviously, if there was a UK-wide approach I would agree with you. It should certainly involve the UK Parliament.

Q341 **Anna Soubry:** Sorry, I know I am interrupting, but it is different with the Welsh because the Welsh Government are Remain and the Welsh people voted Leave. So nobody is getting particularly agitated from Wales. The problem is in Scotland. We know that the Scottish people voted Remain and very clearly voted Remain. So it is a very different dynamic because of the vote in Scotland.

Dr Hughes: That is right, but the Welsh Government have also indicated some unhappiness with the process of the JMC. So, whether you are going to go for a single market solution, which the Scottish Government said it would like, or something very close to the single market, which I think was the terminology of the Welsh Government's paper, there is a sense—I keep saying "my impression", obviously I have not been in the room—and my impression is there has not been that sort of discussion around the range of options there are for the future relationship with the EU. The process hasn't worked and I think, therefore, it needs rethinking looking forward for the next two years and beyond because the trade deal is going to take much longer than two years.

Q342 **Chris Law:** I accept both your positions. It has clearly failed. If this is a precedent of a supposedly UK-wide approach, it has failed at this level, so does this not bode rather badly for the future of EU negotiations? What do you think the problems are that the UK Government are having, let's say, first, in reaching the UK-wide approach and, secondly, what kind of things are they likely to face if they continue the way they are doing?

Dr Hughes: In terms of the negotiations, I think the challenge with the negotiations is it covers so much. It covers everything, including the transition period and, unless it is through the European Economic Area, it is going to be extremely complicated. It is not just a simple thing to negotiate ahead of the trade deal. It should not be complicated, nonetheless, across all those areas to say, "Here is the bit on fish and here is the bit on environment that we need to discuss and get the position across the devolved Administrations as well as the UK." So that could happen, but what has happened so far does not suggest that that will necessarily happen, except perhaps at a detailed level. But when it comes to significant major decisions will the devolved Administrations' views be taken into account? Also, constitutionally and politically, should they be?

If you are taking a decision in the negotiations on fisheries—obviously important to Scotland—or you are taking a decision on the financial sector, or you are taking a decision on future customs procedures or bargaining with the EU 27, because you don't have a federal



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constitutional structure in the UK do you have the time now to sort out and agree how you should come to those decisions? I don't think the JMC is giving you a solution to that process at the moment.

Professor Page: I don't think there is anything I would wish to add to that, other than simply to say that making a success of this business of EU withdrawal, regardless of what we feel about the desirability of the EU withdrawal, will require successful collaboration, co-operation between all the Administrations in the United Kingdom. There is no getting away from that fact.

I take Kirsty's point about the big JMC level decisions, but there is going to have to be practical co-operation to ensure that we have the policies and the systems in place that can function as and when the UK leaves the European Union.

Dr Hughes: One comment on that is: again, my impression before the Brexit vote is that the JMC was not seen necessarily to always function very well in getting Scottish input into UK positions on EU laws. Occasionally Scottish politicians are allowed to represent the UK in the Council of Ministers but that has been rather rare, so that is something that wasn't necessarily functioning terribly well even before the Brexit vote.

Q343 **Margaret Ferrier:** Can I come in with a supplementary on that? If we look at the past we can see, as my colleague said, that it doesn't bode well because was it not the case that an unqualified, unelected Lord was sent to negotiate with the EU instead of a fully qualified Scottish Government Minister in that field? So if that has been done before, as I say, it is not looking good for the future and surely you should be sending the right person to negotiate for you. If we are looking at a UK-wide deal that will benefit the whole of the UK at this point in time, then it should be the most qualified person that you send to these negotiations. That may well be a Scottish Government Minister rather than a UK one.

Dr Hughes: The expertise of the Minister or representative is one issue but obviously there are other political issues in who should be represented. Sorry to be repetitive, but I think it comes back again and again to the question of existing constitutional structures within the UK. If you look at the case of Belgium, you regularly see Ministers from different parts of Belgium turning up at the Council of Ministers and that is all sorted out in their constitutional structures. But that is not the constitutional structure of the UK. We don't have a federal structure. If you had a federal structure it would need to include some very new structures in England.

So the current structures, vis-à-vis the devolved Administrations, are problematic but what the solution to that is is a very big question.

Professor Page: You have to distinguish between the negotiation of the UK's withdrawal from the European Union and the future trade agreement



or trade relationship on the one hand, which is what I think they are referring to, and the whole question of the exercise of the powers that will come back to the UK in the wake of the United Kingdom's withdrawal. That is why I drew this distinction between those that will go to Holyrood, which are important but not as important as many of the ones that will come to this Parliament. That is why we need to get this business—to use the language of federalism—of shared rule right. It cannot just be a case of talking about, "These are the Scottish Parliament's powers and you get on and do with them whatever you want, subject to whatever adjustments." We need to get the shared rule and reserve matters business settled.

