



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 28 June 2017

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Wednesday 28 June 2017

CONTENTS

DECISION ON TAKING BUSINESS IN PRIVATE	Col. 1
BREXIT	2

FINANCE AND CONSTITUTION COMMITTEE
19th Meeting 2017, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

- *Neil Bibby (West Scotland) (Lab)
- Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
- *Ash Denham (Edinburgh Eastern) (SNP)
- *Murdo Fraser (Mid Scotland and Fife) (Con)
- *Patrick Harvie (Glasgow) (Green)
- *James Kelly (Glasgow) (Lab)
- *Liam Kerr (North East Scotland) (Con)
- *Ivan McKee (Glasgow Provan) (SNP)
- *Maree Todd (Highlands and Islands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

- Gerald Byrne (Scottish Government)
- Ellen Leaver (Scottish Government)
- Gordon MacDonald (Edinburgh Pentlands) (SNP) (Committee Substitute)
- Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 28 June 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning and welcome to the 19th meeting in 2017 of the Finance and Constitution Committee. Willie Coffey is not attending today, and in his place we have his committee substitute, Gordon MacDonald. Do you want to make a declaration of interests, Gordon?

Gordon MacDonald (Edinburgh Pentlands) (SNP): I have no declarable interests, convener. I would like to apologise to the committee and the minister, as I will have to leave this meeting early in order to attend a meeting of the audit advisory board, which starts at 11 o'clock.

The Convener: This is Gordon MacDonald's first attendance at the meeting, which is why there was a requirement to ask if he had anything to declare.

This is Liam Kerr's last appearance as a member of the committee. Liam, we have very much valued your contribution in the time that you have been on the committee and I thank you for all you have done over the past months. We look forward to Alexander Burnett taking your place after the summer.

Agenda item 1 is to decide whether to take item 3 in private. Do we agree to do so?

Members *indicated agreement.*

Brexit

10:01

The Convener: Item 2 is to take evidence on Brexit from the Minister for UK Negotiations on Scotland's Place in Europe. The minister is joined by Scottish Government officials: Gerald Byrne, from the constitutional policy unit; and Ellen Leaver, the European strategy manager.

Do you want to make an opening statement, minister?

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): I do not. I think that there will be plenty of questions, so that would be a bit superfluous.

The Convener: I understand that the Scottish Government and the Welsh Government were unhappy with the way in which they were treated in the run-up to the article 50 letter being sent. In the Brexit process, do you believe that the United Kingdom Government has so far conformed to its constitutional obligations with respect to the devolved Administrations?

Michael Russell: No, I do not. I made that point in the lecture that I gave in Cork in April, and I have continued to make it. Further, I think that the situation is worsening.

The terms of article 50 require the country that is withdrawing to abide by its constitutional process. That would be difficult to define in the case of the UK, because there is no written constitution, but there would be an expectation that the current constitutional practice would be followed. There exists a joint ministerial structure and, as a result of Brexit, a new part of that structure was put in place—the joint ministerial council (European Union negotiations)—with written terms of reference that are available for all to see. Two parts of those terms of reference are particularly important. The first concerns the aim of seeking to agree a common UK approach to article 50. It could be that that process could not produce such an approach—that is perfectly feasible—but there was an obligation on the UK Government to try to do that. However, at no time did the JMC(EN) see a draft of an article 50 letter and at no time was a discussion held about what should be in that article 50 letter. Indeed, the first time that I saw the final article 50 letter was after it was published, when the Prime Minister was on her feet. However, all that is in the past. One of the purposes of today's meeting, I hope, is to see what lies ahead, because we are in a very serious and difficult set of circumstances.

The second important part of the remit of the JMC(EN) concerns the need to have oversight, in

so far as that is possible—I accept that caveat—of the negotiations with regard to the devolved competences. The JMC(EN) was meant to meet monthly, but it last met in February. We know of no plan for a future meeting—none of my officials have been approached about a meeting, even though we have urged one. Mark Drakeford, my Welsh counterpart, and I have worked closely on this matter. We have made positive suggestions to the UK Government about reforming the JMC(EN) and focusing on issues more closely. We are willing to participate in that way, but we do not know whether that is going to happen. That means that potentially, that discussion will not take place.

It is important to consider what an expectation would be at this point in the negotiations. Last week, in Brussels, I spoke to a wide range of people, some of whom had been briefed by Michel Barnier immediately after the talks. I have had no briefing from the UK Government about what took place in those talks. I had an informal discussion with Tim Barrow last Tuesday night, which touched on one or two issues, particularly the budget issue, but David Davis has not rung me to say what took place. We were meant to have a conversation on Friday, which did not happen because he was unwell, which I am sorry about. I had a very pleasant conversation with Robin Walker, the under-secretary, who told me that I would receive a phone call and a briefing, but I have had nothing—neither has the Welsh minister.

If we are serious about the process of the JMC(EN) and about engagement, we need to get on with it, and constitutional due process has to be observed, which is not happening.

Patrick Harvie (Glasgow) (Green): I want to explore for a moment the implications of yesterday's statement by the First Minister. Substantial aspects of that statement fall outwith the direct discussion about Brexit, which is your remit, and the purpose of today's meeting. However, there was clearly a sense of a change of approach, specifically to Brexit, in some parts of that statement. Can you tell us what that change is?

Michael Russell: I will not go into the details of this—although I am happy to do so—because I suspect that it will just lead to a political ding-dong. I think that everybody accepts that the election on 8 June produced some changes. In particular, it produced a set of circumstances in which the UK Government does not, in my view, command a majority for the type of hard Brexit that appeared to be inevitable before 8 June.

