

Scottish Affairs Committee

Oral evidence: European Union (Withdrawal) Bill: implications for devolution, HC 375

Wednesday 11 October 2017

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Members present: Pete Wishart (Chair); Deidre Brock; David Duguid; Hugh Gaffney; Christine Jardine; Gerard Killen; John Lamont; Paul Masterton; Danielle Rowley; Tommy Sheppard; Ross Thomson.

Questions 1 - 85

Witnesses

I: Professor Michael Keating, Director, Centre on Constitutional Change and Professor of Politics at the University of Aberdeen, Professor Jim Gallagher, Visiting Professor, University of Glasgow, Charles Livingstone, Constitutional Law Sub Committee, Law Society of Scotland, and Professor Nicola McEwen, Associate Director, Centre on Constitutional Change, Professor of Politics at the University of Edinburgh and Research Leader of the Economic and Social Research Council's UK in a Changing Europe programme.

II: Michael Russell MSP, Minister for UK Negotiations on Scotland's Place in Europe, and David Rogers, Director for Strategy and Constitution, Scottish Government.

Examination of witnesses

Witnesses: Professor Michael Keating, Professor Jim Gallagher, Charles Livingstone and Professor Nicola McEwen.

Q1 Chair: If witnesses assume their seats. Thank you ever so much. It is the first evidence session of the new Scottish Affairs Committee. I think a couple of you have been here before but it looks remarkably different from the last session of Parliament, I think you will agree. You do not look any different at all, John, but there you go. Anyway, welcome, and thank you very much for coming along to the Committee this morning to help us better understand some of the issues around the Repeal Bill and the implications and issues for Scotland and what you feel this Committee should be looking at and considering.

For the record, could we go from left to right? I am not going to ask you to make an opening statement, unless you are dying to say something to us, because we only have an hour and you can see we have a packed Committee and lots of questions. We will start with you, Mr Livingstone.

Charles Livingstone: I am Charles Livingstone. I am a partner at Brodies LLP, law firm, but today I am here as a representative of the Law Society's Constitutional Sub-Committee.

Professor McEwen: I am Nicola McEwen. I am Professor of Territorial Politics at the University of Edinburgh, and Associate Director of the Centre on Constitutional Change.

Q2 Chair: Just before you start, I am having difficulty in hearing some of the people. I know Tommy Sheppard will be having difficulty. Is there anything we can do with the microphones? Just maybe speak up and project a little bit more. Jim.

Professor Gallagher: I am happy to project. We will have great success. I am Jim Gallagher. I am a member of Nuffield College in Oxford.

Professor Keating: I am Michael Keating. I am Professor of Politics at the University of Aberdeen, and I am Director of the Centre on Constitutional Change.

Q3 Chair: I am grateful, and I could also sense that none of you were bursting to say anything by way of an initial statement, which helps us considerably with the proceedings. Today we are here to look at the Repeal Bill and, obviously, some of the issues and implications that we have to consider for Scotland.

As an opening, general question, could you tell us what the Bill does right, the main things it does right, and maybe even look at some of the things it does not get quite right? We will start with you, Professor Gallagher.



Professor Gallagher: Thank you. I had not actually prepared a list of things it does right, but the big thing that it does right is create a capacity or a class of laws called retained EU law. There will have to be a transition, when Brexit happens, assuming it does, from the period during which EU law applies automatically in the UK to the period in which it is replaced by domestic law and, therefore, preserving EU retained law is the sensible thing to do. I am fine with that part of the Bill.

My issues with the Bill are the extent to which it properly reflects the principles of the devolution settlement and how it deals with EU retained law as it affects devolved matters, and the extent to which, in particular, the plan—to reserve everything until it is devolved—is correct. I think it is possible to exaggerate how much is wrong with that because there is a lot of practical good sense in it, particularly at the point where, as of today, we have no real idea what the transition period will be, what it will contain, and how long it will last, and the extent to which, during that transition or implementation period, EU law will still continue to apply, as I rather suspect it will. Although I think if you ask a Government Minister today they will say that it won't, but I rather suspect that it will. If it does, it is certainly premature to be dividing up the spoils and handing the powers to different UK institutions.

Despite that, where the Bill goes wrong is in failing to respect the assumption that, unless there is a good reason to reserve something, it should be devolved. That does not mean that nothing can be reserved or that anything should not operate on a UK basis, and there is a very strong case that many things should operate on a UK basis, but the default assumption, other things being equal, is that things should eventually fall into the devolved bucket.

Q4 **Chair:** Thank you for that, Jim. We will get into some of the nitty-gritty about the impact on the devolution settlement but just the general principles of the Bill, if you could help us with that, Professor McEwen.

Professor McEwen: I would concur with what Jim has said in relation to the devolution aspects of the Bill, and I know we will get into that. I support the principle of ensuring continuity, which is the intention of establishing the category of retained EU law. However—and I say this as a political scientist rather than as a lawyer—I think there is an awful lot of ambiguity around what retained EU law is and will be in the future, and its status vis-à-vis other categories of legislation. That broader issue is quite important to understand the implications of the devolved sections of the legislation, so I do not think it is possible to look at the devolution aspects in isolation from looking at the whole and some of the bigger—perhaps not necessarily problems—ambiguities and lack of clarity on those broader issues around retained EU legislation.

Q5 **Chair:** Thank you. The UK Government has stated that this Bill will ensure that the UK exits the EU with maximum certainty, continuity and control. Is that right, Professor Keating? Does it achieve that fine objective?



Professor Keating: No, I do not think it does. There is a general agreement that some kind of frameworks will be needed to replace EU frameworks in various policy fields. This can be done in various ways: you can preserve the powers, you can have UK framework laws, you can control the money, and you can have intergovernmental arrangements to co-ordinate this horizontally. I think we will end up with all four of those things.

The EU (Withdrawal) Bill only does one of these things. It reserves all powers in a blanket way. That raises problems of principle about the Sewel Convention and about the assumption that powers should be devolved if they are not expressly reserved. Technically, it is also very difficult too, because I am unhappy with this concept of retained EU law, which effectively is defining the competencies of the devolved institutions by reference to whatever the EU happens to have legislated on, rather than in relation to broad competencies.

Elsewhere in their commentary and other things that the UK Government have said is that the aim of all this is to reserve the UK single market. That is an important concept. It has never been defined, but we sort of understand what it means: that there should be no barriers to the movement of people, goods and services within the UK, just as there are none within the European Union. I do not think the retained law is going to do that because there is a dissonance between the two, what happens to be EU law at the moment and the broad needs of the single market.

I also find the analogy of a UK single market, like the European single market, extremely misleading, because the UK single market does not refer to competencies. It is a broad set of principles that cover absolutely everything. It would be more useful to start at that point and ask, "What principles do we need to reserve this UK single market?" and then, "What are the implications for devolution, and what are the instruments?"

I should also say that the UK single market has elaborate mechanisms to enforce it, with the role for the Commission, the Council of Ministers, the courts, the European Court of Justice, and is bound by the subsidiarity principle. None of that is in the EU (Withdrawal) Bill. This maybe addresses one little bit of one problem but it does not face up to the big problem: how do you ensure retaining a free UK market after withdrawal from the EU?

Q6 **Chair:** Thank you. I know the Law Society has a number of concerns, particularly around some of the issues with clause 11, but could you help us with this point? The Bill changes Scotland's devolution settlement so, instead of dealing with past legislation that contradicts EU law, the Scottish Parliament will not be able to pass legislation that contradicts a new body of EU retained law. Is that a sustainable position when it comes to this Bill?

Charles Livingstone: The Society has certainly commented on that in our briefing papers. The principal issue that we took with the change is



not necessarily the definition of retained EU law, although there are uncertainties about how Acts of the Scottish Parliament might fit into that body because of the way it describes legislation having been passed or made, which does not quite marry up with the procedures that are followed in the Scottish Parliament. It seems to take a UK Parliament-focused approach to that concept.

Principally, the issue that we had with the transition from one body to another and how the two marry up—the principal query we had, if not necessarily a concern—is that at the moment the Scotland Act restricts the Scottish Parliament from legislating incompatibly with EU law, whereas the EU (Withdrawal) Bill will say that the Scottish Parliament cannot legislate to modify retained EU law. It may be that that is just reflecting a different view of the status that each body of law has, in the sense that the Scottish Parliament could never really purport to modify EU law in any event. Certainly, when you create differences in language like that, you do start—at least in the minds of lawyers—hares running about: why is that different? What does this mean now that it did not mean before? Certainly, in terms of the transition from the status quo to what is proposed in the Bill, there are question marks that we have called for clarity on.

Q7 Chair: Thank you. I just note something that you said, Professor Gallagher, where you said that it might be prudent for this restriction on the Scottish Parliament's competence, as it allows this traditional view for the EU to apply. Would it be possible to achieve this without restricting the competence of the Scottish Parliament?

Professor Gallagher: There might be other ways of doing that, although I haven't invented any of them. I agree with what Michael said that we are going to end up with a mixed economy here. Different instruments and different tactics will be used to achieve the policy aims, but I do think that there is a good argument in policy terms for a period during which we pause and make sure that we don't inadvertently give away powers that we don't actually have. That is to say during the transition period. That is why I am content enough with clause 11 of the Bill, provided it does not go on forever and, at the moment, clause 11 appears to be permanent. I would rather see clause 11 with a sunset to it. Precisely when that sunset will be is an arguable point.

Chair: I might come to that point later on in these proceedings, but thank you for that.

Q8 John Lamont: Good afternoon, panel. As we have heard and as we know, the Bill provides for the powers that are currently exercised by Brussels to be repatriated, initially to Westminster. We have heard your comments this afternoon about your views on the Government rationale for doing that. I am not clear, though, what alternatives you think there were to provide the legal clarity that the country needs for day one after Brexit.



Professor Keating: There is the transitional period or the implementation period or whatever we call it, and there I agree with Jim. There may be a need for some kind of certainty for a short period but, in the meantime, we should be thinking about what the basic principles are and start at that end rather than starting with existing legislation.

The time period and the implications on this will depend on a lot of policy choices by the UK Government. They may take a few years. For example, international trade agreements may have implications for this. Whatever agricultural policy is going to be pursued at UK level, if there is going to be one, will have implications for how much you can devolve. If it looks like the present CAP, then there is quite a lot of room for devolution in recent years. If it is more constricting, it might be more constricting.

This is very open-ended at the moment, so we could end up in a position where we have to wait until the UK is going to make a policy on something before we know what the constitutional position is. That is just not a good way of running a constitution. There should be clarity about the principles, and if it is inconvenient to have to involve the devolved Administrations, well, too bad. That is the kind of political system we work in at the moment.

I would put the emphasis, along with the Welsh Government's proposals, on the need for agreement among the nations of the United Kingdom on these policy areas, rather than on a hierarchical position, top-down.