Q344 **Anna Soubry:** That leads us to question 10, which is: given the scenarios you have quite rightly painted as to what would happen, what are your views as to the sort of structures? First and foremost, Chair, I do need to put on the record that, of course, the situation in Northern Ireland is very much something that has been at the forefront of the Government's mind. I think we do have to say that. The peculiarities and special situation that is very concerning there.

When we look at even whether there should be new structures, which I think is what you are saying. Do you have two hats? Do you have your own personal political views as to independence or federalism, as opposed to where we are at the moment as a United Kingdom? Or are you just able to look at it on a clean academic—

Professor Page: Yes, that is the way I am looking at it.

Q345 **Anna Soubry:** You just look at it in a purely academic sense?

Professor Page: Yes.

Q346 **Anna Soubry:** Do you think we need some new structures then to sort out these problems?

Professor Page: Absolutely. The danger I see is that an awful lot of this will be left to the unco-ordinated efforts of individual UK Departments, so the working out of what this means in terms of agriculture, fisheries, will be left to Defra with no degree of central co-ordination role assigned by the UK Cabinet Office. That is where we are heading and we need to address that.

Q347 **Anna Soubry:** So what solutions do you—

Professor Page: I would say two things. First, you cannot leave it to the unco-ordinated efforts of individual Departments to do whatever they think is most appropriate from the point of view of the UK and England. Secondly, it cannot all just be left to a memorandum of understanding and, no doubt, there will be a multiplication of these memoranda of understanding that are "binding" in honour only; a moral obligation but no legal obligation.



In many of the situations we are talking about we will be talking about powers that will be exercisable by UK Ministers, by Scottish Ministers and I see no reason why, in respect of those powers, there should not be obligations to consult before they are exercised and, in some cases, to obtain the agreement of the other Administrations involved, so that there is an agreed approach to exercising these powers rather than, "This is what we are going to do. Take it or leave it."

Dr Hughes: I agree with the second half of what Professor Page just said but not the first part. I am not quite sure why you would predict that this would be unco-ordinated. Why would something that is as politically sensitive as fisheries and agriculture—and is also going to come up in the UK-EU 27 negotiations—not be co-ordinated from the Cabinet Office or centrally? Obviously there is an enormous question of bandwidth across all these issues and negotiations, and then the internal sorting out of competencies and future structures.

Going back to your original question, at one level, yes, we are trying to take an impartial view here. You don't have to have a personal bias towards federalism, which is very tricky in many ways politically to think about, to think, "This system is not working very well, so are there more pragmatic and quicker ways to make it work better than trying to step back and have a huge discussion of what would it be if you are going to have federalism and a written constitution?" and so on. That is certainly a path other countries have gone down. But realistically, if it is not the path that the UK is going down at the moment, what else can be done and quite quickly, given that we are heading into a general election phrase? Even before that, I find considerable concern in the relationship between the UK Government and the Scottish Government and the fact that things like the JMC are not working well. There is not going to be full agreement on an approach to the Brexit negotiations but at least to have some give and take, but that seems to be more absent than present so far.

Q348 **Chair:** Professor Page, I don't know if it is in the evidence you gave to us but you said, "The options for protecting Scotland's interests in relation to policy areas being repatriated to Westminster are (a) independence, (b) adjusting the devolution settlement in some way or shared competence." Are you suggesting that the only way we can maybe secure this—because there are obviously big political choices—is by Scotland becoming an independent nation?

Professor Page: That is one way of addressing these issues from a Scottish perspective.

Q349 **Chair:** It is not the only way you are saying?

Professor Page: Yes, I am saying there are different ways in which you might address that particular problem.

Q350 **Chair:** When you say "shared competence", what do you mean by that?



Professor Page: That is what I was hinting at when I talked about saying these powers would not just be for UK Ministers to exercise on their own. They would exercise them after consulting or with the consent of the devolved Administrations, or conceivably the other way around: the power would belong to the Scottish Ministers but before they exercise it they would consult UK Ministers. In that way you would actually have to address the question of: do we have an agreed approach to this particular question? That is what we are trying to get to, a situation in which no part of the United Kingdom feels it is in a situation that this is imposed on it, take it or leave it. There has to be an agreed way forward. I think you can build structures. "Shared competence" is just a shorthand way of expressing that.

Q351 **Chair:** There are issues about Scotland being an independent nation and this would be one really elegant way to deal with all of this, would I be right in assuming that? Or are there issues with Scotland becoming an independent nation?

Professor Page: That is a whole other question, the question of independence.

Q352 **Chair:** Do you want to have a stab at that, Dr Hughes?