There is an opportunity for a new approach to this very difficult subject. It is not just me who is saying that; I call in evidence the Archbishop of Canterbury, who said at the weekend that a cross-

party and much more inclusive view of this needs to be taken. I spoke yesterday in place of the First Minister at the annual meeting of the Association of British Insurers—its Brexit meeting—at which its president called for exactly such an approach. Wherever I go, I hear people talking about the need for change.

The First Minister reflected the seriousness of purpose of the Scottish Government in saying that we want to engage in discussions about Brexit because it is very problematic now and its consequences are so great. The space has opened up to allow that to happen again, so we should allow it to do so. I am addressing Mr Harvie's question in the context of Brexit. Those are the changes that I think have taken place. The opportunity now exists to re-engage in a serious and purposeful manner to try to make some progress on this very difficult issue.

Patrick Harvie: In recent months, one of the most frequent feelings I have had—I suspect this also applies to many of the 48 per cent of people across the UK and the 62 per cent in Scotland who voted remain, and some who voted leave but have realised that they could not believe what was printed on the side of buses during that campaign—is that politicians who know that this is wrong are just going along with it; they are simply accepting something that they know will cause huge social and economic damage to Scotland and the UK. I have had to accept that many of them are representing people who voted leave, but I thought that the Scottish Government had taken a different position so far by recognising that we all represent people who, by a clear majority, voted remain. I thought that the Scottish Government's view was to say that Scotland has not consented to this. Is it still your view that Scotland has not consented to it and are you willing to fight for membership of the European Union, not just the single market?

Michael Russell: It is still my view that Scotland has not consented to this and my position, and the Scottish Government's position, on keeping full membership of the EU has not changed. However, in "Scotland's Place in Europe", the Scottish Government endeavoured to seek a compromise in difficult times. I suppose that what we are continuing to say is that we require to seek such a compromise and that is the best we can make of a bad job at the moment. I still wish us to be a full member of the EU. It is quite obvious that the situation of the EU has changed over the past 12 months because it is stronger and it is making greater progress; it is in fact in much better health than people thought it was, whereas the UK appears to be in much worse health than people thought it could be. In all those circumstances can we find a way forward, perhaps a transitional way forward? I think the transitional way forward is

membership of the single market at this stage. That is of course traditionally a way into the EU, and it might well work in that way for Scotland. It could be seen as a way out for the rest of the EU.

However, I am in no doubt that if I could find a way for Scotland to stay in the EU, I would find it, and I continue to look for that way. I am also trying to make sense of what is the most astonishingly complicated and difficult political situation that any of us will have faced. We have to be realistic about that too—it is astonishingly difficult.

Patrick Harvie: You have mentioned the comments by the First Minister yesterday, saying that we will

“redouble our efforts and put our shoulder to the wheel in seeking to influence the Brexit talks in a way that protects Scotland’s interests.”

She specifically cited the paper you mentioned and then made it clear that protecting Scotland’s interests meant staying in the single market. Later she called on other political parties to back the Scottish Government’s demand to be “at the table” and to be

“able to influence the UK’s negotiating strategy, and for Scotland and the UK to stay in the European single market.”—[*Official Report*, 27 June 2017; c 14.]

Bearing in mind your comments to the convener about the lack of any sign of willingness to treat the negotiations with the devolved Administrations seriously so far, do you detect any sign, either from the current Prime Minister or from her potential successors, of a hint of openness to staying inside the single market? I have not heard any such hint.

Michael Russell: It is a very good question. The answer is how you would interpret what you see. It is like watching the Kremlin wall. They have made no statement that they are going to stay, or are considering staying, in the single market.

However, look at, for example, the front of *The Times* today, where there is what seems to be a well-informed story about major difficulties among the key players. We are looking at a very unstable political situation, in which we do not know what the end game will be. It is therefore important to see whether there is common ground about the way forward among the majority of people who are engaged in this discussion and debate. The common ground that I and others detect is a willingness among those people to reconsider the single-market issue; in fact, many of them have never come off that issue.

Whether the UK Government will in the end find itself in that position is a moot point, but I will tell you one way in which it might happen. The question of transition is becoming crucial in discussions. It is an issue that started with the UK

Government saying “no transition”—I seem to remember the UK Government saying that transition would only encourage civil servants to think that we were not leaving the EU—so transition was forbidden. People are now quite openly talking about transition over a two to five-year period. Transition is not a third state; it is the continuation of what exists until it stops existing. That is also clear from everything that we hear from Brussels. Transition might be membership of the single market through the European Free Trade Association/European Economic Area route, while other things change. That is an opportunity.

I cannot be more firm than that. However, there is a continuing opportunity to try to get this into a better position. I note that the leader of the Conservative Party in Scotland talked about Brexit in different terms after 8 June than before 8 June. I am not criticising her for that; it is a positive thing. Maybe we can find a way to allow this to happen.

Charles Grant of the Centre for European Reform, whom I saw in London on Tuesday, has just published a piece on the way in which a gradual shift might take place, because politically it is very difficult for the Prime Minister to move in a precipitous way on this matter.

I think that we have to be open to it, discuss it and put principles on the table. We also have to find the structure to do so. Going back to my earlier response to the convener, I think that at present that structure has to be the JMC(EN), because there is no other structure.

The Convener: Adam Tomkins is interested in the transitional arrangements, which have become a feature of this discussion.

Adam Tomkins (Glasgow) (Con): To start with, does the Scottish Government now accept that the whole of the United Kingdom is leaving the European Union?