Professor McEwen: Part of the problem with the Bill as currently drafted is that it is fusing two different things. There is the issue of continuity on day one to provide that certainty to avoid the cliff edge and all of these laudable aims, but the clause 11 procedures, as far as I can understand them, do that but also combine changes that might be for the future. Where the Prime Minister has talked about the need to avoid new barriers post-Brexit, then that is all subsumed within the addition of the inability of the devolved legislatures to modify retained EU law.

It goes back to my original point about: how long does retained EU law remain on statute, what is the longevity here and what would be the relationship into the future? It would be helpful if you could tease out or find a way to separate out that issue of continuity, clarity and certainty at the outset from how to build a future relationship.

Q9 **John Lamont:** How do we do that? That is my question to you.

Professor McEwen: A number of different ways, but the key for me would be the principle of consent and how you build in a principle of consent. There are procedures in place already and well-practised within legislative consent, as you know. I absolutely appreciate that the task and the scale of what is involved here may mean that the existing procedures are not in themselves sufficient but, alongside other things, other ways to do frameworks, whether it is through concordat and agreement or through legislation, within the devolved legislatures or in



this place then those are things to look at. Teasing out those two separate issues would be helpful.

Professor Gallagher: If I were going to Dublin, which I am not, I would not start from here. The problem here is that we are legislating without a full policy picture. In other words, we don't actually know what our destination is. As Michael says, we cannot describe the post-Brexit UK on major issues that are relevant to the whole UK, the nature of our relationship with Europe long-term, the extent to which we are or are not a global country with international trading, or whether we remain a country rather more closely linked to the European market. Partly as a result of that, we do not know the extent to which it will make sense for all of us to decentralise some things and not others.

If you were doing this in a more ordered way, you would work out the policy and then you would start drafting the legislation, but the timetable is such that people in Whitehall had to draft the legislation just now. As I said at the beginning, I am not unhappy with the concept of retained EU law and I certainly do not have a better one to offer, and no one, so far as I can see, has proposed one, but I do think that there are very major questions here about the distribution of powers that will have to be worked out.

I agree with Nicola broadly that they will have to be worked out in discussion and negotiation. That will require both the UK Government and the devolved Administrations not to be obdurate on the one hand and grandstanding on the other, but to try to find a workable solution. It is important and significant that the UK Government have said, in terms, that the relevant parts of this legislation will require consent under the civil convention.

Chair: Thank you. We are going to come to that again in the course of these proceedings, but I know Ross Thompson wants to come in on something he has heard.

Q10 **Ross Thomson:** It is just a supplementary to that question following on from the evidence and Professor Keating's point about: when you reference CAP, do we look at these powers as policy starts to come forward, and which lies at which level? Then your own point, Professor Gallagher, about the two Governments working together. As you know, in the past changes to the devolution settlement have been informed by commissions, like the Smith Commission, which has led to more powers coming to the Scottish Parliament. These powers have been looked at in detail and what should lie at which level. Do you think there should be a similar sort of process before any other powers currently held by Brussels are devolved to the different Administrations?

Professor Gallagher: I don't think that this should be a process which is defined to be a barrier or you cannot devolve unless you have gone through this. If there were time some expert work on: what the options are, what the modalities would be and how you would manage UK



frameworks that are needed, and is reservation right for some things? Is complete devolution right for other areas? As Michael says, framework legislation is partial reservation, partial devolution. Is it sensible to proceed on the basis that most of these things can be done by agreement, as I rather suspect that they can?

Finally, people tend to forget that the existing devolution settlements already empower the UK Government, when it is necessary to ensure that international obligations are met, to direct the devolved Administrations. There is quite a lot of back-up power in the UK Government's armoury already. When we talk about the extent to which this is a power-grab at the centre, we forget that much power already does reside at the centre, and that is part of the deal, actually, today.

Q11 Chair: Just before we move on from this, I note your remarks, Professor Keating, where you see this as a rolling back of devolution that shifts the balance of power in favour of Westminster. What exactly were you thinking of specifically when you made these remarks, and could you give us an example of how this is actually the case?

Professor Keating: Yes. It is a matter of principle that power is being taken back. You could say that power is already constrained by the EU, but that is not relevant to the internal constitution of the United Kingdom. These powers belong to the devolved legislatures and are being taken back, and then the UK will decide—in consultation with the devolved—about which bits to give back again. Maybe they will give them all back and maybe they won't, but it is very likely that they will all come back. That is about procedure and about process. If we are going to have something like a federal system, some kind of federal principle, that is just not something that would happen in any federal system. You simply cannot do that, so it is a matter of principle.

There is also a practical matter as to what scope the devolved legislatures and Governments will have to make policy afterwards. One problem here is, if they are getting powers handed back piecemeal, it makes it very difficult to make coherent policy. One of the good things about the devolution settlement for Scotland and then finally for Wales is the reserved powers model, so if you want to do something you can find the powers to do it unless they are specifically prohibited. Whereas, I can anticipate Governments now wanting to do something and scrambling around the statute book to find the bits and pieces of powers that will allow them to do that. That is going to cause all kinds of problems and there will be all kinds of things that will maybe go to the courts, but will certainly cause intergovernmental problems.

I think we should start with this principle that we assume the existing balance of powers—it may not be perfect but that is the status quo, and that is the acquired right of the various levels—rather than assuming that the UK will take all the powers and then start giving them back again. That is a matter of principle but I also think it is a matter of practice and coherent policymaking at the devolved level.



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Agriculture is a good example of this. I could go on at length about that. It would make for a much more coherent agricultural strategy in the different parts of the UK if they did have this generous assumption that they are allowed to do things unless there is some specific reason for them not to.

Chair: Thank you. I know we have a whole bundle of questions to get through, and I know John Lamont wants to come in there with a quick supplementary.

Q12 John Lamont: Professor, you talk about taking powers back from the Scottish Parliament. Can you detail to us today which powers are exercised today by the Scottish Government through the Scottish Parliament that are going to be taken back as a result of this process?

Professor Keating: Powers in agriculture, which are currently devolved, and in which, under the Common Agricultural Policy, there is a degree of leeway for the devolved level, the environment, areas of justice and home affairs. These are the principal ones that are both devolved and European—

Q13 John Lamont: Can you give us some more detail? You are talking in very general terms here about very wide policy areas without providing the very specific details that we require.

Professor Keating: In agricultural policy there is agricultural support, which is devolved but within European frameworks and with a degree of flexibility, agricultural regulations and agricultural standards. These are fully devolved but constrained by European frameworks. They will now be taken back and with the effects that we do not really know what the outcome of that is going to be.

Professor Gallagher: I do not quite agree with Michael, although I agree with the general principle that the default assumption should be that things that currently are not reserved should go to the Scottish Parliament, although I can see there may be exceptions to that. There are slight cross-purposes, of course, in that last conversation, that in practical terms the Scottish Parliament and Government will exercise pretty well the same powers they exercise today, but the nature of the constraint on them will be different. We will be constrained by this concept of retained EU law. Whether that constraint is exactly the same is a question for the lawyers but one can see what the intention is, so I don't quite agree.

For example, on agriculture, the Scottish Government will have the same administrative powers and the same administrative discretion as they have today but, until something else is done, the Scottish Parliament won't be able to legislate on agriculture in a way that it cannot legislate today. Of course, it can make secondary legislation on agriculture today, for example, on modules in agricultural support, which it already does.

Chair: Great. We will have to move on here. Thank you for that.



- Q14 **Deidre Brock:** Just further to the piecemeal handing back of powers that you referenced, Professor Keating, the UK Government said that the reservation of all powers, as repatriated from Brussels, is transitional and that they hope to rapidly identify areas that could be released from that transitional arrangement. Could I ask which areas you think might be identified as suitable for that in the first instance and when you think that should be occurring? Straight away? What are your thoughts on that?

Professor Keating: I am yet to be convinced that this idea of reserving everything initially, other than for a transitional period of the negotiations, is the right way to go at all. I would put it the other way around, asking: what powers would need to be retained and for what purposes? Before we can answer that question we need to know what international constraints the UK is going to subject itself to by way of free trade agreements, what kind of agricultural policy we are going to have. As Jim says, many of these international obligations will be binding anyway because they are international, global, they are WTO. They are not just the European Union. As Jim says, there is a mechanism already to deal with that.

I do not accept the premise here, "Let's reserve everything, call it retained EU law and then devolve other things afterwards". I think that is the wrong place to start. As I said before, even if you do that, there will be all kinds of other things that might escape that, where you might have common frameworks that don't fall into the category of retained EU law.

- Q15 **Deidre Brock:** I am not sure I heard from a couple of folk about the idea of a commission along the lines of a Smith or a Calman Commission. Professor McEwen, could you give us your thoughts on that just to establish which areas—

Professor McEwen: The Smith Commission and the Calman Commission are obviously quite different beasts. The Smith Commission was done very quickly, but it was much more of a party-political process rather than an expert commission in the way that Calman was. I am not sure that timing lends itself very easily to that, and I am inherently a bit concerned about the elite nature of those processes. This is all very complex and there are many people with expertise to bring to these sorts of processes and scrutiny processes in terms of the legislation. There may well be a role for a body like that to make some recommendations but, personally, I would rather it was in the hands of the legislature.

- Q16 **Deidre Brock:** Mr Livingstone, first on that point as well but also just about the Law Society of Scotland's suggestion that there be a reverse sunset clause, just causing the clause restricting the Scottish Parliament's competence to cease to have effect two years after the UK leaves the EU. Can you elaborate a little more on that, and perhaps other members?

Charles Livingstone: The society has proposed or suggested an amendment for debate that would impose a two-year sunset clause on the restriction on the Scottish Parliament's powers. In fact, that says a



number of options, without endorsing any of them, as to how things might be handled. If the sunset clause was to be introduced, that would not necessarily endorse any particular outcome, but that would reflect the intended transitional nature. The society's position on this is similar to what Professor Gallagher outlined, and the concept of retained EU law is probably necessary, at least for a period, while other things are worked out.

A sunset clause on the restriction on legislative competence would essentially preserve the position for a period of two years—as our amendment has it, or whatever other period might be thought appropriate—in which the discussions over where powers should lie and who should do what can take place. Those are policy and political decisions, rather than legal decisions, that the law will reflect whatever outcome was arrived at. In a sense, that sort of restriction would preserve the position in that the UK Government would retain the ability to legislate for a particular outcome, and the Scottish Parliament would retain the ability to grant or withhold consent to that as it sees fit.

Just tying that together with the question about commissions, the society did in an earlier briefing—not the second reading briefing—note the possibility of having a commission. If that were to be the case, not necessarily having an indefinite time period but a longer time period to have those discussions would not be a bad thing. It would certainly allow discussions to take place with more reflection and more input from those who are likely to be affected by the final decision that is reached.

Q17 Tommy Sheppard: Good afternoon. Can I segue from that into asking you a few questions about this notion of common arrangements post-Brexit? Looking at that body of law that is to be repatriated, which does not relate to reserved matters in the 1998 Act—in other words, areas where you might plausibly argue that it is consistent with the 1998 Act for it to be devolved straight to the Scottish Parliament—the UK Government are saying that they cannot do it straight away because these powers, when they are devolved after a transitional period, need to be done within the framework of common arrangements throughout the UK. From a constitutional point of view, do you find that argument convincing at all as a reason for not pursuing a direct transfer of powers now? If so, in what proportion of the 111 areas do you think that it would be convincing?