Dr Hughes: Yes, absolutely. Unless the UK changes its mind, and two years is a long time in politics, as I think I said earlier. One week at the moment is a long time. It is unlikely at the moment but possible that the UK could change its mind. Article 50 is reversible. Otherwise, to stay in the EU and have control of these competences in Scotland then you could be an independent member state in the EU. That obviously looks more straightforward now than it did in 2014, in terms of the mood music from the other EU 27. But there is the intermediate option, which obviously the "Scotland's Place in Europe" paper puts forward, of Scotland staying in the single market while the rest of the UK doesn't. Then there is another intermediate, which would be for the whole of the UK to stay in the single market.

If you look at the "Scotland's Place in Europe" paper, that would involve an enormous amount of devolution. It would also be relatively tricky in a number of different ways. Scotland at that point would still be a sub-state of the UK so how could it apply to join the European Economic Area, all these sorts of issues. Depending on the nature of the future UK-EU 27 trade deal, it may set up frictions in Scotland/rest of UK trade. But that is the model that the Scottish Government put forward with the votes of the Labour MSPs obviously but not Lib Dem and Tory MSPs.

Chair: I know Mr Law has particular questions on this issue.

Q353 **Chris Law:** Yes, I want to look in particular detail at the future relationship in the EU for Scotland. Clearly, Scotland and UK have different priorities when it comes to its relationship with the EU. What I want to know is what are the options for Scotland's future relationship with the EU and perhaps what you thought would be best for Scotland?



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Dr Hughes: Whether inside the UK or independent—both those scenarios?

Chris Law: Just in terms of the relationship to the UK. That relationship specifically to the EU, so if it means independence is going to be the better route necessary in order to have the best relationship with the EU would that be the case?

Dr Hughes: I think what you have seen since last summer is obviously the Scottish Government do a lot more diplomacy across the EU than they normally do. I cannot remember who but someone commented that they thought that was the most in 300 years. I don't know if that is true. It was a lot of activity. Then you have obviously seen a trade office to be set up in Berlin. I think, if Scotland stays inside the UK, just as you would expect Bavaria or other major parts of other EU member states to put a lot of their nation into how they relate to Brussels or other member states, Scotland was doing that and could carry on doing that. But I think it is in the context of the devolved settlement of powers, so what does happen over fisheries?

Imagine—we are not exactly predicting this—if all fisheries powers were devolved to Scotland, it would need some sort of international legal personality to then be part of international negotiations or there would have to be yet another pragmatic shift of how the UK does international negotiations to include Scotland at that point.

If Scotland are going to go down the European Economic Area route, whether in the UK or outside the UK, in both cases from my point of view you have a very major democratic deficit because you are rule taker rather than a rule maker. So, although some people see Scottish independence in the EEA as preferable to being in the EU, because you don't have to be in the euro and perhaps you won't have to be part of the EU's austerity policies, I don't think it is a democratic choice in that sense and it is rather a standing on the sidelines choice. We have to remember that the reason Norway went down that route was because it voted against the EU. It didn't vote to stay in the EU.

Just one more point. There is obviously a very important pragmatic question there if Scotland were going independent, or even if it was in the EEA while also in the UK, of the impact on Scottish/rest of UK relations, including economic relations. There are some arguments that perhaps those could be easier if Scotland were in the EEA not the EU. Again, I don't particularly agree with that but it does depend partly on the nature of the future UK-EU 27 trade deal.

Q354 **Chair:** The challenges you were discussing there between the EEA and EFTA, which you touched upon, obviously facing Scotland would be the very same challenges of course the UK is currently facing in its own negotiations going forward, are they not?



Dr Hughes: If the UK—and Theresa May admitted this recently, didn't she?—wants access to the single market in future, once it has left the EU it has to meet EU rules and regulations for its exports to that market but at that point it no longer has to meet those regulations in its domestic market. Whereas, of course, if you are full member of the single market—like Norway—you have to apply those regulations in your domestic market too. That is the main difference.

If you were arguing, as many of us have been, about a so-called soft versus hard Brexit for the UK—is it better for the UK to stay in the single market or the EEA rather than this third country trade deal?—I think in many ways, yes, it would be better to stay in the EEA. But you are then a complete rule taker, whereas in a third country deal you are partly a rule taker and partly not.

Q355 **Chris Law:** Just on that note, Kirsty, it will be the last question from myself, what do you then predict the UK Government is looking to get at the end of the day? Does it want to be a part rule taker and rule maker by being outside altogether, or do you think it would be quite happy to go down an EEA route?