Michael Russell: I do not want to be awkward, Mr Tomkins, because I am not trying to avoid that issue, but I think that the certainty that existed on that before 8 June no longer exists in quite the same way. The trajectory would still appear to be in that direction, but this is the most unpredictable set of circumstances that I or any of us has ever seen or will ever see in politics. That is still the trajectory. I am working on the assumption that the negotiations that have started will continue and might come to a conclusion. However, it is as if we have lots of parallel universes—there are still lots of other possibilities, and some have very limited likelihood and others have much greater likelihood. I cannot be absolutely certain that that is the case, but I am working on the basis that the present trajectory is where it is going.

10:15

Adam Tomkins: I will come to the single market in a minute but, for now, I am just talking about membership of the EU. From your answer, it seems that the Scottish Government still has some reluctance to accept that the whole of the UK is leaving its current status as a member state of the EU.

Michael Russell: It still seems to the Scottish Government, and to many other people—even more so after 12 months—that leaving the EU is an extremely difficult and incredibly expensive exercise that will not produce anything like the boasted advantages that were claimed for it during the campaign.

Adam Tomkins: I am just—

Michael Russell: Can I just finish that answer? Over the past 12 months, that argument seems to have gained a great deal of currency.

Adam Tomkins: Yesterday, the First Minister said that she wanted her Government to play a role in the negotiations. I am just trying to understand what the First Minister and her Government think that the negotiations are designed to achieve. The UK Government has made it perfectly clear that it wants the negotiations to achieve the UK leaving the EU. Unless the First Minister and her Government are able to accept that, and to voice that in forums such as this, it is difficult to understand how the Scottish Government can play a meaningful role in the negotiations. Let me ask the question again: do you accept that the UK is leaving the EU?

Michael Russell: I am trying to be helpful to you, Mr Tomkins. The reality is that the trajectory is in that direction, but someone does not have to be a cheerleader for Brexit to say that we need to be part of the negotiations. That is for two reasons. The first is to avoid the damage that we think the process will cause. We do not believe that it is a good idea, but it presently appears to be one that will take place. I say “presently”, because everybody must accept that the dynamic changes almost daily. In the present circumstances, our job, which we are very willing to undertake, is to be involved in that process, not least because the negotiations involve devolved competences. If we were to step back from the negotiations and take a purist view, we would not be able to do our day job of defending Scottish interests, which is what we will do. Therefore, it is by no means inconsistent—indeed, it is probably helpful—for us to be a sceptical but helpful voice in trying to find a way through that. That is what we are providing. To say that we have to pass a loyalty test before we can take part in the negotiations is not, in my view, helpful.

Adam Tomkins: Minister, please do not put words in my mouth. I did not talk about loyalty. If I wanted to do that, I could have done so very easily. That is not what I am talking about at all. We all accept that there is a degree of fluidity around the nature of the deal that the UK has just started to negotiate with the EU27. However, I am asking a more fundamental question. It seems to me that nobody, on either side of the negotiations, accepts that there is any doubt about what they are designed to achieve, which is the UK’s exit from its current membership of the EU. I am asking whether you and the Scottish Government now accept that the UK is going to leave the EU.

Michael Russell: With the greatest respect, I am not trying to be difficult at all. I am sorry that you have taken it that way. When we have the chief negotiator on the EU side saying that there are other possibilities, it would be very foolish of me not to agree with him. The situation has lots of possibilities. I do not think that there is a great deal of difference between us, so let us not try to exaggerate it. There is under way a set of negotiations the purpose of which is to allow that exit to take place. It is important that we participate in a way that helps to protect Scotland’s interests. However, I am not 100 per cent convinced that the exit will happen. The political instability at the present time indicates that the situation is getting worse rather than better. Many options remain there, but the purpose of the negotiations is for the UK to leave. The purpose of our involvement in them is to ensure that Scotland’s interests are protected in that regard. That is what we should be doing and are trying to do.

Adam Tomkins: I want to ask you about a phrase that you used in answer to the convener’s question, which was “constitutional due process”. Do you accept that, in the Miller judgment, the UK Supreme Court unanimously ruled that it is a feature of our constitutional law that the UK’s membership of the EU is a reserved matter for the UK Government and not a devolved matter for the Scottish Government?

Michael Russell: I accept that, but I also believe that there is a wider issue of constitutional due process, which the European Parliament will be concerned with, for example: the willingness to ensure that this is an exercise entered into by the United Kingdom in full consultation with all its parts. That has not been the case.

Adam Tomkins: “In consultation with”?

Michael Russell: I think that “consultation” in the UK sense means participation and involvement.

Adam Tomkins: So you do not mean consultation; you mean participation.

Michael Russell: What I want to see is—

Adam Tomkins: This distinction is quite important.

Michael Russell: Convener, shall I answer?

The Convener: Let us try to keep this to asking questions and answering those questions.

Michael Russell: I am very happy to be as helpful as I can be in answering questions—and let me do so.

Some of the evidence that you have been taking is very interesting in this regard. If we get locked into the idea that there is a line there, and that line is the only line we can have, we are not going to make any progress.

The obsession with process has perhaps not allowed us to consider the way in which we could make some progress. We can make some progress if we understand that, in constitutional terms, the present UK Government has done its best to exclude the devolved Administrations and has not honoured the promises and commitments it made by entering into the new part of the JMC structure. That is germane and is understood by us, by the Welsh, by many in Northern Ireland and, increasingly, by members of the EU.

It would be better to move on now, given the situation, and to find a way to make things work again. I would hope that the UK Government is thinking of that. With the Welsh, we are constructively putting forward ideas about how that could happen.