Professor Gallagher: I will go first if you like. There is a good case for saying that many of the things that are currently uniform across the UK, because of EU law, should continue to be uniform across the UK for similar reasons. To take Michael's example of the EU single market and contrast it with what I would call the UK domestic market, the UK domestic market is something that grew up over some centuries, including particular legislation from most of our Scots businesses to make sure they could flog their stuff in England and that they were not subject to disadvantages because there was a difference between Scots and



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English law. So I think the idea that there is a common UK domestic market is in everyone's economic interests.

- Q18 **Tommy Sheppard:** Sorry to interrupt but can I just ask you: would a more rational way of approaching this not be to amend the 1998 Act to add to the list of reserved matters?

Professor Gallagher: It might well be, and if you would like to propose that, I am sure the Government would be happy to consider your reservations.

- Q19 **Tommy Sheppard:** It would make it more honest, wouldn't it?

Professor Keating: I agree that that would be a better way to start, to unpack this notion of what the UK single market is, because nobody has ever defined it, exactly what is—

- Q20 **Chair:** Where did it come from? There is a Scottish single market. There could be a Perthshire single market. Where does this emerge from?

Professor Keating: It goes back to the Treaty of Union, the concept about commerce and free commerce and so on, but the term "single market" was borrowed from the EU and I think that is a very misleading analogy. It is a transversal principle. It covers everything. It pops up, for example, minimum pricing of alcohol. That was a public health issue as far as the Scottish Government was concerned, so that is nothing to do with specific competencies. Anything can come up in that.

We should really be having a debate about what the implications of that are, what does need to be common, and how that would be policed, because the EU has a specific way of dealing with single market issues that has no analogy whatever in our devolution settlements. We are simply not equipped to. Before we resolve this issue after the transition period, we should be having that discussion and then think about what mechanisms might be put in place. We know that intergovernmental mechanisms under the devolution settlement have been a bit ad hoc, quite unsatisfactory. They are going to become much more important now, and it is important to get that right.

Professor Gallagher: If you look at schedule 5 of the Scotland Act, you will see that it begins with the reservations of matters that are about the UK single market. They are reservations in relation to macroeconomic policy, reservations in relation to monetary policy, reservations on competition law, and a whole series of things at the very beginning of schedule 5. The question is: to what extent are there other things that are probably more at what you might call the retail end of the market, which could be either reserved or agreed or produced on a common UK framework on some other basis?

Let me give you one example. An obvious example would be product standards. If you today buy a toy in a shop for a child, you will see that it has a little "E" on it, which says that it meets EU standards. What will



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replace that once the UK is no longer—if it is no longer—in the EU single market?

I might just pick you up, Chairman. A single market is not a place. Perthshire is not a single market. A single market is a set of rules that facilitate trade. When we talk about leaving the EU single market—which I think is a crazy idea but let us assume that we are talking about it—what we are leaving is the body of rules that facilitate trade and which are, therefore, held to be economically advantageous. As Michael said, the UK domestic market grew up over a long time and did not need a set of formal rules to do that, but we may well have to have now that we have a devolution settlement that is not constrained by the European Union. Things like food labelling—to take that as an example—and product standards, all the things that make it easy for people in one part of the United Kingdom to trade with another part of the United Kingdom.

Chair: I do not know how I am going to break the crushing news to my Perthshire traders if there is no Perthshire single market.

Professor Gallagher: I am afraid there is bad news.

Chair: I am sure they might get over it.

Q21 **Tommy Sheppard:** I did ask if you could try to quantify how much of this body of legislation is being repatriated. How much of it do you think should be delayed over and have a transitional period because there is some requirement for a statutory UK framework?

Professor Gallagher: I don't think that work has been done.

Q22 **Tommy Sheppard:** The alternative to having a statutory framework in place is just the common-sense process of Governments talking to each other and doing things jointly anyway.

Professor Gallagher: Which worked well in the EU.

Tommy Sheppard: The British and Scottish Governments work together every day, all the time, on a whole range of stuff. In which areas do you think there is a specific requirement for a statutory framework that has to be defined and legislated for before the transfer can take place?

Professor Gallagher: I think that work hasn't been done.

Q23 **Tommy Sheppard:** Is it just a few areas or do you think this is widespread?

Professor Gallagher: I think there are a relatively small number of areas. It probably relates to areas that are connected to the buying and selling of goods and services, and that would certainly be product labelling. It might also be the regulation, say, of those services that are regulated currently by the EU. To take an example, probably banking regulations are reserved already but there may be some other financial services regulation that happens depending on EU rules. That might have to be substituted. Until somebody sits down and does the work, I don't



think it is possible to write the list. I can tell you things that would be needed.

- Q24 **Chair:** This is quite an important point that we could explore a bit further because it seems to me there are two options the UK had, depending on how they approach this, and one is one they have pursued, which is really the UK becoming the EU in terms of its responsibility for all this. That looks to be what has happened. Would you agree that is roughly where we are with this? It is the UK assuming the role of the EU.

Another one, of course, was to just devolve it to the devolved services of Parliament, and then negotiate and construct a means of constructing these common frameworks. We have chosen the former over the latter, but surely the latter would have worked equally as effectively and we would not have the issues and implications that we have for devolution.

You said something particularly on this, Professor Keating, and I would be interested to hear your response to that.

Professor Keating: Yes. A lot of this is a matter of political judgment, how much harmonisation you need. Do you want to avoid a race to the bottom? Do you like regulatory competition or not? Some people are quite happy with this and other people are not. This is debated again in relation to agriculture. What counts as an agricultural subsidy? The UK Government's view on that is different from the Scottish Government's view on that already, and neither of them is entirely consistent with WTO or EU regulations. That becomes a matter of political judgment rather than a strictly technical matter.

Then, if you look at how the EU single market works, there are some common regulations but the very important principle is simply mutual recognition. You can do it that way. What would the role of the courts be? The European Court of Justice is extremely important in policing the single market. We don't have anything like that in this country. None of those questions have really been raised. I don't think we can simply incrementally shift the devolution settlement to achieve this. We have to start at that principle and then work out—as the EU does, based on the notion of subsidiary—what is the minimum amount that we need to harmonise at a UK level, and leave everything else devolved?

- Q25 **Paul Masterton:** I am following up on what Tommy was saying and the Chair as well. You talked about the alternative being the flipside, where everything was just immediately devolved, and if you then agreed or decided there was a UK framework, you would then have to roll back. We now seem to be looking at some form of transitional period—you mentioned that, Professor Keating—you talked about not knowing what the end policy platform is going to be. Would that not make practically having a period whereby all four components of the UK were able, in theory at least, to do their own thing on these areas, to then piece back together a UK framework? How would that practically work?



Professor Gallagher: My view is that the right answer to this question is to have a sunset clause on clause 11 and to use that period to sort out what the frameworks are going to be. If we were doing this policy rationally, we would have thought of that before we started deciding to leave the EU. We might have decided what life outside the EU would be like, but we have not done that and we have committed ourselves. We have sent the Article 50 notice. We are, therefore, facing a harder deadline, so some legislation just now is essential, I am afraid.

Q26 **Paul Masterton:** In that sense, then, the way that the UK Government have done it does make some element of sense, rather than leading to a process of complete devolution where you could, in theory, have Stormont, when it is up and running, or Cardiff, going off in that transitional period, doing something different, which could then make trying to re-piece together a UK thing more difficult.

Professor Gallagher: What I think would be undesirable is if you had early devolution, the UK then entered into some international commitment or other, and it then came along and said to the devolved Administrations, "We are about to tell you to undo what you have done". I don't think that is an argument for saying permanently that what falls within the normal parameters of devolution should not be devolved.

Q27 **Paul Masterton:** Is your suggestion, then, when you are talking about a sunset clause, that rather than necessarily having a hard time deadline, it is actually linked to whatever transitional period is being agreed with the EU so that it is linked to that future piece?

Professor Gallagher: Possibly that. It would have to be flexible because we have no idea how long this process will take. Let's be frank: at the moment, we don't know what the length of the proposed transitional period is, nor do we know what the task that would face us at the end of it would be. Doing what we have done already, which is to set our deadline and then find we don't know where we are going, do not do that again.

Professor McEwen: I would have thought that if a sunset clause was to be on a table, it would make more sense to align it with the sunset clause elsewhere in the Bill and the delegated powers. One note of caution on that is that the provisions within the Bill would enable it to be amended, including a sunset clause presumably, after enactment. If part of the issue—and I think it is part of the issue—is a lack of trust between the Administrations, at least at ministerial level, then that may be a stumbling block around finding a compromise agreement on a sunset provision. I am not against it, in principle, as long as it is meaningful in practice.

Q28 **Paul Masterton:** In terms of the frameworks themselves, I would be interested to know—each of you or whomever wants to say—how you envisage those being agreed or designed and determined and then implemented. I know that the Scottish and Welsh Governments have



been very clear that they do not believe there should be any kind of top-down implementation. I think the Welsh Government has just settled on a Council of Ministers type of arrangement.

Professor McEwen: We have not really heard from the Scottish Government yet on how they would envisage that. The Council of Ministers' suggestion came from the Welsh Government, and I am doubtful as to whether the proposal that was presented by that Government would be agreeable to the Scottish Government, given the constraints on autonomy that it would imply.

There are practices already. One example that always comes to mind when I think of this is around climate change. When the UK Parliament passed climate change legislation, it did so with the consent of the devolved legislatures, including with the concordat and including with the usual legislative consent motions. That is an example of where that may come into practice here. Following on from what Jim was saying earlier, it may be that the areas we are talking about are less expansive than is often assumed within the context of this debate. The first thing that needs to be done is to get a good grasp of that.

Q29 **Paul Masterton:** My last question was whether you would prefer any process around framework determination to be on the face of the Bill or to be dealt with externally by concordats, memorandums and suchlike?

Professor McEwen: I think consent has to be on the face of the Bill. Whether you are meaning machinery of intergovernmental relations or the longer-term processes and procedures, I don't think that belongs on the face of the Bill, but the issue of consent is quite important.

Chair: Thank you. I know Christine Jardine has a supplementary before we move on.

Q30 **Christine Jardine:** Yes. It is very much in line with what Paul Masterson has been saying. Just to be absolutely clear on what Professor Gallagher was saying, are you saying that, although there are problems with the framework, what they have suggested might be more encompassing than they will eventually need, but the danger of not having the framework suggested at the moment is that you then have to impose it at a later date, which is more difficult, so perhaps it is not perfect but it is the lesser of two evils?

Professor Gallagher: As I have said before, the argument for a temporary reservation is a reasonably good one but I don't think the argument for a permanent reservation is a good one.

I wonder if I might take the opportunity to offer you two examples that might help. One of the things that have changed during my working life as a public servant is the deeply detailed and constraining EU rules on public procurement. In the olden days, we used to put an advert in the paper and we took the cheapest price. Now we go through a very



rigorous and thorough procurement process that is designed to ensure, first of all, the equality of suppliers and the best deal for the public.