Dr Hughes: I don't think at the moment it is going down an EEA route because of the way Theresa May has talked about her red lines on the migration policy in the European Court of Justice. If you went down the route of a Canada-style trade deal that would be extremely damaging to goods and services trade. The National Institute of Economic and Social Research predicted that could lead to as much as a 35% fall in goods trade and a 61% fall in services trade, so that would obviously be huge. This deep and special bespoke agreement would lie somewhere between a Canada-style deal and a Swiss deal. It may be that either we are going to end up with a Canada-style deal or we are going to end up with a deal that looks a little bit like EFTA, but it will have its own UK-EU court rather than an EFTA court. It won't have complete free movement of people and, therefore, it won't have the good access that the EFTA EEA countries have. It will be a very cumbersome new set of processes that will give us better access than Canada, worse access than Switzerland and Norway, and would certainly lead to some reduction in trade compared to what it would have been otherwise.

Q356 **Chris Law:** Last question to yourself, Alan. You have obviously stated before, and stated today, if Scotland were to continue to adhere to EU law while the UK did not, "This could raise a question of barriers to trade between Scotland and the rest of the UK and threaten the integrity of the existing UK single market." Therefore, are trade barriers between Scotland and the UK inevitable if Scotland has a differentiated relationship with the EU?

Professor Page: Yes, I think the Scottish Government's "Scotland's Place in Europe" paper glossed over that. It said we could have a relationship with the European Union. We could be part of the—I am talking about Scotland now—single market and retain a relationship in



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trade terms with the rest of the United Kingdom. I am not sure I understand how that would exactly work if there were differences in rules between those that applied in Scotland, by dint of being within the single market, and those that applied in the rest of the UK, by reason of the fact the rest of the UK was outside the single market. So I think there is an issue there that would need to be addressed.

Dr Hughes: Just briefly to add on that. I think there are two parts to this. First, the UK Government have been telling us that they are aiming for a deal where there is frictionless trade and automatic customs arrangements and so on. The more frictionless they are from the UK to the EU 27 then likewise the more frictionless they can be from Scotland to the rest of the UK.

The example that "Scotland's Place in Europe" explores is of Liechtenstein and Switzerland and the concept of the parallel marketability because Liechtenstein is in the single market and Switzerland isn't. How they cope with goods flowing freely from the single market and from Switzerland is a model that that paper suggests. Inevitably, that will add a certain amount of bureaucracy and complexity. There are also other issues if Scotland was in EFTA and the EEA, in terms of signing up to EFTA's trade deals and how that might impact on any future Scottish/rest of UK trade arrangement if it was inside the UK, certainly on any potential to be like Liechtenstein and Switzerland who will be in a joint Customs Union.

There are lots of ways to look into this and, of course, the UK is looking at that to try to make its move with the EU 27. The Scottish Government have been looking at that to try to make it potentially feasible to stay in the single market. There are ways to make it easier but to make it barrier free trade—I don't think there will be a big problem unless it is a WTO trade—and tariffs in trade between the UK and the EU and, therefore, between Scotland and the rest of UK, but non-tariff barriers it is very hard to see that there would be none.

Q357 **Margaret Ferrier:** I am going to come to what you spoke about regarding indications that the European Parliament seems to be sympathetic to Scotland's desire to retain a close relationship with them, so do you think that Scotland's position around the Brexit outcome could influence negotiations between the UK and EU in a positive way, or do you see it as separate negotiations going on even though Scotland is still part of the UK?

Dr Hughes: There certainly won't be separate negotiations because the EU 27 will be—and have been—very clear on following appropriate recognition of state to state relations and not going over heads of Government and heads of state. There has been informal contact but there have not been negotiations that would be unusual or a breach of the EU set up or of protocol.

It is very interesting to see that the European Parliament's resolution very briefly mentioned Scotland, whereas the EU draft guidelines of



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course mentioned Cyprus, Gibraltar and Northern Ireland but didn't mention Scotland. That is the formal position.

It is a very interesting question whether the Scottish Government positions might influence the EU 27's attitude to the UK during negotiations. I struggle a bit to see where that might come through because although, for instance, there might be sympathy with the Scottish wish that the UK could stay in the single market, if that is not what the Government are negotiating there is just no follow through. When it comes to Scotland perhaps having a particular position on fisheries, the EU 27 may prefer whatever deal the UK Government are offering. The EU has always been extremely hard-headed in its trade negotiations, so it is going to be very hard-headed in this negotiation. It is sympathetic to the position Scotland finds itself in and, if Scotland were to vote for independence, it would be sympathetic to Scotland wanting to rejoin the EU. But I think, in terms of Scotland influencing the negotiations, you would have to think of particular examples. I am not saying it wouldn't but, just thinking rapidly, I don't really see how that might work at the moment.

If it had been agreed with the UK Government that the UK Government would put forward the idea of Scotland having a differentiated relationship, that would be different but at the moment I don't—

Chair: We have another vote. I think we are all involved in this one. Can we just say to you we are very grateful for what will be the last formal session of this session of Parliament? We are off to Brussels at the beginning of the week to speak to some of the figures there to progress this inquiry, but if there is anything that you feel that we have missed, anything that you feel that you want to add, please get in touch with this Committee.