The Convener: I know that Ash Denham was interested in discussing the JMC. I do not know if that has all been unpicked in the way you want, Ash.

Ash Denham (Edinburgh Eastern) (SNP): It has to an extent. I will explain the way I see it. Minister, I am interested in what you see as being the future for the JMC process, as it is at the moment. You have alluded to the fact that you do not think that the terms of reference are being met in this case.

In the UK, we currently have a set of intergovernmental relationships that I would characterise as being quite asymmetrical when it comes to the power balance. If we have the JMC system and the two Governments are looking for something quite different—perhaps the UK Government is looking for a light form of consultation but the Scottish Government is looking for more meaningful engagement—is the process up to the job, even taking into account some of the things that you put in your joint letter to David Davis? Do you think it is up to the job, especially at a time like this, with Brexit?

Michael Russell: There has been a lot of analysis of the JMC process over many years. The

House of Commons Justice Committee, the House of Commons Welsh Affairs Committee, the House of Commons Scottish Affairs Committee, the Calman commission, the Silk commission, the Smith commission, the Institute for Government and the House of Lords Constitution Committee—to name just a few—have all examined the JMC process, and they have all said that it is not fit for purpose. We have a process that does not really work and has never worked. Nonetheless, that process is all we have got at the moment and we think that it could be improved in the particular circumstances in which we find ourselves, because it is important that there is such a mechanism.

The terms of reference for the JMC(EN) are clear, and it is not us who have breached them; we have not had a willingness from the UK Government to live up to them. Indeed, the Prime Minister has described the JMC(EN) in terms that do not appear in the terms of reference, speaking of the devolved Administrations having the opportunity to “make representations” to the UK Government, which is not what we are talking about.

We need to work out whether the process can still operate effectively. If it cannot—the view of all those who have been involved is that there are huge difficulties with it—how would we move to something else? That is a little bit like some of the issues that we might come on to in a minute, regarding frameworks. You can proceed by negotiation and discussion, accepting that all parties are equal and that we are going to find a way forward, or you can just tell people what you are going to do.

We have a structure, and that structure should be used to ascertain whether we can find a better structure. In other words, the first task is to bring the JMC(EN) back together to consider, for example, the proposals that Mark Drakeford and I have made and other proposals, and then to take things forward. That is what we should be doing.

I am ready to take part in those discussions, and so are the Welsh. There is the issue of the Northern Irish situation. We will know tomorrow—I think 4 o'clock is the deadline—whether there will be an Administration set up in Northern Ireland. If there is one, we will move forward with that. We will then talk about the process's weaknesses and how we can make it work. It is unbalanced—*asymmetrical* is a generous way to describe it. There is a large UK presence and the rest of us sit around it.

The arrangements were shambolic in terms of meetings and agendas. There needs to be a recognition that we must make progress on individual items. Now that negotiations are under way, the JMC process needs to slot into the four-

week negotiating cycle. We can all see ways in which that could happen. In the negotiating cycle as described by both sides—Barnier and Davis—there are specific purposes for each of the weeks. We will inject ourselves into the four-week negotiating cycle at the point of most relevance and we will meet in each of those weeks. The opening round began on 19 June, the second will begin on 17 July, the third will begin on 28 August, the fourth will begin on 18 September and the fifth will begin on 9 October. We will have those meetings, we know what each is meant to produce and we can fit into those slots.

Ash Denham: The JMC(EN) is the process that we have. You think that it could be made to work with some tweaks to the system to make it more efficient and that it could meet more often. Have you been given any indication of willingness on the side of the UK Government to make it work?

Michael Russell: We have not been given any indication of anything. On Friday, Mark Drakeford and I received a letter from David Davis about the citizenship proposals. It did not contain any more than what the Prime Minister had made public on Thursday night. At the end of that letter was a line that said, more or less, that the UK Government was still thinking about things. It needs to come to the table and talk. We cannot make progress on the issue unless we sit down to make progress on it. That is the basic message—we need to get that meeting.

The Convener: Neil Bibby is interested in transparency in this area.

Neil Bibby (West Scotland) (Lab): I raised issues of transparency with you the last time that you were here, minister. The terms of reference for the article 50 negotiations state that the default position for both the European Commission and the UK Government is transparency. Will the Scottish Government's position in its intergovernmental discussions on Brexit be transparency? What documents relating to any intergovernmental negotiations on the withdrawal agreement and the new relationship with the EU will the Scottish Government publish?

Michael Russell: We will be transparent. Transparency is the right way to do this, so we will publish our documentation provided that we are part of the process—and there is no guarantee that we will be. If we become part of the process and it moves on, we will publish our documentation.

We have taken an open approach in any case. The difficulty that arose some months ago around the publication of letters was that part of the convention under freedom of information is that we do not release other people's letters; they release them. There is nothing that we do not want people

to know is taking place. I am keen that we publish our approach to each of the major issues as they arise in the negotiating process so that the process is clear. In many cases, our approach will be supportive of the UK's position. Where it is different from the UK's position, we can have a useful debate and discussion.

The process can only improve with transparency on all sides. We will publish what we have and we will be open about it. We already report on meetings of the JMC, which are reported through a formal process in the Parliament. I am happy to look at that again if it is helpful for me to do so. I am also happy to have cross-party discussions. Two weeks ago, I wrote to all the other parties, offering to sit down and talk about things. I am awaiting a response. When I have it, I will be happy to sit down and talk on a cross-party basis with individual spokespeople about where we are with this. I think that that would be helpful.