That would be part of retained EU law, I imagine, and I think probably most people in the UK across all the devolved Administrations would agree that there should be a common procurement framework inside the UK. That makes sense, and that is a good example of where a UK framework would be highly desirable. It might be that that is something that people would agree should be done in reserved legislation. That is quite possible.

Another example, which will be very important going forward, is the extent to which the EU state aid rules should be replaced by some UK equivalent, and we have history in that as well. For those of us with longer memories, the concordat on the use of Industry Act powers, which was entered into in 1999 between all the devolved Administrations that were then operating, which was designed to stop wasteful use of public money, bidding against one another for mobile capital projects. We will need something a bit like that, and that might be done by agreement. So, as Michael says, you can see a selection of things with different modalities might be used.

Professor Keating: We do not know when this UK single market principle is going to come up. It will not just be agriculture and environment and the things that may be reserved. That has been the experience so far, so we need a framework for dealing with that. A lot of concern has been expressed in international trade agreements about the impact on public services. The TTIP, for example, went down on this side of the Atlantic precisely because of that. We need to have some mechanism for dealing with those kinds of things.

The second point is about framework laws, which have a really very bad experience in other countries. They are almost inevitably used as a way of legislating in detail, rather than setting broad frameworks. They have been abolished in Germany for that reason. They are the source of interminable litigation in Italy and in Spain, and in Canada this has caused problems as well. I would not go down that way. It is much better to look at this as essentially a political problem to be negotiated among Governments that have their own powers and need to agree on their common interests.

Q31 **Ross Thomson:** The UK Government have been clear that, in line with the Sewel Convention, it is going to seek the legislative consent of the devolved Administrations in respect of the EU (Withdrawal) Bill, and both the Scottish and Welsh Governments have said, as the Bill currently stands, they cannot recommend consent. What happens if that consent is not forthcoming?

Professor Gallagher: Let's hope we never find out. It has never happened before, so we don't know.



Chair: I think we deserve a better response than that.

Professor McEwen: It is not a veto, of course, as you know, so I think it becomes then a matter of politics, rather than law. First and foremost, it would be a matter for this Parliament to decide whether it wanted to take into account the absence of consent from one or more of the devolved legislatures. Of course, it would be a matter for the UK Government to decide—weighing up the costs and benefits—whether they would take it into account and how they would take it into account. These are political judgments, ultimately, rather than legal ones.

The devolved legislatures have indicated that they would in that event go down the road of continuity legislation. I will leave it to the lawyer to comment in detail on that, but I would imagine that that may deal with the day one issue, but it won't help us with the ongoing relationships and the single market type of issues that would flow from that. That could only be through either imposition, which has its own consequences further down the line, or through consent.

Q32 **Ross Thomson:** Professor McEwen set you up very nicely there.

Charles Livingstone: Yes. The devolved institutions already have the power to make changes to get their legislation in a fit state for exit day, subject to the fact that they could not bring anything in that was inconsistent with EU law while they were still subject to that constraint. Given that that will fall away, or it is assumed that that will fall away, then they would be able to enact their own legislation, so would not have to be reliant on the EU (Withdrawal) Bill.

To that extent, the order-making powers and that sort of thing, the Bill could be amended so that it applied on a UK-wide basis on reserved matters, but applied only to England or England and Wales or whatever combination was required so as not to tread into devolved areas. In terms of the continuity of law, that would be a potential approach. Obviously, that would not deal with the issue of restraints on the legislative competence, either removing the existing EU law constraint or introducing any new constraints of the type that we have discussed today.

Certainly, from a legal perspective, the Supreme Court was pretty clear in Miller that the Sewel Convention is not justiciable. It is a constitutional convention and so is not justiciable, which is not to say it is unimportant, and they were not saying that it does not exist or is not part of the constitution.

Q33 **Chair:** On that point, when we were passing the Scotland Act and we had the section that dealt with the legislative consent motions, were we just imagining the fact that it was enshrined in law, or was that something to give us a bit of encourage to continue with the rest of the Bill?

Charles Livingstone: I think the Supreme Court were clear that they did not consider that that made the convention justiciable, so they



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regarded it as potentially a declaratory provision, which has political purpose. That again is not to say that it is irrelevant, and it is not to say that the underlying convention is unimportant. It is just that there are aspects of the constitution that are enshrined in conventions that are essentially outside the remit of the courts.

- Q34 **Chair:** Everything that we have in terms of Scotland Acts, and the three that we have had since devolution, are just not really worth the vellum they are printed on, basically, because they can just be done away with at the whim of the UK Government? Is that where we are with this?

Charles Livingstone: The UK Parliament retains the ability to legislate on any matter as a constitutional issue.

- Q35 **Ross Thomson:** Just to follow up, Professor Gallagher, you are on the record as saying that to refuse consent in the Scottish Parliament would be an empty gesture. Could you expand on that?

Professor Gallagher: Sure. It is essentially the same point as Nicola was making. The refusal of consent will not invalidate the legislation that was passed here, even in the absence of consent. That would be a highly undesirable outcome, but it does take both sides to tango in this. We are in an unprecedented situation that when the Sewel Convention was considered, this distinctly abnormal situation was clearly not in anybody's mind. I agree with Michael Keating and with Nicola that the correct approach on this side is to seek agreement, and it seems to me that all Governments involved are under an obligation to seek to do that. As I said earlier, what you don't want is obduracy on one side—that will give you nothing—and grandstanding on the other. There is a danger of that, I am afraid, because of the politics of this. It would be I think unreasonable of any of the devolved Administrations to insist that there can be no conceivable reservation of matters that are currently otherwise devolved as a result of this process. Equally, it would be wrong of the UK Government to say, "You have to work for every piece of devolution that you get".

The example that is in my mind here is in the second of those Scotland Acts, Chairman, the 2012 Act, where it went to the wire on a number of issues on consent, including the question of whether Antarctica should be reserved or devolved.

- Q36 **Chair:** Yes, I remember that well.

Professor Gallagher: Yes. If we start having that kind of conversation again, in the difficult circumstances that we are currently face, then this process—

- Q37 **Chair:** I think we established that Antarctica was definitely reserved.

Professor Gallagher: I think that was eventually agreed, yes, but at the very last moment, for good reasons. It should never have been raised as an issue at all.



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- Q38 **Christine Jardine:** The Bill grants both UK and Scottish Ministers delegated powers to correct retained EU law on devolved areas. Is it appropriate that Ministers from both Governments have the power to amend legislation in devolved areas of responsibility?

Professor McEwen: It is inevitable that you have some of those powers in there, given the timeframe and the scale of the task before us. Clearly, within the Bill, powers delegated to devolved Government Ministers are considerably weaker than the powers given to UK Government Ministers. I note the Scottish and Welsh Government amendments that seek to redress that, as a matter of principle, on the basis that you should not have that asymmetry. There are two bigger issues there. One is the issue of parliamentary scrutiny for the devolved legislatures and the UK Parliament, so that is one issue, and making it more symmetrical would simply spread that problem to different legislatures.

The other issue is whether the powers themselves are too broad, and it goes back to some of the bigger issues that have been raised in the context of this debate around the powers to modify and correct the very broad understandings of correcting deficiencies within retained EU law. Personally, I am uncomfortable with the breadth of it, whoever is exercising the power, whether it is devolved Government Ministers or UK Government Ministers, so if you consider that in relation to the broader narrowing of the scope of delegated power in the first instance.

Chair: We are at the end of our time.

- Q39 **Christine Jardine:** Lastly, the Secretary of State for Exiting the European Union has said that the UK Government will always consult on corrections, but there is no requirement to do so. Do you think that there should be a requirement?

Professor McEwen: Yes.

Christine Jardine: Short and to the point. Thanks.

- Q40 **Chair:** Thank you very much. We are at the end of our time. One last question that we haven't been able to get to is on the amendments. I noted your remarks, Professor McEwen. In your view, do you think they significantly improve the Bill and, if they were adopted, do you think this would be a way forward for making progress on this? I will come to you first, Professor McEwen, because you did mention that.

Professor McEwen: They address some issues. They are amendments, in principle, and reflect the principled opposition to the constraints on devolved power that we have been discussing, but they would only take you so far. They do not do much to resolve some of the bigger issues that we have been discussing around how you go about establishing common frameworks and how you overcome some of the challenges that are part and parcel of this process.

One final point I would make is that, wherever we go here, devolution is becoming more complex and more complicated. There are all sorts of



potential unintended consequences further down the line. If we can simplify the process at this stage within the Bill, that would be best.

- Q41 **Chair:** Thank you. Just to wind up, I know that Professor Keating has possibly been the most critical of the process and this Bill. First of all, what do you make of the amendments and where do you see this going, and where are going to end up with this process? I saw Professor Gallagher pulling a face at that particular question. Is this going to be resolved in any satisfactory shape, or are we looking at real, profound difficulties here?

Professor Keating: The amendments are consistent with my own criticisms of the Bill. Were they passed they would force the UK Government to rethink and start somewhere else in the process. To that degree, I would go along with those amendments.

Where are we going? I don't know. As Jim has reminded us several times, we are under a very, very strict timetable here. This all has to be done extremely quickly, but I don't think that that is any excuse for setting constitutional precedents that could be problematic in the future.

Chair: I am grateful to all of you for being our first guests in the new session of Parliament and the new Scottish Affairs Committee, so thank you very much for that and we will let you get away. Thank you.

Examination of witnesses

Witnesses: Michael Russell MSP and David Rogers.

- Q42 **Chair:** Minister, we know we have taken you away from the delights of the Scottish parliamentary recess, so we are very grateful for your coming down here this afternoon. We understand that Mr Rogers is one of your officials, is that correct?

Michael Russell: It is indeed. Mr Rogers is in our Constitution and Other Matters Unit. That is not his title.

Chair: We are grateful to both of you for appearing here this afternoon. Minister, if you would like to introduce yourself and give anything by way of an introductory statement, please do.

Michael Russell: I am Mike Russell. I am the Minister for UK Negotiations on Scotland's Place in Europe in the Scottish Government, which is a long version of the shorthand that is used by media generally as the Brexit Minister.

I only want to make one point because, clearly, you are all very familiar with this issue and you will have read a great deal about it. I want to make a point about the work we are trying to do in the Scottish



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Parliament to take forward the issue of the EU (Withdrawal) Bill. We have made it very clear—and I made a statement to the Scottish Parliament in early September and subsequently appeared before the Finance and Constitution Committee—that we differentiate between the technical nature of withdrawal from the EU, which is a process we don't like but we recognise that there has to be a technical framework in place to allow it to happen, which we are willing to work with and to find a way to do that, and the policy of leaving the EU, with which we profoundly disagree and we think is bound to end in tears. Indeed, as a process it is already mired in tears as far as we are concerned.

On the technical issues, we have been very clear about the Bill. The Bill contains two principal defects, to which we cannot agree and we will no doubt go into the detail of those. Were they to be cured in the process of amendment of the Bill—and the Welsh Government and ourselves have put forward, very unusually, suggested amendments to a Westminster Bill—then we will bring forward a legislative consent motion. We believe that Parliament will back that legislative consent motion. Until those problems are cured we cannot do that. That is a position, I am glad to say, has attracted support from Labour in the Scottish Parliament, from the Liberal Democrats in the Scottish Parliament and from the Green Party in the Scottish Parliament. We have been meeting together to discuss how we take that issue forward, both at Holyrood and also in terms of the work being done by Scottish Members and other Members here. I am also pleased to say that, as a result of the statement I made in early September, the Conservatives in the Scottish Parliament asked to join in those discussions and, indeed, we had a meeting with all the parties last week. We don't have a solution as yet within the Scottish Parliament to that but we are talking. As you will be aware, we are also talking to the UK Government to try to find a way to overcome what we believe are fatal flaws in the Bill as far as devolution is concerned.

The reason there is that co-operation is because this is not about the SNP and it is not about a single party. It is about devolution, which all the parties have made work over the last 20 years, and I think that is the key issue. No matter what position you take on the big questions in Scottish politics, all the parties have worked together to make devolution work and to make the Parliament work. We believe this Bill contains things that would make that much more difficult and would reduce the ability of the Parliament to serve the people of Scotland. That is a core issue in the EU (Withdrawal) Bill. There are wider Brexit issues but that is the core issue in the EU (Withdrawal) Bill. We are endeavouring to work with others, as we are working very closely with the Labour Government in Wales to take these issues forward and, indeed, we will continue to do that.

Q43 Chair: Thank you for that statement. We will touch on those issues. Can I press you ever so gently again on your major concerns about what has been proposed in the Bill? We have been hearing over the last few months the general concerns of the Scottish Government. Could you help the Committee by addressing the specific issues that are difficult?



Michael Russell: Very simple to do. We know there are many objections to this Bill. For example, the Henry VIII powers are widely regarded as being democratically dangerous. In terms of our interests as devolved administrations in Scotland and Wales—and of course we cannot speak for Northern Ireland as there is no administration and that has weakened this debate substantially but, even so, I suspect there are strong elements in the Parliament in Northern Ireland that would be concerned about this—there are two items: the restriction of devolved competence in clause 11, which essentially breaks the devolution understanding and, indeed, the underpinning understanding of devolution, that what is not reserved is devolved, and also the provision in the Bill for UK Ministers to make alterations to Scottish legislation without scrutiny by the Scottish Parliament.

Essentially, a different version of the Henry VIII powers is being applied to Scottish Ministers. That would create great difficulty and would be undemocratic. That is not saying that we endorse the Henry VIII powers. We don't. The limited powers that are granted to Scottish Ministers in the Bill—as I have said publicly we will work with the Scottish Parliament to create a framework so that there is a strong democratic oversight of those in the Scottish Parliament. I don't think they should be exercised without that. Those are the two basic issues.

There are other things that we don't like but I think it is right that the amendment to those comes from Westminster and from Westminster MPs. We and the Welsh have taken a position on two issues that we believe are fatal to devolution.

Q44 **Chair:** Just on the process of the Bill, first of all, was there anything that you saw when it was produced that surprised you, anything of, "How did that get here?"

Michael Russell: It all surprised us. Those who are not familiar with the Scottish Parliament might not be aware of how Bills develop that would have an element that would require legislative consent. There would always be a process of discussion between officials about the Bill, how it should be drafted and what would be in. That is the best way in order to get a Bill that can get legislative consent.

On this occasion, when we knew the Bill was coming—and the Prime Minister announced that at the Tory party conference in 2016—we then started to say very early on, "We need to have that conversation". It did not take place. We understood by January of this year that the Bill was going into draft form. I raised this with the Prime Minister directly in January at the Joint Ministerial Committee plenary session in Cardiff. Ben Gummer was the then Minister of the Cabinet Office with responsibility for the Bill, and we had a conversation subsequent to that about him coming to Scotland and talking about the Bill and working together to try to get the Bill correct. We then heard no more. We raised it several times. There was an election, and then we were told that the Bill would be published at some time in July. We asked to see it and we saw it, I



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think, two weeks before it was published. When we saw it, we made it immediately clear that we could not accept clause 11 and other aspects of the Bill.

I then spoke to David Davis. He rang me to talk about the Bill and I made it clear to him we could not accept it. I went to see him in London—I think in the first week of July—with a suggestion that a placeholder be put in the Bill for clause 11 particularly. That was also the Welsh suggestion. While discussion took place that did not happen and the Bill was published in mid-July. Since then we have been making the points about it.

Q45 Chair: We have seen all the media coverage of your high-level meetings with the Secretary of State for Exiting the European Union. Do they have a full understanding of the Scottish Government's concerns? Have you sensed that they are starting to meet some of them and has progress been made in trying to solve them and get them fixed out?

Michael Russell: We are endeavouring to make progress. Those meetings have broadly been positive. We do not have a resolution to this but we last met three weeks ago. John Swinney and I met with the First Secretary and the Secretary of State for Scotland. Our officials have since been working on issues arising out of that meeting. The Joint Ministerial Committee for European Negotiations meets on Monday. That is the first time it has met since 8 February. It is meant to be a monthly meeting. That will now be chaired, I understand, by Damian Green and this issue will be on the agenda.

We are keen to make progress and progress can be made. If the amendments that we have suggested with Wales are enacted, that issue will be closed down. We also accept there may be other ways of amending the Bill. We have had highly-skilled lawyers, councillors and others thinking of it, but if there are other ways then, of course, we will discuss those other ways. However, the Bill will have to be cured in that way for us to bring forward the legislative consent motion. Of that there is no doubt.

Chair: I am grateful.

Q46 John Lamont: Good afternoon, Minister. It is very good to see you again.

Michael Russell: Nice to see you.

John Lamont: I want to better understand your position and the position of the Scottish Government, particularly in relation to clause 11. Am I correct in thinking that you are demanding that all returning powers are automatically devolved to the Scottish Parliament?

Michael Russell: I don't think "demanding". I take exception to that word. We believe that it is consistent with the campaign for the referendum. I am happy to provide a leaflet—although I am sure people



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will have it—that says all those powers would come to the Scottish Parliament. We believe that should be the default position because the powers that relate to devolved matters should come to the devolved administrations. We have also made it clear—and we made it clear in “Scotland’s Place in Europe”, which we published in December—that we believe and understand there should be some frameworks that will govern some of those. The issue is that those frameworks should be agreed between the parties. There should not be any imposition. The governance of those frameworks should be on the basis of co-decision making. Those are the two positions we hold.

Q47 **John Lamont:** You also want Scotland to stay in the EU?

Michael Russell: I have absolutely no difficulty in saying that, in my view—and I am sure people will agree with this—that that is a different issue.

Q48 **John Lamont:** You don’t think it is a contradiction that on the one hand you are criticising the UK Government for the process they have put in place because, if you follow through with your policy objective, these said same powers will be transferred back to Brussels?

Michael Russell: No. I don’t believe that is a contradiction at all. As I said at the outset, we have made a very clear distinction between the technical process of the EU (Withdrawal) Bill—which we accept has to happen, and there has to be a legal framework in place and we have said we will work with the UK Government and with the other devolved administrations to create that legal framework—and a policy position, in which I am not reconciled to the prospect of Brexit and I believe it is the wrong thing to happen.

Technically, we have said we accept there has to be a Bill. We are trying to work on that Bill and we have been very willing to do so. There are other things in the Bill I could really object to but I am not going to. I am simply going to say that there are two things that will severely affect devolution. As a former MSP I know you will understand some of those.

Q49 **John Lamont:** I do understand but what I want to be absolutely clear is that these powers, which will be transferred to the Scottish Parliament, could potentially be transferred back if your policy objective is achieved.

Michael Russell: In those circumstances, if we were an independent member of the EU, then all the powers that we would have would be exercised in the way that other EU members do but that is not the issue.

Q50 **John Lamont:** That could potentially mean transferring back.

Michael Russell: With the greatest respect, Mr Lamont, that is not the issue. The issue here is whether we can get a Bill that is workable for withdrawal. I would be absolutely happy to see a process of accession but it will be a different process. What we have here is a technical problem that we need to solve. It is consistent with the campaign of the leavers that these powers come, and then we take a responsible view about how



we can in actual fact operate frameworks. That is what we are trying to do.

- Q51 **John Lamont:** You have made lots of reference—not today but elsewhere—about this power grab that this process is effectively achieving. Can you name one power that the Scottish Government currently implements that it will not be able to use after Brexit?

Michael Russell: Yes, I am happy to do so. I have a list here of 111 issues that the Cabinet Office produced. Many of them relate to that. For example, we could look at environmental quality of flood risk management. In your constituency I know there are flood schemes that I formerly, as Environment Minister, was involved in implementing. Those would not be possible under this thing. We could go to fracking, which is an agreement under the last Scotland Act that that power be transferred. The Scotland Act has been enacted. The process is going on. That would not be possible. We could look at issues to do with GMO marketing and cultivation. Those are issues that the Scottish Parliament has taken a very clear and consistent view. We would not be able to exercise it. In fact, we could go through this list. There are some very, very interesting ones.

John Lamont: Number 79 and number 106: 79 relate to organs and 106 relates to statistics. I am not entirely clear what they mean in terms of the powers that the Scottish Government currently exercise that they will no longer be able to exercise.

Michael Russell: There are both direct powers within this list, things that we presently do, but there are also areas of competence. If you look, for example, at the Brussels Regulations on family law, that is an area of competence that is exercised within a European context. It is perfectly possible to have a discretion about how we should exercise that within a UK context. However, what is being said here is not that. What is being said here is that these powers will be removed from the Scottish Parliament and they will only be exercised by Westminster. That is a material change. That is within the context of the settlement powers but I have also indicated to you a whole range of powers; for example, minimum standards legislation and human trafficking where the Scottish Parliament passed legislation.

Chair: I think we have had enough powers. I know that you have a substantial list there and I know the Committee would be keen to hear more of them, but we are getting the point of that.

- Q52 **Christine Jardine:** Thank you very much. You just referred to having discretion to implement powers or to exercise powers within—you used the word “context”—an EU context. Is there not an argument that perhaps what is in this Bill, other than, as you say, clause 11, is simply to allow you to exercise discretion within the same framework but the centre of it being the UK Government rather than the EU Government? As John said, there is a contradiction between being quite happy to work within that European framework but, when the powerbase moves to



Westminster, it is not acceptable. Could you explain the difference?

Michael Russell: Your own Members in the Scottish Parliament have made a very strong argument based on what we are saying on this. The Liberal Democrat position has been almost exactly the same.

Christine Jardine: Sorry, that was not what I asked.

Michael Russell: I was about to give you the answer. I was giving you the context of the answer. I am happy to give you the answer. The answer to that is: no, that is not the position that we find ourselves in or the United Kingdom finds itself in. The reality of the situation is that devolution exists. Your argument is that essentially devolution should be suspended.

Q53 **Christine Jardine:** No, that is not my argument. I am not making an argument. I am simply asking for clarification of why it is acceptable to have a European framework but why in, say, things like environment law and food quality you feel it is unhappy. If what we are saying is there is a sunset clause and the powers that should revert to the Scottish Parliament go to the Scottish Parliament, what is your argument with the framework when you already work within a framework and, as John said, if your policy is carried through the powers would go to Brussels?

Michael Russell: I am not saying you have an argument but I have inferred from your question that there is an argument.

Christine Jardine: No.

Michael Russell: Let me then say how I respond to my inference of your argument. My response to the inference of your argument is to make two points. One is that the decisions made within the context of the European Union—and I have been a Minister that has attended the Council of Ministers—are co-decisions. There is co-decision-making. There is no proposal in the Bill, nor has there been a proposal from the UK Government, for co-decision making. Were there to be such a proposal, and we have been having this discussion, we would work with the UK Government to establish those frameworks. There would also be the issue about the decision of what frameworks there should be. That also has to be a genuine discussion and not an imposition.

I go back to the argument that we have devolution. Devolution exists. It is, in the phrase used by others, "The settled will of the Scottish people". It is there. The operation of devolution cannot be overridden except if the UK Government decide to override it. This is what this Bill does. This Bill decides to override devolution. We think that is undesirable. We make common cause on that with the other parties in the Scottish Parliament: the Liberal Democrats, Labour, the Greens, and indeed the Conservatives seem to take the same view. We say, "Let's work on the basis of the constitutional settlement as is, the constitutional settlement supported across the parties, and then let's make sure that, once we have that in place, we have those sensible grown-up discussions about the frameworks that are going to operate."



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This is not saying, “We are not going to co-operate on frameworks”. We have said for the last year we are going to co-operate on frameworks. It is about having a sensible, rational co-decision-making process.

Q54 **Christine Jardine:** It is co-decision-making that is your issue?

Michael Russell: The governance of any frameworks and the decision of what those frameworks are, are the two key issues in clause 11.

Christine Jardine: Thank you.

Q55 **Chair:** Would it be right to characterise this that the EU currently exercise all these frameworks and what looks like is happening with this Bill is that the UK simply assume the role of the EU when it comes to all these issues? Are there other ways that this could be done? Is there another means that we could achieve—

Michael Russell: I have some scepticism about it, but if you accept the rhetoric of taking back control it is in actual fact taking back control solely to Westminster, not taking back control within the established Constitution and the constitutional settlement. The Prime Minister keeps saying, “We entered the EU as one UK and we will leave as one UK”. That is, with respect to the Prime Minister, something of a misunderstanding of the last 40 years and particularly the last 20 years of constitutional development. We have had development of a devolved Constitution that needs to be respected. One of the House of Lords Committees indicated that, unless there was that process, this was essentially taking away powers from the Scottish Parliament. I won’t go through the list of 111 but there they are.

Chair: Thank you for that. I am noticing that the Minister is on his feet. That assumes there will be a vote soon, so if we hear the bells going it means we will have to go down and vote but we will resume.

Q56 **Gerard Killen:** Thank you, Chair. It is to expand on this idea of co-decision-making. Both the Scottish and the Welsh Governments have argued that any common UK-led framework would have to be jointly agreed through co-decision-making. How do you think this could be achieved?

Michael Russell: There is a very helpful paper from the Welsh Government, which they published early in the summer, June perhaps. It lays out some initial thinking on it. I work very closely with Mark Drakeford, my counterpart in Wales. I am very enthusiastic about those thoughts. We are quite close to saying that if we could establish that framework or structure that was based on co-decision-making—and there are European examples and there examples in that paper—then that would clear away one of the major obstacles. Then we would all be able to have confidence and trust in the process. There are lots of possible models.

The Welsh have contributed some very useful material. I am sure the paper is available to you. We will continue to discuss that with him. I am



appearing at an event in Brussels next Tuesday with Mark Drakeford that I think will expand further on that. If we can agree that with the UK Government, and if any Parliament reassembles in Northern Ireland with them too, I don't think it will be difficult to get that structure. It has to be based on co-decision-making because it deals with competences that already exist within the devolved administrations.

Q57 Gerard Killen: Do you think it makes sense to put these arrangements in place to agree common frameworks before Brexit or do you think we have to have some sort of transitional period?

Michael Russell: That is an interesting point. We have a process of legislation that is just starting. As you will know, the EU (Withdrawal) Bill is the first stage of a number of Bills: there will be an Agricultural Bill. There will be a Fisheries Bill. There will be a Trade Bill. We need to get the principle right now and then as those Bills move forward those frameworks—they won't be in every area but, for example, agriculture is one that is much talked about—could be part of that Bill. We would get that well established. It is right to do it now to understand how it works. That will mean that for the next year or 18 months these Bills are also going to be easier in terms of the framework. We have to agree the policy but, in terms of the general framework of putting things in place, it will be easier to achieve.

Q58 Chair: You do believe there is a necessity for some UK-wide frameworks when it comes to this? I think you have said that already.

Michael Russell: We have said it for a year.

Q59 Chair: Could you explain to the Committee how these could be constructed then if the model that the Government are using and applying is, in your way, flawed and does not work on behalf of the Scottish Parliament?

Michael Russell: David might want to say a word or two about that because he has worked on it.

David Rogers: The way we see it is a spectrum of possible arrangements for a framework, ranging from an area where the two Governments might need to have some sort of informal working arrangement to some arrangement where we might have common legislation, probably through an Act of the UK Parliament but agreed through legislative consent procedures in the devolved administrations and the devolved legislatures. Somewhere in between you could have a memorandum of understanding or other working arrangements. The point behind all of these would be based on agreement and on the responsibility of respective Governments to their own legislatures for their devolved powers.

Michael Russell: I laid a few of these out in the statement I made in the Parliament. Some of the language in there has also been used by the UK Government, which is positive. You could have those joint pieces of



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legislation. You could have memoranda of understanding. You could have concordats. In the legislative form you could then have what is the equivalent, essentially, of the Council of Ministers in European terms. If you take agriculture as an example, you could have the four Agriculture Ministers meeting on a co-decision-making basis on key issues. It would not be with everything but, for example, on animal health or pesticide control there would be a framework that had legislative authority and was operating by consent of the four.

Chair: We would like to have heard from the UK Government on these particular issues but all invitations to come before this Committee have been refused. This is part of the real frustration of this Committee in order to try to understand the UK Government's approach to these issues.

Q60 **Paul Masterton:** Minister, you talked there, both of you, that there are lots of options around how this co-decision framework could be. One of the things that came up in the previous evidence session was there was a feeling that the Scottish Government did not have a clear position on their preference. Does the Scottish Government have a position on their preferred approach to how frameworks could be set? Do they accept the preferred Welsh Government model? Do they reject that or do you prefer the position of the English Government?

Michael Russell: There will be different types of frameworks. To be fair, I think the United Kingdom Government accept that and there has been that discussion. They will go from a full legislative model that would be in statute and you would have, essentially, that type of Council of Ministers' arrangement in the statute with a governance that was agreed in law, right through to what David has been talking about, which might be a memorandum of understanding on certain issues. For example, when you have two legal systems, there is a clear interface with them. For example, I go back to family law and the Brussels structure, if you are going to operate on that then it is not difficult to see how the two legal systems work together with mutual recognition and the acceptance that the Parliaments will legislate in that way.

I don't think we should be prescriptive. The Welsh have contributed some very good ideas for new circumstances but there will be different models that will operate. They will depend on the subject. Again, that is something we need to discuss in more detail. The UK Government needs to indicate where they stand on that. We have heard fishing, agriculture and environment are key issues in that. We want to know whether there are others. I am sorry but there are 111 things on this list. How do they fit together into structures and which of those structures are permissive in a sense, because you have got an informal agreement, and which are legislative.

Q61 **Paul Masterton:** You have advised there are 111 and you reeled off several points before. Presumably the Scottish Government, if it accepts that UK frameworks are necessary in some areas, must have their own



ideas of what areas those frameworks will be in.

Michael Russell: Yes. We have been clear from the beginning. I cannot remember precisely what we said in "Scotland's Place in Europe", but I think we indicated an area there. Agriculture is an obvious one because there is already a very substantial European framework. It will require some structure between the four administrations because there are different priorities and they need to be remembered. I don't think that would surprise us at all. There are some arguments that fishing isn't in that same category.

Chair: Thank you, Minister. As you can probably hear, the bells are going so we have to suspend the sitting. We will resume in 15 minutes' time.

Sitting suspended.

On resuming—

Chair: I apologise for the arcane workings of this particular parliamentary institution, where it takes 40 minutes to go and vote. I am sure that Mr Thomson and Mr Lamont long for the days when you pressed a button and that was your vote completed. Thank you for being so patient and we will now resume back in session.

Q62 **Danielle Rowley:** Gathering what was discussed, we talked a bit about consent and why the Scottish Government would not give legislative consent. What impact and what consequences do you think it would have if the Scottish Government, and indeed the Welsh Government, did not give consent?

Michael Russell: Clearly, it would be a unique situation that has not happened before. In a sense, of course, it would deepen what I think is already a pretty complex and difficult constitutional set of circumstances. In practical effect what should happen under the convention, in the legislative consent process, is that the UK Government should withdraw the parts of the Bill for which consent has not been granted. In terms of detail for those who have not been in the Scottish Parliament, the detail refers to parts of the Bill that require legislative consent. I have had a letter from David Davis asking us to pass a legislative consent motion on those and that is what we will consider.

They should withdraw those from the Bill. I am not naive enough to think that they will withdraw those from the Bill and, therefore, the Bill might proceed without change. That would be a unique circumstance in devolution. It would create a great difficulty between the Governments and the Parliaments. It would also, frankly, start a process that would become more and more difficult with every single following Bill. As I have said, this is the first Bill of a number. If we get this one right then the passage of the others is likely to be reasonably smooth in terms of legislative consent, providing the lesson is learnt about working together. However, if that one does not then I think every single one of them will have legislative problems in the Scottish Parliament. That becomes a sort of trench warfare and that is in nobody's interest.



Q63 **Danielle Rowley:** Does the Scottish Government have a plan on what they would do if the Bill passes without consent?

Michael Russell: There is an alternative. I made it very clear in my statement to the Scottish Parliament that it is not an alternative we prefer, and the Welsh have the same alternative. It is to bring forward a continuity Bill that is endeavouring to find a way in which we can legislate for the circumstances to protect the Scottish Parliament. That is harder for us to do. Clearly we have to be mindful of our legislative competence, overall, and the competence of any legislation we pass, but that remains a possibility. Both we and the Welsh Government have made it clear that our lawyers have been working together. We have been looking at the possibilities for that. Were that to be necessary we would bring one forward.

The best way to resolve this is to accept that changes to this Bill are what is needed in terms of devolution and what devolution is. It is not simply us that are saying it. It is that unanimity across Wales and Scotland on this matter that is helpful.

Q64 **Chair:** I am interested in your views, Minister, on the UK Government v. Gina Miller in the Supreme Court, where there seemed to be a real putting in place of the Scottish Parliament with all the references to sovereignty. I remember with successive Scotland Bills believing that the Sewel Convention was enshrined in law and that the Scottish Parliament was permanent. It surprised me greatly to find that this could be done away with if the UK Parliament decided that was going to be the case. I don't know how you find it and if you have got any observations about that.

Michael Russell: We regretted that. We think that even constitutional conventions should be respected. This is a convention that has withstood the last 20 years and is an important convention to us. I suspect the problem is not just the facts of the judgment; it was the manner by which the Advocate General approached this, which was to seem to think that in some way this was something to be celebrated. When legislation is passed and those taking part in that legislative process believe something has happened, it is truly regrettable that they should be told in such terms that it has not happened.

Q65 **Chair:** Do you have a sneaking suspicion that this was said at that point as a softening up exercise for the prospect of the Scottish Parliament not supplying their legislative consent motion, and that then put in place the idea of sovereignty when it came to this?

Michael Russell: There are reasons for this happening but I think the reasons for a lot of these things happening are to do with ensuring the availability of certain things in the trade talks, including agricultural and fisheries competencies, but I try not to have sneaking suspicions. If I have suspicions, it is wise I say them. On this occasion, it was a lawyers'



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debate. One of the lawyers seemed to be particularly pleased that he had won out.

Q66 **Chair:** We have the Advocate General joining us in a couple of weeks' time. I know this Committee will be keen to put some of these points to him and find out what his view on all this was.

Q67 **David Duguid:** Minister, you have raised concerns that the Bill empowers UK Ministers to correct EU retained law in devolved policy areas without any involvement from the devolved institutions. Given these powers are limited to corrections of a technical nature, what changes are you concerned that the UK Government might make using those powers?

Michael Russell: I am concerned about changes to a whole range of legislation. We could start with the Scotland Act. It is possible to make changes to the Scotland Act under these powers. In my view, that would be a difficult and dangerous thing to do without open discussion and reasons for it.

I think the issue is as much democratic accountability as any other issue. I don't think anybody should be seeking to change law that the Scottish Parliament have passed without being accountable to the Scottish Parliament. That is what we should see in terms of these powers. These powers are unacceptable in their exercise without a framework of supervision, whoever exercises them, but the ones that are being suggested to the Scottish Parliament are defective, in the sense that they are not as wide ranging and they allow somebody else to take the place of Scottish Ministers on key Scottish legislation. That should not happen.

Q68 **David Duguid:** The amendments proposed by the Scottish and Welsh Governments would require UK Ministers to seek consent from the Ministers of a devolved Administration before exercising those powers. How would you envision that working, practically?

Michael Russell: We are having discussions with the Scottish Parliament about what the supervisory nature of that would be, but I would anticipate a process that would allow the Scottish Parliament at committee, or other level, to have a view. Some of those things can be semi-automatic. I was very briefly Chair of the Finance and Constitution Committee of the Scottish Parliament, but I was there long enough to realise that there were some methods of approval, particularly on some issues. Government guarantees, financial guarantees, I think, was one of them. The Committee had the right to scrutinise these but the decision of whether or not they should do so was held by the convenor of the Committee exercised with clerks. On a matter of a small amount of money, it would not really matter; a matter interpreted to be significant, then the Committee would scrutinise that. I suspect a broadly similar process is needed, although there may be more involvement in it.

The challenge of Brexit is to all of the existing structures and institutions. Government cannot commit themselves to this. It is a matter for the



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Scottish Parliament. The Scottish Parliament would need to look to make sure that their arrangements could be adapted and developed in order to take care of it.

Q69 **Chair:** For those of us who have not had any experience of it, can you help us with the process in the Scottish Parliament? In committee just now, the legislative consent motion is being looked at. Is that correct?

Michael Russell: No. At the present moment, the Finance and Constitution Committee is examining the legislative consent memorandum. I am sure the convener will give you information on this if you ask for it but, as I understand it, their inquiry will conclude in an interim report in early December, but it will not formally report until it reports to the Parliament at the conclusion of this process. The legislative consent motion must be brought forward and passed before the last amending stage of the Westminster Bill and that, in this case, would be in the House of Lords. So there is a space for this debate and discussion to take place and there is a space for a solution to be found.

Q70 **Chair:** What I was getting to, there is an opportunity to come to some sort of agreement and arrangement and there is time to ensure that we get that process in place?

Michael Russell: We would like that to be sooner rather than later but, yes, there is that opportunity and that is why we are entering into this, trying to have that dialogue.

Q71 **Deidre Brock:** Minister, I think it is probably fair to say that you were disappointed, along with the Cabinet Secretary for Economy, Jobs and Fair Work, that the officers, I presume, within the Scotland Office, or perhaps Ministers, forgot to pass on very important papers about customs and trade. The Secretary of State for Exiting the European Union has claimed that the UK Government will always consult the Administrations on corrections made to direct EU law relating to the otherwise devolved areas of competence.

What discussions have there been with the Secretary of State as to what form that consultation will take? The JMC meetings appear fairly sporadic lately.

Michael Russell: I am not aware there have been such discussions with officials. Are you aware of that?

David Rogers: Only that there was a discussion that led to that undertaking, but behind that is the Scottish Government view that if the UK Government are using ministerial powers to change the law in devolved areas that should be with consent, not with consultation.

Q72 **Deidre Brock:** Indeed. But they have not outlined what form that consultation will take?

Michael Russell: Trying to be as fair as I possibly can, I suspect that if it does take place that is a discussion that will take place down the road.



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The general position here is that there has not been the consultation and publication that there should have been.

There are different types of publication. This morning we published a document about business views on Brexit. I have sent it to David Davis today. This is an information document, which I hope will inform it.

There are documents produced that suggest negotiating positions. Those are the documents being produced now—I think we are up to 17 or 18 of those documents—that are taking negotiating positions. As some of them deal with areas of devolved competence and make proposals, those are documents that should have been discussed with the devolved Administrations before they were published. The customs and trades ones are cases in point. I think there is a trade one that makes a proposal about a type of joint legislative activity. That has never been discussed. It would be quite useful to have a conversation about that.

In addition, when our officials have those discussions in good faith, as we are trying to do—there is regular official contact—they need to know about these things. We did not know about that until, when, Monday morning?

David Rogers: I don't know. Certainly, over the weekend would be the earliest we would have heard of those White Papers.

Michael Russell: There is a third issue that I want to touch on, Chair, with your permission, which is: if those documents are entered into negotiation and make commitments, they make commitments on behalf of the devolved Administrations, of which we are unaware and which we might not be able to meet in good faith. That is quite a dangerous thing to do in terms of due process.

Ross Thomson: The question that was raised about engagement was my question, so I will come back to the framework issue as well. In the month of August, there were 20 meetings between Scottish Government officials and officials in Defra. One of the issues has been that Scottish Government officials are not saying where they would accept UK-wide frameworks, for example, on animal and plant health, so we can put in place that UK framework. They are declining to say what should be done at a UK level.

We asked the Minister if he could use his office to help ensure that, when these meetings are happening, we can have that dialogue to provide clarity about where things should be done at UK level, so these discussions can continue to progress and we can have a dialogue. We would also ask him, "Do you believe there is a deal to be done on frameworks?" so we can move these things on.

Michael Russell: Let me separate those issues out. Unequivocally, I would say to Mr Thomson, yes, there is a deal to be done. However, I saw a very unfortunate remark that Iain Duncan made on the record during the Tory Party conference, saying that there had been 50



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meetings between officials in agriculture and fisheries, agriculture and crofting, and they had come to those meetings and said nothing and offered nothing. First of all, Ministers should not criticise officials in such a way but the second point here is that it is not true. We have regular contact. The reality, however, is what we will not do; we will not enter into discussions about frameworks until we have an agreement on what those frameworks should be and how those frameworks would operate. If there is a serious attempt by the UK Government to try to ensure that these agreements are reached at official level, and not at Ministerial level, then we will say, "That is not feasible or possible".

I want to have these agreements. I would like to have the dialogue that we were promised. For example, I would like the Joint Ministerial Committee to meet on a monthly basis, as was promised. I would like to have been consulted on the Article 50 letter, as indeed the terms of reference of the JMC said. I would like to have seen papers that made commitments for devolved Administrations. None of those things has happened. However, again on your issue of doing a deal, we can resolve this tomorrow. We can resolve this on Monday when we meet, if there is an acceptance that the Bill as drafted is inoperable, will not work, and needs to be changed. That unlocks the door, but we don't get the door unlocked if at official level we have discussions about intensification and officials are not allowed to say—because this is what has been happening—that there are papers in the pipeline that suddenly appear.

It takes two to tango. I am making a clear commitment here that if UK Ministers sit down, and we sit down on Monday, and we can come to an agreement on those frameworks and what they deal with, and what the governance is and the fact that we are able to find the means by which we work together, we will do the deal. But we won't do the deal if what is happening is that an attempt is made to say to our officials, "Go on, tell us what you want and we will just do it", trying to undermine the position that has been taken by the Welsh and Scottish Governments. That will not happen.

Tommy Sheppard: Can I follow straight on from that, Minister? I am presuming that across the 111 or more areas there has to be a diversity of arrangements, post-Brexit. In some instances, I would have thought, apart from cross-border information exchanges between the relevant agencies, there is no particular necessity for a consistency of approach. In other areas, there might be the need for a joint framework or joint working, but I would thought it would have been in a relatively small number of areas where it is required to have a full-blown legislative framework. In those areas we are essentially, are we not, creating a third category of power, to add to reserved and devolved, which is a hybrid category where the Scottish Executive has executive authority to act but has to do so within a UK regulatory framework. My question is this: from the discussions you have had so far, how far apart do you think you are with the British Government in identifying how many of these powers are going to require the full-blown legislative framework? Do you sense that



that is a sticking point or is that something that is capable of resolution?

Michael Russell: In fact, that could be done very quickly if there was an acceptance that this is a joint decision. The key here is if we agree that together we will sit down and agree that, fine. If the argument is that it will be imposed, then it cannot be done.

You make a very interesting point about the nature of these 111 items and they are very different. Looking down the list again, on number 43, environmental quality—water quality—there is a difference in water quality and water quality regulation north and south of the border. There is a European framework but there are some important differences. That is one area where one would want to have a discussion about how we can move forward on that. When we get to number 56—forestry (domestic)—I do not know what that means and I have been an Environment Minister with responsibility for forestry. I don't know what they want to do in that area.

There is an existing Forestry Commission. It is based in Edinburgh, but it is operated separately north and south of the border and the Scottish Parliament is about to pass a Forestry Bill that takes this a further stage on in terms of separate legal entities. There are some shared responsibilities, the Forest Research Institute for example, is one; very positive, we could work very closely on that. So that has to be unpacked, but I go back to these two crucial points. First of all, how do we decide what there are frameworks for, what are formal legislative frameworks, what are concordats, what are other things. We need to decide that, go through this group list, and do that. The second thing is we need to say, "What do they look like? How do they operate? How do we get co-decision-making?" Those are the crucial issues. I say to Mr Thomson again, if we resolve those issues there will be a deal. If we cannot resolve those issues, there will not be a legislative consent motion.

Q73 Tommy Sheppard: I get the sense that the UK Government are saying the reason why they need to have clause 11 is because they simply do not have the time to work through and identify where joint arrangements are required and what they should be. From your point of view, can I just be clear that that is not a problem for you to identify?

Michael Russell: I don't think they are saying that. To be rigorously fair, I don't think they are saying that. There have been a lot of reasons given for this. I have indicated my own view that I think a lot of it is to do with trade; a lot of it is to do without having a full understanding of what devolution is. Damian Green, I think, authored or put his name to a piece in *The Scotsman* some weeks ago that talked about jam manufacturers in Dundee being able to sell in Newcastle. I know what he is saying there, that he does not want barriers.

Devolution is based on difference, being able to make decisions, subsidiarity in the right place but, equally, we do not want additional barriers so let's talk about how that works in these areas. But some of



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these areas I do not understand at all, forestry for example. There are some things in here where there will always be different regulatory frameworks because there are already different regulatory frameworks. We could do this deal on this, but let's do it realistically and let's do it on the basis of what exists in the existing constitution and how we can build on that.

Christine Jardine: I would like to go back to the question Mr Duguid asked about your amendments. You have concerns about the Bill empowering UK Ministers to correct EU retained law in devolved policy areas without involvement of the devolved institutions. For clarity: do your amendments only require consent from Scottish Ministers rather than the Scottish Parliament?

Michael Russell: They do and that is consistent with the UK legislation, but of course I have said—which I don't think UK Ministers have yet said—that I am very keen to put in place a system of supervision of the exercise of those powers, which is democratically accountable. I am on record as saying that. I have indicated that the Scottish Parliament is working to find that. I am being consistent with UK legislation, but I am going a step further. I believe many parties in the UK Parliament also want to see such regulations or systems put in place for UK powers.

Q74 **Christine Jardine:** One other thing for clarification. The jam: one of the areas that people have talked about as being a major problem with a hard cliff edge with Brexit, and it is an important part of the UK-wide regulatory framework, is food, for food quality. Are you suggesting that we should not have the same food quality regulations throughout the UK? Surely not.

Michael Russell: I am suggesting that we should have the same food-quality regulations as they relate to the circumstances in Scotland, the circumstances in England, and the circumstances in Wales, because there may be circumstances in which there may be different regulations. An example—

Q75 **Christine Jardine:** At the moment there is not; there is a UK/EU framework.

Michael Russell: At the moment there is an EU framework and it is perfectly possible that there can be a UK framework. But if you believe in devolution, you believe in decision-making closer to the people so, in those circumstances in Scotland, where there are issues that would require to be addressed by those regulations then they would be imposed. This is about the appropriate level of decision-making. Not every level of decision-making is appropriate. If you don't accept that principle of devolution, then you are going against what devolution has achieved. Devolution, of course, was established by the consent of the Scottish people or, rather, by the people of Scotland perhaps; not all of them were Scottish Liberal Democrats.

Q76 **Christine Jardine:** I only raised it—I was going to talk about the Calman



Commission—because a point made earlier was that, in the event of the UK making trade deals with the rest of the world, there would be a need in the food market for uniformity across the United Kingdom, for jam producers in Dundee to be able to trade abroad through the UK trade agreements. Is there perhaps an argument that we need to accept that there are parts of this framework that we will have to accept?

Michael Russell: Presently I am quite sure there are no barriers to jam production north and south of the border, but the reality of the situation is that I would not want, for example—and I presume you would not want—to accept lower standards than we have now in things like the importation of chicken or hormone beef, or whatever. The Scottish regulations, I would have thought, would make that absolutely clear that we did not wish this to happen. We would also want to make sure that we protect our own native production. It is big point for Welsh lamb producers, for example; a big point for hill farmers in my constituency in Argyll and Bute.

If we have a framework without co-decision-making, we could find ourselves being forced to include that. I think Liam Fox has indicated that he did not see many great problems with chlorinated chicken. That would be bad news for those people who are producing chickens in Scotland or elsewhere. So I think we would want to make sure of the higher standards. I would go further. Read that across into things like the environment. Speaking as a former Environment Minister, I do think it is absolutely vital that we recognise the important role that European environmental regulation has produced.

We hear, of course, arguments that that regulation is too stringent and should be reduced. I would want to make sure that what we have achieved in Scotland in that regard is continued. In those circumstances, I am in favour of the right type of regulation and it may well be there are specific circumstances and specific products, or ways of doing things, that would benefit from the importance of devolution, which we have all supported.

Q77 **Christine Jardine:** On co-decision making, there are examples—perhaps we could say the existing framework from the EU, which applies a standard of food quality—that everyone in the UK is happy with. Would you like to see some co-decision making to protect that?

Michael Russell: I would want to see whether there are areas of legislative competence presently in the Scottish Parliament. That includes this because we have a flourishing food industry, which we have developed over the last decade, with the particular interest of, for example Richard Lochhead, my former colleague. In all those circumstances, I would like to see that continued and that would be best continued if there was a framework. If we agreed there should be a framework, then that is best continued by having co-decision making rather than having decisions imposed.



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Q78 Paul Masterton: In the frameworks there is a distinction between the policy in terms of what the framework achieves on the ground, and the process as to what that framework is and how it operates. Is the Scottish Government's position that they are not going to get into the detail of the policy until they have determined what the process will be? You have clearly identified—at least in your own mind—where frameworks might be required, so presumably, even if not officially or published, you have an idea of what you might like the content of that framework to look like but you are very much putting the process element first, getting the process agreed before you get into substantive issues?

Michael Russell: I don't regard "process" as a dirty word, so I don't have any great difficulty with you on that but I would put it another way. I would like to see firm foundations on which we could operate these policies together. If they do not have firm foundations—and I know that of old, unfortunately—then they are not likely to be successful, so if we can put firm foundations in place then we will be able to move forward.

Q79 Paul Masterton: In terms of the Scottish and Welsh Governments' amendments, clause 11 is effectively a full reversal; rather than things being held to be devolved, everything is completely devolved. One of the things we talked about in the previous evidence session was that that would allow potentially, during a transitional period where the aim is to have a status quo, an opportunity for divergence among the four component parts of the UK. Would you not accept that that could make it very difficult to then agree some kind of common framework if, for example, off their own back, the Welsh Government have, say, weakened animal welfare standards to be below what Westminster and Holyrood would agree?

Michael Russell: I am not sure I accept your timeline. If you accept the timeline that exists presently, which is EU (Withdrawal) Bill, legislation on key areas—we assume some of those would deal with frameworks in agriculture, environment and trade—once those are in place and the frameworks are established, I don't see how they could diverge before the UK exits, so I don't accept the premise of your question.

Just as I don't regard "process" as a dirty word, I don't regard "divergence" as a dirty word. Like many others, the Scottish Conservatives support devolution. Devolution is a process in which there will be divergent views. For example, you can take minimum pricing. We do not all agree on it, but the Scottish Government made the decision that this was appropriate in the circumstances and that has been an issue that has gone ahead. There are many such issues, but not all such issues, and the way in which we can work together is to have the right frameworks in place, those foundations in place, on which we can then build. This is not controversial. This can be achieved. We have conceded the issue of frameworks early on. Now we need to be able to establish them.

Q80 Paul Masterton: So an alternative, I guess, between the current clause



11 and what you are proposing would be to identify the areas where the frameworks are going to be needed and devolve the rest.

Michael Russell: That is essentially where we may end up. I am not unhappy if, for example, you were to be promoted this week and to be at the JMC next week and you were to offer that as the next step forward. I would be probably sitting there saying, "Let's sit down with that piece of paper and let's get the things on the piece of paper". David might want to—

Q81 **Chair:** Before you do, I want to explore a couple of other issues—there is another vote coming up, and I know you have to get away, Minister—about the Scottish Government's general approach to Brexit. In particular, where are we now with Scotland's Place in Europe? Is it still alive and active?

Michael Russell: It has attracted ever-growing support, I am glad to say. Scotland's Place in Europe has been a document that more and more people realise argues for—

Q82 **Chair:** Does it remain Scottish Government policy?

Michael Russell: The policy of the Scottish Government is, first of all, we don't want to leave. We would like to be members of the EU. We think that is the right thing to be. At the absolute minimum, the distance from which we are with the EU is crucial and that distance requires us to be in the single market and the Customs Union, a position that not only we take but I am glad to see, for example, the Government of Ireland take. That is very useful. Our position is that we will come back to that paper with further information later in the year. Meanwhile we will continue to listen to stakeholders and, indeed, we published a document today about business and business views. It is full of quotes and information from actual businesses about the difficulties they are facing and we seek absolute clarity. Our view is this is not a process that is going to end in anything other than tears.

Q83 **Chair:** "Scotland's Place in Europe" had a pretty frosty reception from the UK Government, to say the least, and it all seemed to founder on the prospect of Scotland remaining in the single market when the rest of the United Kingdom withdraws. Is there any way that we have been able to square that one at all? Or is there any progress made or any understanding that this could be a prospect?

Michael Russell: To be generous, we started off with a process that there was still a question about the single market. The Prime Minister had made a speech at Lancaster House two days before JMC was meant to discuss "Scotland's Place in Europe", saying that that was not going to happen. Now we are in the position where apparently there is to be an implementation phase, which will be within the single market. I don't think any other transition is possible, so things are moving on our position.



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Q84 **Chair:** Just on transition: have you been consulted about any transition arrangements or discussions?

Michael Russell: We followed with interest the change in position. It started with no transition at all. Then there was a question of: what could it be, another structure? Now we are into single-market membership. There is only one transition possible, which is membership of the single market and that has to happen.

Chair: Ross, we must be quick, because the Division bells are about to go.

Q85 **Ross Thomson:** On this question of the single market, the PM confirmed again today that the UK will leave the Common Fisheries Policy. Would you rather Scotland was a member of the EU single market and, therefore, in the CFP, or would you prefer it to have access to the single market and outwith the CFP?

Michael Russell: I have to say I have witnessed that question before, not least from the Scottish Fishermen's Federation. My position on the Common Fisheries Policy is absolutely clear. I represent a constituency with strong fishing interests. The Common Fisheries Policy has not worked and we need to get alternatives to it. But let us not throw the baby out with the bathwater. Let's have an arrangement with Europe that works for us. Of course, if the Prime Minister has confirmed that today, then what she has said is that this is an EEA-type arrangement, not a single-market-within-the-EU-type arrangement, which is yet another policy. It is a baffling number of policies that the Prime Minister comes up with every day.

Chair: Almost with perfect timing, we have come up to 4.15 pm as the bells go. Minister, we are very grateful. You are our first ministerial witness in this new session of Parliament. We are grateful for your time. Thank you for your patience with all the Divisions.