Neil Bibby: That would be helpful, because there have been concerns recently about the Scottish Government in relation to freedom of information requests. I know that that has not necessarily affected you, minister, but there are concerns about transparency. It should not take freedom of information requests to get transparency.

Michael Russell: I am not going to enter into that debate. It is a debate for another place and time, and there are lots of issues in it.

My approach to this is entirely consistent with the approach that is being taken by the EU and the European Parliament, and the UK Government has rightly committed itself to the same process, which is helpful.

The Convener: We have spent a fair bit of time on this area, but there are a couple of issues that I want to tease out before we move on. There are a couple of letters involved. First, the secretary of state's letter to you of 29 March talked about "intensive discussions" on "Scotland's Place in Europe", including a substantial work programme to which a "good deal of resource" is being applied. Patrick Harvie wants to ask you about the joint letter, but can you first tell us whether the secretary of state's letter reflects the reality?

10:30

Michael Russell: It is a difficult and contentious area. There can be no doubt that there have been many meetings between officials. My view of that—and that of my officials—is that those meetings have produced virtually nothing, because there has been no information comeback. I hope that we will go on to talk about the proposed great repeal bill, which is a useful illustration of the point. We have not seen anything

that will be in the great repeal bill. The normal process for a major piece of legislation that has implications for the Scottish Parliament is to have intensive engagement among officials in the construction of that legislation so that there is a full understanding of what is happening, particularly between the lawyers. That has simply not been happening. Those channels have, in essence, closed down.

I have heard David Davis talk about there having been a hundred meetings between the Scottish Government and the UK Government. There may have been that many meetings, but the content of those meetings has not produced any results, because no policy options, for example, have come back to us. You cannot make decisions unless you know what policy options are being considered.

The answer is that it was a good try, but it will not tell us the truth of what has taken place.

The Convener: Ivan McKee will move on to talk about the great repeal bill in a minute, but Patrick Harvie has a question about the joint letter.

Patrick Harvie: I have a couple of quick follow-up points to make. Ash Denham mentioned the joint letter from you and Mark Drakeford of the Welsh Administration. One of the issues that you seek to put on the JMC agenda is:

“Analysis of the economic impact of various scenarios, including ‘no deal’ and of reverting to WTO rules ... leaving the Single Market and withdrawing from the Customs Union.”

Can I take it from your earlier comments that you also seek to put on the agenda an analysis of the economic impact of remaining in the single market and of the other options that the Scottish and Welsh Administrations are pursuing, including the transitional arrangements that you discussed?

Michael Russell: Yes. We published some of that material in “Scotland’s Place in Europe” and the Welsh Government published some of that material in “Securing Wales’s Future”, which came out a month later. Those documents remain the most substantive contributions to the debate. We were also driven by David Davis’s admission that there had been no analysis of the no-deal scenario, which we thought was of great concern.

Patrick Harvie: If the JMC(EN) gets up and running again, is it a requirement from your point of view that it should conduct an analysis of the options of staying inside the single market?

Michael Russell: There is no doubt that that has to be a serious and costed option.

Patrick Harvie: A couple of paragraphs later in the letter, you suggest

“significantly reducing the number of attendees from the UK Government.”

Can you explain that? I remember that stacking the room was a tactic in student politics, but I am slightly surprised that it is going on in the UK Government.

Michael Russell: I would not use those terms, of course. However, it is important to realise that there is no equity of arms at the JMC and there never has been. I recall a meeting of the JMC on Europe, when I was a member of it—it was sometime in 2009—at which there were 21 UK Government ministers, me and Rhodri Morgan. It was not exactly a meeting between the devolved Administrations and the UK Government.

As it takes place before a meeting of the European Council, the JMC on Europe tends to be used as a briefing for ministers, so many of the UK ministers turn up. However, the JMC(EN) has brought to the table not just the Department for Exiting the European Union, which has been running it, but Alan Duncan for the Foreign Office, which you can understand, given the Foreign Office’s responsibility; someone from the Department for Trade and Industry from time to time; the Chancellor of the Exchequer; the Chief Secretary to the Treasury; all three territorial secretaries of state; and Ben Gummer from the Cabinet Office—of course, he is no longer in post, but I presume that the first secretary will attend. From time to time, other ministers are added, too. From the devolved Administrations, it will be me and, if a special subject is to be discussed, an additional minister—on one occasion Michael Matheson came to discuss justice—Mark Drakeford and a supplementary official, although neither of us usually has them, and two ministers from Northern Ireland. At the start of the process, the ministers from Northern Ireland were Martin McGuinness and Arlene Foster. Martin McGuinness particularly wanted to be there, and I think that he was right to ask for that level of representation. Since Martin McGuinness’s sad demise, two ministers from the Northern Ireland Executive have attended but without the power to do anything other than listen and make representation—they cannot take anything away for action.

We envisage—Mark Drakeford and I certainly envisage this, and we have discussed it a lot—a much more flexible arrangement in which there would be, probably, the DEXEU and one other representative, the devolved Administrations and additional ministers as required. We also hope that meetings will move around the country a bit, as we always meet in London. I think that I am right in saying that there has been a meeting of any part of the JMC outside London only once, and that was the JMC plenary in Cardiff at the end of

January this year. It is not inconceivable that we could have agreed agendas in time, action points and some dedicated resource for taking things forward.

The Convener: We have spent a fair time on that area, so we will move on to the great repeal bill.

Ivan McKee (Glasgow Provan) (SNP): Thanks for coming along this morning, minister. You have already touched on this to some extent, but I want to explore and get a bit more clarity on the great repeal bill and the other, associated pieces of legislation that were mentioned in the Queen's speech. To what extent has the UK Government kept the Scottish Government informed on that? What have you seen? How does it compare with the usual process at this stage of a bill?

Michael Russell: I have indicated pretty strongly where we are with that, but let me start by saying this. We have known about the great repeal bill since it was announced at the Tory party conference last year. The First Minister had a phone call from David Davis on, I think, the Saturday night before the start of the conference to say that the Prime Minister was going to announce it the next day, so we have known about its existence and the idea of it since last October. When the JMC(EN) started to get under way—was the first meeting in October?

Ellen Leaver (Scottish Government): It was in November.

Michael Russell: Clearly, the bill featured at that time, and it has continued to feature.

At the start, there was a discussion about its drafting. We were told that it would be in draft form and that it would be discussed later. We understood—we only understood, because we had not seen anything—that there would be a draft bill between the turn of the year and February. It was discussed at the January and February JMC(EN) meetings, although only to the extent that we asked to see it. Indeed, I raised the timetable directly with the Prime Minister at the JMC plenary in Cardiff in late January, making the point that we needed to see the bill and the timetable for it so that we would know what was going to take place, because we had to prepare for it.

There had been a trawling exercise right across the UK, involving the various Governments, for issues that might require to be included and problems that might arise, but we could not analyse what the issues would be in Scotland until we knew the solutions that the UK Government was planning, particularly changes to subordinate legislation.

We have not seen anything. The normal procedure for a bill that has consequences for devolved competences is that civil servants are involved at an early stage to discuss the issues that will arise and how it should be handled—the normal intergovernmental stuff. If there is a glue in intergovernmental activity, it is the informal work and liaison that civil servants do with one other and occasionally through the official part of the JMC. However, nothing has been revealed to us. No drafting has been shown to us. Even the lawyers' channels have not worked. Usually, they are active no matter what is happening—lawyers have a camaraderie that helps—but nothing has happened there.

We do not know what policy solutions will be applied. I had a conversation with David Davis about the matter in February, when he talked for the first time about bringing case law into the bill, just as a theoretical issue, and that was that.

We understand that the bill will now be published within the next fortnight. [*Interruption.*] Sorry—let the *Official Report* show that Gerald Byrne is shrugging.

Gerald Byrne (Scottish Government): We believe that it will be published shortly.

Michael Russell: We have an arrangement that our officials will discuss the bill with the UK Government on Friday. I do not think that there is any problem with my saying that—it is transparency. There will be a discussion on Friday—for the first time—in which we understand that some details of the bill will be vouchsafed to our officials in London on a confidential basis. If it happens—I am not holding my breath—that will be our first opportunity to gain some understanding of what may be in the bill.

That is just the great repeal bill; a number of other bills have also been announced. We have endeavoured to find out what is in the farming bill, for example, but we understand that the UK Government does not know.

There is also the vexed question of the subordinate legislation that will flow from the great repeal bill. I have had one conversation—or rather, two conversations—with David Davis about legislative consent, and I am pleased that he indicated in the House of Commons on Monday that there will be a legislative consent motion. The Secretary of State for Scotland had indicated that there would be, and David Davis confirmed that on Monday. However, we do not know to which parts of the bill the legislative consent motion will apply, because we do not know what is in the bill. We are presently flying blind—or rather, we have not taken off yet—but we hope that, on Friday, we will be a little bit wiser.

Ivan McKee: You might not be able to answer this question, minister, but do you perceive that the UK Government has behaved in that way because it does not know what is in the bills or because it has made a conscious decision to behave differently in respect of those bills than it might behave normally?

Michael Russell: To be fair, I think that, on many things, the UK Government does not really know. However, the great repeal bill has been in draft form to some extent for a considerable period of time. The draft may be sketchy and a lot of things will have changed, but I would have thought that it would have been possible to share it with us before now.

Of course, the election intervened, which closed things down. Officials' channels normally stay open during the election period so that there can be conversation, but that did not happen. Nonetheless, the bill has been there. Ben Gummer and I had a very brief conversation about the bill in January or February, in which he said that he would like to come up to Edinburgh and sit down with me and talk it through, but that never happened.

Ivan McKee: What concerns do you have about the timetable and the amount of parliamentary time that the bills will take up? Are we going to run out of time? Do you have concerns about that?

Michael Russell: Let us be blunt: we have to do it. To take a pragmatic approach to all this, we will have to have arrangements in place for 29 March 2019 so that the cliff edge does not crumble underneath us and we fall. We have a big job to do to put the arrangements in place.

I notice that Murdo Fraser and Adam Tomkins are nodding vigorously to each other, as I appear to be saying that Brexit will take place. I am planning for all the eventualities and trying to ensure that Scotland is not put in an impossible position. We will have to undertake this legislative task, but I am presently unaware of exactly what the task will require.

The Convener: Murdo Fraser is also interested in this area..

Murdo Fraser (Mid Scotland and Fife) (Con): Perhaps you can clarify the position with the great repeal bill, which you say that you have not seen. Have you had any briefing from the UK Government on the contents of the bill?

Michael Russell: No.

Murdo Fraser: Nothing at all?

Michael Russell: No.

Murdo Fraser: We understand that the great repeal bill will require a legislative consent motion to be passed by the Scottish Parliament. What is

the Scottish Government's current position on that?

Michael Russell: We would have to see the legislative consent motion. I have not seen it, because I have not seen the bill. I could not commit to a position on the bill or a legislative consent motion without seeing it.

I have indicated to you, as I have indicated to UK Government ministers, that I recognise the reality of the need to ensure that the legislative framework is in place at the end of March 2019 so that Scotland does not have a whole set of even more intractable difficult problems to resolve. That is where I am. Without seeing the bill, however, it would be impossible to say. We will certainly want to ensure that the framework is in place, but we are not going to be the midwife for a reduction in the powers of the Parliament—that is quite clear.

Murdo Fraser: Would you accept that the consequence of the Scottish Parliament not passing a legislative consent motion—although the Supreme Court judgment in the Miller case determined that, legally, that would not prevent the UK Government from legislating if it wanted to—would simply be to create a lacuna in Scots law?

Michael Russell: Yes, I accept that. I accept that the commitment that was entered into by the UK Conservative Government to make the Sewel convention legally binding was not honoured. In those circumstances, I accept the Supreme Court judgment. I also accept that the UK Parliament and the present UK Government can simply ignore the position of the Scottish Parliament. However, that does not mean to say that we are willingly going to accept undesirable changes to devolution. As I understand it, that is also the very clear position of the Welsh Government.

The Convener: We got into secondary legislation issues, minister. Liam Kerr wants to pick up some of them.

10:45

Liam Kerr (North East Scotland) (Con): The background briefing notes to the Queen's speech say that the repeal bill will

"create temporary powers for Parliament to make secondary legislation, enabling corrections to be made to the laws that do not operate appropriately once we have left the EU."

Do you have any information on how temporary "temporary" is?

Michael Russell: No.

Liam Kerr: Do you have anything at all on that?

Michael Russell: No—we have no information at all on that. We have seen speculation on the nature of those powers and on their being granted

to the Scottish ministers in specified circumstances—indeed, we would expect that—but we do not know what those specified circumstances are. I am sorry that I do not know.

Liam Kerr: It appears that much of the work that is to be done will involve secondary legislation. The committee has looked at the Sewel convention, which you mentioned earlier. Does the Scottish Government have a view on whether the Sewel convention applies to secondary legislation?

Michael Russell: That is a very interesting point, which we will need to debate at some length. I am aware of the evidence that the committee has taken on that, and the straight answer has to be that the Sewel convention does not appear to apply to secondary legislation. The Scottish Government raised the matter in the Smith commission. However, there are exceptions to that. The Public Bodies Act 2011 created circumstances in which the Scottish Parliament has a procedure for dealing with secondary legislation from the UK that has implications for Scotland. I want to reserve our position on what would be possible there.

The best way to approach the matter and take it forward is to have mutual respect and to say that there would be no attempt to make changes without consultation with the Scottish Parliament. Given that the Sewel convention is not justiciable, the legal position is quite clear: there would not be legal recourse. However, it would be best to show mutual respect. That is the purpose of the Sewel convention, too, of course; its purpose is that the two institutions should show respect. I hope that we will proceed on that basis.

Liam Kerr: Given the scale of Brexit, I presume that you accept that some of the secondary legislation on devolved matters might have to be made by the UK Government rather than the Scottish ministers. If so, what is the Scottish Government's appropriate level of involvement in the making of secondary legislation?

Michael Russell: I would not necessarily accept the first point, simply because we do not know that. There could be some clever fix somewhere in the legislation that the UK Government is planning, which allows things to be done very quickly and in batches. We originally thought that the legislation would be targeted towards each circumstance, but if it is much broader, as many speculate that it will be, and there is a bill that has a means of dealing with things more broadly, which are then narrowed down elsewhere, there might well be a way to do things that we can apply as well, so that there will be no need for the UK Government to do the work.

If the UK Government is to do that work, there needs to be mutual respect, for example, with our accepting, on a case-by-case basis, where a resolution of the Scottish Parliament or of both Parliaments would seem suitable. It will be about agreeing how we can work together, and that winds us back to the very start. This is an incredibly messy and difficult set of circumstances, and we need to find a way to proceed and then put it in place, so that we can make progress. We will not find that way if we do not sit down and talk about it.

The Convener: I want to unpick that a bit. Last week, we received very interesting evidence in that area from Alan Page. There will be an LCM associated with the great repeal bill, and between 800 and 1,000 pieces of secondary legislation will go through the Westminster Parliament and the Scottish Parliament. Much of the secondary legislation at Westminster will be technical and meaningless as far as the devolved settlement is concerned, but some of it might significantly impinge on devolved areas. A process for that currently does not exist through the Sewel convention.

You began to explore other potential areas. An approach that Professor Page suggested would be interesting for us to look at is

“to make the exercise of subordinate law making powers in the devolved areas subject to parliamentary procedures in both the UK and Scottish Parliaments, models for which are to be found in Schedule 7 to the Scotland Act 1998.”

Is the Scottish Government considering that? Have you had a discussion with the UK Government about the approach? If you have not, are you going to?

Michael Russell: We have not, because the UK Government has not discussed the matter with us or discussed the bill with us.

I have looked at schedule 7. Quite clearly, as I have just indicated to Mr Kerr, the proposal that you mention would rely on resolutions from both Parliaments. That is a distinct possibility, but I stress that, although we can probably make the process work pretty well if we are going to find a way of working together, if there is an intention that things will simply be imposed, a difficulty will arise. The approach to the process is as important as the legality of it.

I read Professor Page's comments. We have to remember that the Scottish Government reports to the Parliament every six months on transpositions, so this is not an area that is completely unknown. Things happen, but they happen with the consent of the Scottish Parliament. That is the position from which we should stand back and look at the matter. I hope that Westminster would not wish to legislate in ways that did not have the consent of

the Scottish Parliament. If that is understood, we can deal with this.

The Convener: You mentioned the importance of frameworks, minister. Maree Todd would like to pursue that point.

Maree Todd (Highlands and Islands) (SNP): Having heard about the asymmetric—and shambolic—nature of the intergovernmental relationship, I would like to know how concerned you are about the possibility that, instead of seeking agreement, the UK Government will simply impose UK-wide frameworks in areas that are currently devolved, such as agriculture, fishing and the environment.

Michael Russell: We are very concerned about that, and that concern is shared by Wales and, in part, by Northern Ireland.

The language that is being used is quite interesting, and I think that we need to unpick it. There seem to be two sets of assumptions. One is that there is a set of frameworks in Brussels that deal with these matters, which can be transposed by placing that decision making in Westminster and then discussing what happens next. Those decision-making processes in Brussels are, essentially, co-decision-making processes that are engaged in by independent members. The Welsh have said that, if the proposal is to create the equivalent of a ministerial council and have a co-decision-making process, they are prepared to discuss that, as long as the process starts with the devolution of all matters that are to do with, say, agriculture to the devolved Administrations and there is a subsequent discussion about how those powers are exercised. I have absolutely taken the same position. If, once the process is completed, there is to be a discussion along the lines of the proposal that was made during the referendum campaign, which involved all the powers being devolved to the various Administrations, that is a feasible way to proceed.

What is not feasible is for the UK Government to make an ex cathedra decision to direct all those powers to Westminster and then, at an unspecified moment in the future, to engage in negotiations and discussions about them, using a process that is not agreed—that point is particularly important, given that even the process that we have in the JMC(EN) is not operating. We will go forward on the basis that that is not acceptable.

There are some hints that decisions have already been made. I notice that, in his paper, which provided a helpful analysis of the two views that exist, Charlie Jeffery pointed out that the Tory manifesto contains a reference to UK agricultural policy. That is concerning. Further, we have seen the language of a UK single market being used. That shows an erroneous understanding of what

exists on the ground and how it operates in terms of devolution.

There is some way to go to resolve the situation, but I hope that there will be a willingness to resolve it. The wrong way to proceed would be to shove such matters into pieces of Brexit legislation and say, “Like it or lump it, we will talk about it later.” We would not accept that.

Maree Todd: Do you have any proposals for how those issues could be resolved? Some of the people who gave us evidence spoke about arrangements in other European countries, and Belgium was held up as a particularly good example, because the intergovernmental relationships between regional and central Government are effective. Do you have proposals for how that should work going forward?

Michael Russell: Yes: we start with a JMC(EN) that is actually working, we look at a set of proposals for taking issues back to the devolved Administrations, and then we accept a power-sharing arrangement, where that is appropriate and necessary. Where it is not appropriate and necessary, we say, “Well, we’ll be operating our distinctive policy.” That is the basis of devolution. For example, the Scottish Government took forward single-unit pricing for alcohol, because we had a specific proposal for specific circumstances. The logic of the UK position on the so-called single UK market—which is an internal market, not a single market—means that that could not have happened, because it would have been seen as a barrier to trade.

We need to be careful. Charlie Jeffery correctly identifies a divergence of view about where we are and where we want to go, and it is important that we discuss that through a structure that allows us to resolve it. The JMC(EN) is where we should be talking about that.

Neil Bibby: Are there any circumstances in relation to agriculture and fishing where the Scottish Government believes that a UK common framework would be beneficial to those industries?

Michael Russell: An example is animal health, which already operates on a collaborative basis, because it needs to do so. If I remember correctly from my time as Minister for Environment, there was a single budget for animal health in the UK at the start of devolution, which was eventually devolved, so the nations took responsibility for those parts of that policy area that were not done in Europe and agreed to work closely together. Of course, they also worked through the European veterinary framework, so there was a European element that helped and enhanced what was being done in these islands.

We are absolutely ready to sit down and talk about those issues, and they are new issues

because of the Brexit process. What we are not willing to do is to accept as given the default position that everything reverts to Westminster and nothing reverts to the devolved Administrations unless Westminster says so. That is where we have got to, from the start of this process, when the promise from the leave campaign was that all those matters would go to the devolved Administrations.

The area needs sensitive handling, but the start is to accept the principle of devolution, and then we can sit down and talk about how those things can work. The Welsh Assembly Government published a paper two weeks ago on its views on the matter, which was very helpful. I did not agree with all of it, but I think that it has been a helpful contribution, and we will bring forward some ideas of our own. We want to sit down and talk about it. It is impossible to make progress unless we talk about it.

The Convener: One of the suggestions in the Welsh paper is for a voting procedure through a UK council of ministers framework. What did you think of that?

Michael Russell: It is an idea. We have to start with the principles that apply and then move forward. There will be many ideas about how to resolve those matters. Europe has been bedevilled by issues such as qualified majority voting, so it is too early to talk about those. The paper is a welcome contribution on the table. A lot of thought has been put into it and it shows the real concern in Wales. There is a strong introduction from the Welsh First Minister, Carwyn Jones, about the reality of the constitutional structure that we have now and how different it is from the 1970s, and he is not prepared to allow that to be rolled back. His fear—and the great fear of the Welsh, which I echo—is that, if the frameworks operate in the way that currently appears to be proposed, they will roll things back.

The Convener: I know that James Kelly wanted to ask about legislative impact—I am not sure whether your concern has been covered by previous responses.

James Kelly (Glasgow) (Lab): It has been covered.

The Convener: If there are no further questions, I thank the minister for coming along this morning. We have covered a lot of ground in a lot of detail, and we are grateful to you.

10:59

Meeting continued in private until 11:20.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba