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Cenedlaethol
Cymru

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Wales

Cofnod y Trafodion The Record of Proceedings

Y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol

The External Affairs and Additional Legislation Committee

07/11/2016

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Meeting Agenda

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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynnddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd. Lle y mae cyfranwyr wedi darparu cywiriadau i'w dystiolaeth, nodir y rheini yn y trawsgrifiad.

The proceedings are reported in the language in which they were spoken in the committee. In addition, a transcription of the simultaneous interpretation is included. Where contributors have supplied corrections to their evidence, these are noted in the transcript.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Dawn Bowden Bywgraffiad Biography	Llafur Labour
Hannah Blythyn Bywgraffiad Biography	Llafur (yn dirprwyo ar ran Eluned Morgan) Labour (substitute for Eluned Morgan)
Suzy Davies Bywgraffiad Biography	Ceidwadwyr Cymreig Welsh Conservatives
Mark Isherwood Bywgraffiad Biography	Ceidwadwyr Cymreig Welsh Conservatives
Steffan Lewis Bywgraffiad Biography	Plaid Cymru The Party of Wales
Jeremy Miles Bywgraffiad Biography	Llafur Labour
David Rees Bywgraffiad Biography	Llafur (Cadeirydd y Pwyllgor) Labour (Committee Chair)

Eraill yn bresennol
Others in attendance

Piers Bisson	Llywodraeth Cymru Welsh Government
Dr Joanne Hunt	Prifysgol Caerdydd Cardiff University
Carwyn Jones Bywgraffiad Biography	Aelod Cynulliad, Llafur (Y Prif Weinidog) Assembly Member, Labour (The First Minister)
Yr Athro/Professor Michael Keating	Prifysgol Aberdeen University of Aberdeen
Dr Lee McGowan	Prifysgol Queens, Belfast Queen's University, Belfast

Dr Rachel Minto	Prifysgol Caerdydd Cardiff University
Akash Paun	Sefydliad y Llywodraeth Institute for Government
Andrew Slade	Llywodraeth Cymru Welsh Government
Yr Athro/Professor Roger Scully	Prifysgol Caerdydd Cardiff University

**Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance**

Alun Davidson	Clerc Clerk
Gwyn Griffiths	Cynghorydd Cyfreithiol Legal Adviser
Elisabeth Jones	Prif Gynghorydd Cyfreithiol Chief Legal Adviser
Rhys Morgan	Dirprwy Glerc Deputy Clerk

*Dechreuodd y cyfarfod am 13:57.
The meeting began at 13:57.*

**Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introductions, Apologies, Substitutions and Declarations of Interest**

[1] **David Rees:** Good afternoon. Can I welcome Members and the public to this afternoon's meeting of the External Affairs and Additional Legislation Committee, where we continue our evidence gathering into the implications for Wales of the decision to leave the EU? This afternoon, we'll have two separate sessions. In the first session, we welcome the First Minister, and the second session will be focused upon the intra-UK structures.

[2] Before we start, can I remind everyone that the meeting is bilingual? If you require headphones for simultaneous translation, please use them on channel 1. They are available for amplification on channel 0. Please turn your mobile phones off, or any other electronic equipment that may interfere with the broadcasting equipment. If there is a fire alarm, we're not scheduled for one, so please follow the directions of the ushers to leave the building. We've received apologies this afternoon from Michelle Brown, but there is no substitute, and from Eluned Morgan, and we have Hannah Blythyn substituting, so welcome this afternoon.

13:58

**Gadael yr Undeb Ewropeaidd: Y Goblygiadau i Gymru—Sesiwn
Dystiolaeth gyda'r Prif Weinidog
Leaving the European Union: Implications for Wales—Evidence Session
with the First Minister**

[3] **David Rees:** We therefore go straight into the first evidence session. Can I welcome the First Minister this afternoon to the meeting? First Minister, would you like to introduce your officials?

[4] **The First Minister (Carwyn Jones):** Yes. Andrew Slade, to my left. Andrew, your official title?

[5] **Mr Slade:** Director of agriculture, food and marine.

[6] **The First Minister:** And Piers to my right.

[7] **Mr Bisson:** Deputy director of European transition.

[8] **David Rees:** Thank you very much. And can I thank you for attending today, following on from our session in September? We've hopefully progressed a bit further along the lines. If I open the questions and ask a very simple one: I think, in your statement last week, and perhaps in various public statements, you've expressed disappointment and frustration at the lack of detail that's been emanating from Westminster in relation to the negotiation strategy, and the direction we seem to be taking in the UK. But perhaps you could tell us where you see Wales's vision of where we should be going, and what you would want to see as part of the negotiations on

behalf of Wales with the EU?

[9] **The First Minister:** Well, for me, the principle that is absolutely essential is that of full and unfettered access to the single market. For me, the settlement should be crafted around that one immovable principle.

14:00

[10] If we look at freedom of movement, for example, to me it seems that many people are not content with the current system of freedom of movement, but I do think that it's inevitable that there will be a need for a system of allowing people to move around Europe in order to keep economic growth moving. That, to me, is less important than the issue of full and unfettered access to the single market. There are other issues that are important to us, namely, of course, securing funding, particularly beyond 2020, and, of course, the need to secure the rights of EU citizens who are currently in Wales.

[11] **David Rees:** Thank you for that and I've got colleagues who will want to perhaps explore some of those points a little bit further. What I also want to try to identify is the modelling that might be being undertaken now by the Welsh Government. Last time we met, I don't think there was any modelling being prepared. Have you, as a Government, actually started modelling different scenarios, as different options might come through—whether we're going to have a European Economic Area-type option, a World Trade Organization option or whether it will be some form of free trade agreement? Have you started any modelling at all in relation to what the impacts might be upon Wales?

[12] **The First Minister:** Some initial modelling. We've looked, for example, at the EEA model and the customs union model, particularly, but I feel that we need to explore more deeply what these models mean. I'll be going to Norway in January. I've heard different things about, for example, how freedom of movement operates in Norway. I think it's important to understand at first-hand how Norway's relationship with the EU works and for us to understand how that model might work or might be adapted as far as the UK is concerned.

[13] In terms of the economic modelling, it's clear to me, having spoken to many businesses over the past two months, that businesses feel uncertain and that they're holding off investing for now. They're not saying 'no' for the

future, but the uncertainty is a major factor for them and they want to see an idea of what position the UK will be taking in the future. I don't expect, at this stage, that there will be a detailed negotiating strategy in place, but I hope to see, at some point, an idea of what the UK Government's main principles are in terms of what sort of deal it wants to get.

[14] **David Rees:** Will you be going to Switzerland as well because, obviously, they've had a referendum on the movement of people issue and, as a consequence, they're facing different challenges?

[15] **The First Minister:** Switzerland is a different model. It is a model that looks more like a series of free trade agreements brought together. Service industries are excluded from access to the single market and it's true to say that there is currently a dispute between the EU and Switzerland over the issue of freedom of movement.

[16] **David Rees:** Thank you. Obviously, last week's High Court ruling has made a slight difference and I will move on to Jeremy to ask questions on that area.

[17] **Jeremy Miles:** On the decision last week at the High Court on article 50 and the role of Parliament in that, I think that a summary of it could be to say that the prerogative can't be used because at the end of the two-year period, rights conferred by primary legislation would disappear. That would presumably also encompass, obviously, devolved competencies. So, what's your thinking about whether a legislative consent motion would be needed in those circumstances and, if so, what conditions might you attach to it before you recommended it to the Assembly?

[18] **The First Minister:** It's quite possible that that might happen. Much of this depends, of course, on what the so described 'great repeal Bill' has in it. The way it's been presented to me is that this is a way of enshrining EU law across the different jurisdictions of the UK so that they're not lost when the European Communities Act 1972 is repealed, which is a sensible move—I understand the reasoning behind that—but what we don't know yet, however, is what the effect might be on, for example, Wales or Scotland. I'm told that there will be a section on Wales in the Bill, but it's important that all that does is to enshrine the status quo legally, rather than encroach on the Assembly's powers.

[19] **Jeremy Miles:** So, the great repeal Bill will be a separate piece of

legislation, presumably, from the article 50 trigger—I'm assuming at this point. So, at the point next year when presumably the article 50 mechanism will kick in, we probably won't have any certainty at that point about what the great repeal Bill will look like, unless there have been discussions around that, I suppose. If we don't, is it the Government's view that we would still need a consent motion at that point?

[20] **The First Minister:** It's difficult to give an answer on that until we know what the Supreme Court say and whether they provide a judgment that is different in whole or in part. But, clearly, if we see that there is an encroachment on the Assembly's powers, there will be a need for an LCM. I suspect that that will be needed particularly with regard to the repeal Bill, but, again, we don't have a timetable for the repeal Bill, so it's difficult to know when this would be needed and what the content would be, given the fact we don't know the content of the original Bill that might be proposed.

[21] **Jeremy Miles:** You've said that you want all four Parliaments of the UK to have an opportunity to ratify the deal, if you like, on Brexit. What mechanism would be used to get to that point? Would that be through a consent motion of some sort? What else might be used to get to that point?

[22] **The First Minister:** I would hope that, at that point, we can get to a position where we're in broad agreement across the UK and then bring that agreement to a vote in the four different Parliaments. I think there's sense in doing that. The wider the buy-in of any agreement, the more durable it will be. Secondly, there are some areas, of course, such as fisheries, such as farming, where there is little role for the UK Government. So, it's important that the devolved Governments, and Parliaments indeed, are able to express a view on what, for example, the final settlement for farming is, given the fact that the UK effectively has no role in farming at the moment.

[23] **Jeremy Miles:** Okay, and finally from my point of view, on the question of the European repeal Bill and what that looks like in the end—obviously, we don't know at this point how it's going to look—is there a dialogue going on about what the devolved administrations want to see it looking like?

[24] **The First Minister:** I've made it clear that what I want to see is a Bill that simply enshrines what is there already. It would be a matter then for the four Parliaments, according to their devolved competencies, to look at what is to be kept and what isn't to be kept. That's a sensible position. I can understand the UK Government doing that, but, of course, anything that

encroaches on devolved powers has to be watched very carefully.

[25] **David Rees:** On that particular point, you've previously expressed concerns over the Wales Bill and the reservations within the Wales Bill. Have you done any analysis as to how the great repeal Bill may have an impact that's consequential to the Wales Bill because, obviously, the Wales Bill will be coming to force at some point in time when the great repeal Bill is being discussed?

[26] **The First Minister:** Well, there's a particular issue with fisheries. Scotland has more control over its fisheries than we do. That makes no sense in the future. We need to make sure that the legislative and executive competencies are both aligned in Wales, and aligned then with the competencies that already exist in Scotland and Northern Ireland. When this was covered by the common fisheries policy, it wasn't that much of an issue, but it does become an issue as we leave the common fisheries policy.

[27] **David Rees:** Okay. Thank you for that. We'll move on to the question of the single market. Suzy.

[28] **Suzy Davies:** Thank you. First Minister, you've just said that your core aim here is to have 'unfettered' access to the single market. In order for it to be unfettered, what else do you think may have to give in order to ascertain that?

[29] **The First Minister:** I think there'll have to be compromise. I think there will have to be discussion and compromise, for example, regarding freedom of movement. There are two conflicting positions that can be taken. One is to regard the market as the most important issue, or to regard immigration and freedom of movement as the most important issue. I take it that the market's the most important issue. Why? Because I know that any imposition of tariffs or regulatory barriers would be bad for Welsh business. Why? Because we have so many investors who have come to Wales, or will come to Wales in the future, who see Wales as a gateway to the European market because of its sheer size. If we are not seen as a gateway in that way, it'll affect jobs and investment. That, for me, is the last thing we need to interfere with.

[30] **Suzy Davies:** Okay. Thank you. I'm sure you've seen the poll that was conducted on 20 October by Professor Scully's organisation. In that, it said that half of those who voted to leave the European Union, or just over half actually, were happy for it to be a trade-only deal, and about an eighth of

those who actually would prefer to remain said, 'A trade-only deal would be okay.' But, when the option of a wider deal was given to them, the difference was much starker. Of those who chose to leave, less than 10 per cent were willing to have a wider deal and actually only just over a quarter of those who wanted to remain were in favour of the wider deal. In short, there were an awful lot of 'don't knows' in there. What can you say to us that helps us be persuaded that your view is the right view to reflect the view of the people of Wales?

[31] **The First Minister:** All we know is that people voted to leave the EU. We don't know anything else.

[32] **Suzy Davies:** Well you've got a little extra there.

[33] **The First Minister:** No, we don't know. People on their doorstep will give you a wide range of views. Nobody said to me, 'I want to leave the single market.' People did talk about immigration, that's true. People talked about issues that weren't to do with the referendum—they wanted to 'Kick the Government', as they put it. Other people talked about the fact that money was leaving the UK. But the single market, as expressed in that way, wasn't an issue. The difficulty for us as politicians is to try to understand what exactly people want. I suspect that there are many different views on what people want to see, given the fact that the basic question has been answered, but the detail has not yet been resolved. For me, if I would say to people on the doorstep, 'Do you want to make sure that there are more jobs coming into Wales, and to keep the jobs that we've got?', I think the answer would be 'yes'. But, of course, that means that that is the priority rather than dealing with the issue of freedom of movement. But you can't have both. There is a trade-off between one and the other. But, for me, people being able to keep their jobs and to attract more, better-paid jobs into Wales has to be the main objective.

[34] **Suzy Davies:** Well, thank you for that. It's just that the polling findings, where those questions were put—obviously not with the level of detail that perhaps we would both like to see—seem to suggest that those who have a view on free movement really hold that view quite strongly. So, I go back to my question about how you are going to find out how the 'don't knows' would like this question answered, and how your advisory committee is trying to get to those 'don't knows' to help you answer that question.

[35] **The First Minister:** I think the difficulty is that there are many, many,

many different views, even on the ‘leave’ side, as to what ‘leave’ actually looks like. For example, people said to me, ‘We want to control our borders’. It’s now clear that that will not happen. I knew it wouldn’t happen because the border with Ireland will be open. It was always a myth that the UK would control its borders, but people still don’t quite understand that that isn’t going to happen and there will have to be some kind of agreement with the EU anyway over the issue of the border. It affects us in Wales because we have three ferry ports that have access to Ireland. We don’t know yet—. There are bound to be customs controls, if we are outside of at least the customs union, as there were before. There may well be passport controls in the future. No-one wants this on either side. I understand that. But these are things that we have to prepare for, and what that would do in terms of creating a backlog of trade and traffic going through those ports.

[36] Now, the difficulty is—. The best analogy I can give is that this is like a divorce—the work I used to be involved with some time ago. Divorce is easy. The decree nisi, decree absolute—easy stuff. It’s the detail that counts. What happens with the money? Who gets what? That’s the really difficult bit, and that’s where we are. That’s the closest analogy that I can give. The divorce is the easy part. Leaving the EU is the easy part. It’s who gets what is the difficult bit that has to be done sensibly.

[37] **Suzy Davies:** Okay. Bearing in mind that you said there is a great range of views and a mixture of views, how are you going to distil that down in order to take it to the UK negotiating table?

[38] **The First Minister:** With some difficulty. With some difficulty, because I think it’s going to be pretty much impossible to try to crystallise everybody’s view into one view because, even on the ‘leave’ side, people will take different views on what they think the final outcome should be. I have to make a judgment on what I think is in the interests of Wales. To me, my judgment is that what is in the interests of Wales is being able to keep the jobs that we already have, and our historically low level of unemployment, and to attract more jobs in the future. I base that on what companies have said to me: that the UK is not big enough as a market to be attractive in and of itself. It’s a big economy, but, in terms of the number of consumers, it’s eight times smaller than the EU. So, when I hear businesses saying to me, ‘We’re going to hold off to see what happens, but the last thing we want is to see any barriers—whether they are financial or whether they are regulatory—put in place between the UK and the EU’, that is something we fear. I heard that expressed many, many times when I was in the States in August

[correction: September]—that that fear is great.

[39] **Suzy Davies:** Can I just ask you what they were prepared to accept in terms of fetters in order to have access to that single market?

[40] **The First Minister:** Tariff-free access.

[41] **Suzy Davies:** Okay.

[42] **The First Minister:** To me, I have to say, if we can be in a position where we have tariff-free access to the EU, it makes sense to have little difference in regulatory regimes anyway. That would be it.

[43] **Suzy Davies:** Apologies, but what I meant was—

[44] **David Rees:** Thank you. I have got two supplementaries.

[45] **The First Minister:** Tariff-free access, for me, is the most important thing.

[46] **Suzy Davies:** That's what they want, but what would they be prepared to give up in order to get that—those companies?

[47] **The First Minister:** For them, they want to see tariff-free access. Freedom of movement is not an issue for them. In fact, it is the converse, because, for them, they want to be able to get the skilled people in that they need, especially at managerial level. But, for them, it is access to the single market that is the be-all and end-all.

[48] **David Rees:** There are two people who wanted supplementaries on this by right: Mark, and then Steffan.

[49] **Mark Isherwood:** Thank you. When we visited the Swiss consulate, they told us that, compared to them—and you indicate the situation in which they are in—we are a big player and that we must play to that, not just for ourselves, but also for nations like themselves who want to be part of the European family, but don't necessarily want the template membership model. You referred to Norway in the context of free movement of people. I'm sure you'll concede that we cannot be a full member of the single market unless we're signed up to the four core principles, including the free movement of people. Norway also pays its full contribution financially into the EU, and is

bound by European Court of Justice rulings. So, are you also stating that you believe those should be secondary to

[50] 'full and unfettered access to the single market'?

14:15

[51] **The First Minister:** I think that they are less important than full and unfettered access to the single market, yes. As far as Norway is concerned, it doesn't have freedom of movement as such because there are controls on the ability of people to move to Norway and not get a job within a certain amount of time. So, it doesn't quite have freedom of movement that is absolute—again, different to what exists within the EU itself. Now, the customs union model is another model that can be looked at. We can look at a free trade deal model, but the reality is that would take many years to negotiate. Canada has taken seven years to negotiate its free trade deal with the EU. One of the issues that I think will need to be wrestled with is whether there is a need to look at a bridging option that covers the time between the ending of the article 50 period of two years and the establishment of a more permanent system. To have nothing and to fall off the edge of a cliff in between, I think, is very bad.

[52] I don't think it's possible to negotiate a free trade agreement within two years, especially when we're looking at the fact there are many, many other countries as well that we'd have to negotiate free trade agreements with—it's impossible; it can't be done. Time is not in our favour, so, for me, the best outcome would be an outcome that has that unfettered access to the single market. It may be the EEA. It may be a customs union. It may be possible, so the UK Government tell us, to have a bespoke agreement—but the reality is I don't think anyone knows at this stage what is and what isn't possible. But I think it is important that we outline at this stage what we think, what I think the main priorities are for me. There is no way of—. You can't reconcile—you can't have free and unfettered access to the single market unless there's some kind of compromise over freedom of movement, and it works the same the other way round.

[53] **Mark Isherwood:** And whatever the individual views of Members round this table might be, you still contest that those who voted to leave were not minded by free movement, financial contributions and European Court of Justice rulings.

[54] **The First Minister:** ECJ rulings, less so. Immigration: yes, that's correct. Money: yes, that's correct. People said to me, 'Of course, there'll be £350 million extra for the NHS every week'—that turned out to be untrue—so, that motivated people. I have to say, a lot of people said to me, 'I want to kick David Cameron'—a wholly unrelated issue to the referendum, but I did get that on the doorstep. For others, although they didn't express it in these terms, it was globalisation. People said to me on the doorstep, 'I remember when my father'—usually father—'had a job underground or in the steelworks; it was well-paid, it was secure, there was a pension at the end of it. I haven't got that. Why? Someone's to blame.'

[55] Now, the difficulty with free trade agreements is that that could make the situation worse. If you have a free trade agreement with an equivalent block or country in terms of GDP, it can work well. If you have a free trade agreement with a country that has far lower costs than you in manufacturing, you can potentially destroy your own manufacturing base. So, free trade agreements, actually, are not the panacea that people think that they are. There is the potential there to actually make things worse for those people who feared the effects of globalisation.

[56] **David Rees:** Thank you. Next question, Steffan.

[57] **Steffan Lewis:** Thanks, Chair. You mentioned, First Minister, the regulatory frameworks and that this is a big concern for industry in particular, alongside the risk of tariffs. I wondered if you'd done any exploring of, in the event of there being a hard Brexit, whether aspects of regulatory frameworks would actually be devolved, de facto. So, in certain sectors such as food standards and environmental standards, would it be a simple matter of regulatory frameworks being the area of responsibility of the UK Government or would some of those things potentially fall down to the devolved administrations?

[58] **The First Minister:** Those are two areas where they're already devolved more or less anyway. Now, it would be a matter for the devolved Governments to take a view on what they wished to keep and what they didn't wish to keep. In some areas, it would make sense for there to be agreement—and I stress the word 'agreement'—between the different Governments on a common policy: animal health, for example. It would be very difficult to have three different systems of animal health on this island. It would make sense for there to be one system—but agreed, not imposed; that's the important issue from my perspective. I suspect that, where there

are different regulatory regimes in place, any business will simply comply with the most onerous, because by doing that they get access to the most markets anyway. So, let's say, for example, there were to be regulations at UK level that were less onerous than those at EU level, any business that exports is just going to follow the EU standards anyway, because they want to export to the EU.

[59] **David Rees:** Thank you. We'll move on the next questions on the impact on public services. Dawn.

[60] **Dawn Bowden:** Yes. If I could, First Minister, just bring us back to devolved public services, we've taken a number of evidence sessions from organisations representing health, local government, higher education, public sector bodies generally, and the thing I think that struck me, and I'm sure struck others as well, is that there seemed to be little or no preparation under way for thinking about and contemplating the potential impact of Brexit on our devolved public services, whether it's around contracts, whether it's around procurement or whether it's around the number of EU staff who are employed, particularly around health and social care. I just wonder whether you had any thoughts about why there was this lack of preparation. It almost seemed like a process of denial that a lot of our public services were in. What action do you think the Welsh Government could actually take to get these organisations to sit up and start making some kind of preparations for the eventualities, whatever they might be?

[61] **The First Minister:** All departments in Welsh Government are focused on this, as can be imagined. There have been discussions with the NHS Wales executive board, the major issue, of course, being recruitment of doctors and nurses and what effect a tightening of visa controls, or an introduction of visa controls, might have on their ability to recruit. So, they're very much aware of the problem.

[62] We are working with the Welsh Local Government Association. Councillor Phil Bale, leader of Cardiff Council, is a member of the European advisory group, there representing the WLGA. So, he is their liaison with them. We are discussing Brexit at the workforce partnership council later this month as well. So, that will be an issue that will be looked at, particularly looking at the contribution that workers from outside the UK actually make to the economy and what the impact would be of controls on moving—all these things need to be considered. I wouldn't agree, necessarily, that the public sector's not aware of what's happening, but, as with everybody at the

moment, nobody is aware what the details are and what the final outcome might be. So, they can prepare for different scenarios, but they don't quite yet know—well, no-one knows—what exactly they're being asked to prepare for.

[63] **Dawn Bowden:** The other aspect of that, which I think again was a concern to us, was that, with the exception of the NHS, very few of the public sector bodies were able to give us any kind of information around the level of non-UK citizens that they employ, and the potential impact that that might have. I know, from my time when I was on the workforce partnership council, that we struggled to get local authorities, in particular, to do that kind of work. So, is that a piece of work that you think the local authorities should now be prioritising?

[64] **The First Minister:** Well, this is work that never had to be done before, of course, which is why it wasn't done, but we are looking at how we can do this work, taking it forward, particularly, with the public policy institute so that we can get a better idea statistically of what the spread is of EU workers in Wales.

[65] **Dawn Bowden:** Okay. My final point, Chair, if I might, is on public sector finances. You made a statement very early on in the process that we would need to address the whole issue of the block grant and the Barnett formula. Have you formulated any other thoughts on that at this stage, because, obviously, the way in which devolved public services in particular are going to be funded is going to be, we would assume, quite different post Brexit?

[66] **The First Minister:** Well, we're not supportive of the Barnett formula. It's long past its sell-by date. A floor is welcome, of course, and discussions continue on what the fiscal framework might look like with the devolution of more taxation powers. The issue for us, of course, is what happens, particularly post 2020, with the European funds that would have been available for Wales. There's some funding that would have been there as of right—for example, convergence funding. Our hope would be to be in a position where we no longer qualify, but there would have been transitional funding in place if that was the case, anyway. At the moment, we'll just go off the edge of a cliff in 2020.

[67] There are some areas of expenditure where we wouldn't want a Barnett share anyway. Agriculture is a prime example of it. If we had a

Barnett share of spending for agriculture, we'd see a significant cut in funding for Welsh farming. We've always been funded on the basis of the number of animals that we have, not people, which is fortunate because I think it's about five times higher as a result of that. So, for me, the objective with farming would be that there is a pot of money set aside that we all have a fair historic share of in order to support our agricultural industry.

[68] **Dawn Bowden:** Okay.

[69] **David Rees:** Thank you. I have two supplementaries: Steffan and then Jeremy.

[70] **Steffan Lewis:** Thanks, Chair. One of the unforeseen consequences so far of Brexit has been the plummeting pound, and the Bank of England's reporting an expectation of inflation increasing next year. How have you taken that into consideration in terms of Welsh public services, particularly when it comes to procurement of materials and services that are purchased using sterling? Is that something that you foresee having an unexpected effect on your budgeting plans for next year, in particular?

[71] **The First Minister:** I met with the Bank of England's agent in Wales this morning. At the moment, the slide in the pound is helping exports. That's true. If you're an exporter, then the price of what you sell has dropped. But what we expect to see over the next few years is a gradual increase, of course, in input costs. I suspect the pound may have further to go yet, because every time there's an announcement about Brexit, the pound slides.

[72] It's difficult to know where the pound will be in a year's time, other than, I suspect, it's not going to be much higher, at the very least, than it is now. That means, for example, that, in the steel industry, export prices have been great, but now, of course, input costs—with hedging disappearing over time for coal and for iron ore, they will go up, and that will have an effect on input costs. So, whilst it can be easier to sell the final product, the cost of producing it will go up in time. That'll have an effect on inflation, that is bound to have an effect across Government, and it's bound to have an effect where we have to procure from abroad in currencies other than sterling. Our procurement policy has been to continue to push procurement from within Wales; we've been successful in doing that, but it's right to say, of course, that, if we find that we are buying from outside the sterling area, then prices will go up pretty soon, but certainly in the medium term.

[73] **David Rees:** Jeremy.

[74] **Jeremy Miles:** The last time you were here giving evidence, we discussed the question, on the future funding mechanism, of the prospect of a statutory basis for the funding arrangements. I think you thought that might be a sensible way forward. Has—

[75] **The First Minister:** I think it is. Sorry—

[76] **Jeremy Miles:** Has your thinking on that evolved and what status does that play in the discussions to date, if so?

[77] **The First Minister:** I think it's fair to say that it's not a view that finds favour with the Treasury. In Australia, of course, there is a similar system—the Australian grants commission—where you don't have one organisation that effectively represents a Government with two hats on at the same time. For me, moving funding onto a firmer statutory basis makes perfect sense; it doesn't if you're in the Treasury. That said, our discussions with the Treasury over the fiscal framework continue; they've been good discussions and we're hopeful of an outcome that will be a fair outcome for Wales. In the longer term, as we move—we only have a quasi-federal system, but, as we move to a system where there is a need to make sure that there is more neutrality in the way that money is allocated, then a grants commission style solution, to me, long term, is the answer.

[78] **Jeremy Miles:** And this is presumably something that the devolved administrations would share a common interest in.

[79] **The First Minister:** Scotland wouldn't, because Scotland over-benefits from Barnett, and I suspect that Scotland is quite content with the situation at the moment. This is the problem.

[80] **Jeremy Miles:** But the principle of a statutory mechanism is a shared interest, I guess, isn't it, between—? The actual formula might differ, I guess.

[81] **The First Minister:** I think there's also merit in listening to the voices that exist in the regions of England. The trouble is it's difficult to know who those voices are. We have a mayor of London, we'll soon have an equivalent figure in Manchester, but, if someone said to me, 'Who is the voice for the north-east of England?' there isn't anyone. Who is the voice of the south-west of England? There isn't anybody. But I think English regions have a stake

in this as well; it's not just about the nations. Finding a way of listening to their voice is important as well.

[82] **David Rees:** Thank you. I want to move on, because you've already highlighted the issue in steel, and the steel crisis, clearly, is a still ongoing major point. Hannah.

[83] **Hannah Blythyn:** Thanks, Chair. What difficulties do you think the UK Government's industrial strategy is creating in terms of us being able to assess and determine Welsh needs in respect of trade and manufacturing within those sectors like steel or aerospace, which are key to our economy?

[84] **The First Minister:** I don't agree with the approach that's been taken so far of a haphazard sector-by-sector approach to market access. A week last Monday, I was in Downing Street in the joint ministerial committee, the Prime Minister was there and I said to her—I'll repeat the words I used earlier on—that I didn't expect there to be a detailed negotiating strategy at this stage, nor, if they had one, that they'd share it with me at that stage. But I did expect to have some idea of what the general direction was. I asked her straight—'Look, will you rule out agreeing any deal that includes tariffs?' She would not rule that out. Two days later we get the announcement on Nissan, which originally was specific to Nissan, and then, a day or so later, was said to be specific to the automotive sector. I wouldn't disagree with the UK Government, and I think the phrase that I'd use is using its best endeavours to ensure tariff-free access for the automotive sector. But what about steel? What about aerospace? I don't think a sector-by-sector approach works. I think it's better to say we want tariff-free access, full and unfettered access, to the single market for all sectors. But that's not the approach that seems to have been taken so far.

14:30

[85] **Hannah Blythyn:** Specifically on steel, at the Economy, Infrastructure and Skills Committee in October you said you had the impression that the steam has run out in London, and we aren't seeing the same level of momentum or personal involvement by the Ministers. You've just alluded to a meeting with the Prime Minister, but do you think there has been progress in terms of how the UK Government specifically is addressing the challenges faced by the steel industry, particularly in the light of Brexit?

[86] **The First Minister:** Well, the Prime Minister is in India. I understand she

hasn't been able to secure a meeting with Tata, which is unfortunate, but I do think it's important that the UK Government realises that the pressure is not off. Yes, it's true to say that the situation is better than it was in March, but there are still serious issues that will need to be addressed. We've put a package on the table. We do need to see progress on the issue of pensions. I don't underestimate how difficult that is, but we need to see progress on it. We also need to see further progress—let's see what the autumn statement says—on energy costs for energy-intensive industries. I wouldn't want the UK Government to think that because things are quieter than they were, that somehow the issue has gone away. That simply isn't the case.

[87] **David Rees:** Obviously, I declare an interest in the sense that Tata and its Port Talbot works is in my constituency. But you said she hasn't secured a meeting. Has she asked for a meeting? That's the important question I'd like to know.

[88] **The First Minister:** That's all I know. What's been happening before that I couldn't tell you.

[89] **David Rees:** Suzy.

[90] **Suzy Davies:** I'm less likely to know, Chair. [*Laughter.*] Going back to what you said about Nissan earlier on, I recognise the concerns you expressed there, but, if that deal had been with Tata or the steel industry sector generally, would your response have been the same?

[91] **The First Minister:** I would have welcomed it for steel, but then I would have said, 'What about automotive and aerospace?' This is the problem. I think it has to be for everybody. For me, I think the most difficult sector will prove to be agriculture, where tariffs are sky high, because, if you look, for example, at most trade deals, including that with Norway, agriculture, if I remember, is excluded. Trading blocs are particularly protective of their farming industries, so I do have a particular concern for farming and the export market we have, particularly for Welsh lamb, because history tells us that farming has tended not to do well if a trade-deal approach is used.

[92] **Suzy Davies:** Okay, thank you.

[93] **David Rees:** Jeremy to come back on this one.

[94] **Jeremy Miles:** Just on that last point, on the agricultural sector in

particular, the contribution of that to the Welsh economy is obviously greater proportionally than it is to the English economy, for example, or the UK economy in general. There are a number of questions that have come up in negotiations where the sector interests of the different component parts of the UK are at odds, if you like; they play different roles in the negotiation strategy. What can we do to make sure that we minimise the risk of sectors that are important to us not having the priority that we would like them to have in those negotiations?

[95] **The First Minister:** We'll keep up the pressure. Agriculture is important. If you look at it economically, it's quite small as a proportion of GDP, but it contributes much more for social sustainability in rural areas, and the Welsh language. For me, the justification for paying farming subsidies—why favour farming more than other sectors—is because of that: because it makes a wider contribution beyond simply the economic figures.

[96] The other issue that's complicated in farming is the four different nations often have four different priorities within farming. In England, arable farming has a far greater profile. The farms tend to be larger. There's a greater proportion of good grazing land in England, as a proportion of England, than in Wales. In Scotland, their beef sector is particularly important to them, as is arable. A lot of grain is grown for whisky. In Northern Ireland, pig meat is much more important as a part of the sector than it would be in Wales. For us, it's lamb, beef and dairy. Lamb particularly is the market leader as far as exports are concerned. So, we all have different priorities. For me, it's a question of making sure that all agricultural produce from all parts of the UK are all able to access the market on the same terms.

[97] **David Rees:** Thank you. We move on now to maximising current EU funding. Mark.

[98] **Mark Isherwood:** Thank you. What specific action is the Welsh Government taking to ensure that current EU funding opportunities in 2014 to 2020 are optimised?

[99] **The First Minister:** Well, we want to invest all of the funds. We have already invested 46 per cent of structural funds for the 2014–20 period, and that includes, for example, the recent announcement of funds for the AgorIP project, led by Swansea University. We hope to have agreements in place covering around 60 per cent of our funding by the time of the autumn statement this month, with a view to getting up to 100 per cent before the

door shuts on us. We also want to access, of course, as much money for the metro as we can before that door closes. Now, the UK Government's announcement on extending the period for funding is welcome, of course. Our worry was that it would disappear again far sooner than we now see, but obviously the intention is to spend as much of it as possible on good projects as we can.

[100] **Mark Isherwood:** When do you understand now that you would have to spend the money by?

[101] **The First Minister:** Well, it's not clear at the moment what the UK Government means when it says that there have to be agreements in place by a particular time, but, for me, our understanding would be that we have to spend the money possibly by 2020, or possibly for the period of two years beyond that, which would have taken us beyond the European funding period. But it's not quite clear yet how that would work.

[102] **Mark Isherwood:** And are you able to give us a commitment today that, whatever the deadline, once clarified, is, that that money will have all been effectively spent?

[103] **The First Minister:** We're all aware of the deadline and, clearly, from our perspective, we want to get as much of that money out of the door as possible.

[104] **David Rees:** Thank you. In relation to higher education—. We've talked very much about trade and the implications of trade, but the movement of people is a question that you've highlighted as something that is moveable, but, for higher education, the movement of students and the movement of academics is critical. Have you had an assessment of the impact upon our HE sector, relating to the possible implications for our student population and our academic population as a result of Brexit?

[105] **The First Minister:** That work is in hand. The Cabinet Secretary has a group, which came together on 28 September for the first meeting. It'll meet again next week on the fifteenth to assess it. There are two—. There are three issues, I'd say, three issues that affect higher education. Firstly, student numbers. We know that, if there's a reduction in the number of students from outside the UK, as it'll be when we leave, then that will reduce their income substantially, and that income will come from UK students. So, that's a factor, first of all. Secondly, European funding; we know how important

that's been to Wales. The Swansea University campus in your constituency, of course, Chair—I always remember to say that—has benefited hugely, for example, from investment from the European Investment Bank. And, thirdly, it's hugely important that the UK isn't seen by the academic community as an unwelcoming place for them to come to. We've been successful in attracting some of the best people in the world through the Sêr Cymru schemes, but, if the UK is seen as being out on a limb or out of the mainstream, that will have an effect on our ability, as the UK, to attract the best academics, and that will have an effect on the standards, ultimately, of our universities.

[106] **David Rees:** Will this impact upon the Diamond review, because, clearly, Diamond undertook his analysis at a time when we were part of the EU and would remain part of the EU?

[107] **The First Minister:** No, Diamond didn't look at the issue of Brexit, and it's not something that we would expect Diamond to be affected by. It is true to say, of course, that the obligations that we currently have with regard to EU students would go, but those obligations are quite small, compared to the obligations that we've had in place for Welsh students over the last few years.

[108] **David Rees:** Okay. And finally on the education side, lifelong learning projects have been very much to the fore of European funding. We have the Jobs Growth Wales fund, which is all being funded through support from Europe. What analysis are you doing to look at the implications of the loss of such funding to ensure that such schemes that have been successful are able to be replicated and continued?

[109] **The First Minister:** We are looking at some potential options as to how that funding can be accessed in the future. We come back to this point that the impression was given at the time of the referendum that no money would be lost at all. We hope that that is the case, but, nevertheless, there are options we're looking at to see how the programmes that have been the most effective can be taken forward, even without structural funds.

[110] **David Rees:** Are you therefore only planning and looking forward up until 2020, 2019, because, you know—?

[111] **The First Minister:** Well, we're looking—. We have to look beyond that. Ultimately, we have to see whether we can secure funding for these projects at a time when European funding or a replacement might not be available.

Not easy, but nevertheless these are options that we're looking at.

[112] **David Rees:** Thank you. Steffan, questions on intra-UK relations.

[113] **Steffan Lewis:** Thank you, Chair. You announced in a statement to the Assembly recently about the creation of a joint ministerial committee on European negotiations. In the joint communiqué, it mentions that one of the objectives is to seek to agree a UK approach to, and objectives for article 50 negotiations, which is quite an ambitious objective for a group with such differing views. Are you able to elaborate on exactly how the mechanics of that work? Do all heads of Government take turns with a PowerPoint presentation on their vision for the European Union and the UK, or are you going to be invited to set out the Welsh position and your counterparts elsewhere? Or is it the case that the British Government takes the lead, and it is up to them to present to you their starter for 10 when it comes to the EU and our relations with them? How is it going to work in practice?

[114] **The First Minister:** At the moment, I think it's fair to say that the UK Government is seeking views. Our representative as a Government will be Mark Drakeford on the committee itself. Can I say it would absolutely not be acceptable for it simply to be a body where the UK Government brought forward its proposals for the other three Governments to accept or not? That's not in the spirit of partnership working. That's not what the Prime Minister said, so it's important that those words are adhered to.

[115] There is a precedent for this. When I was rural affairs Minister first time round, many, many years ago now, there would be a monthly meeting of the four rural affairs Ministers from the four Governments, and we would jointly agree a UK position at the forthcoming Council of Ministers. So, it is there as a precedent. Admittedly, this is a bigger project, but, nevertheless, it has happened in the past. And I think it's sensible to do that, because although there are different views, there will be some areas where we'd want to see agreement. I would prefer to see a negotiating position adopted by the UK that has wide buy-in. I'm sure the UK doesn't want to be in a position where it's going into negotiations with the EU when there are Governments within the UK publically criticising the UK's position. Sensibly, they would want to be in a position where they can get as much agreement as possible in order for there to be a degree of unity around that negotiating position. So, that is what this committee must do, but it has to do that on the basis of agreement and not take it or leave it.

[116] **Steffan Lewis:** So, in terms of the public problems now with the triggering of article 50, is that something that you would expect the new JMC body to have to—? I mean, everybody's attention has been taken by whether royal prerogative or parliamentary approval is the right course of action. Is it actually something that the JMC itself should be agreeing on in the first instance—when and the nature of article 50 being triggered?

[117] **The First Minister:** I think that's all up in the air at the moment; we have to wait and see what the Supreme Court actually says. If the Supreme Court come back in January and say, 'Yes, the High Court have been right', then, of course, there'll be, I've no doubt, discussions as to how the parliamentary process is followed. I don't just mean that in UK terms, but how the parliamentary process is followed to get a view on when article 50 is actually triggered. I suspect, however, that if the UK Government wins its appeal in the Supreme Court, then it will see itself as the sole arbiter as to when article 50 is triggered.

[118] **Steffan Lewis:** So, you wouldn't anticipate that being something that the UK Government discuss with your JMC for some sort of an agreement.

[119] **The First Minister:** We would seek to discuss it, but it's a question of whether—. If they win in the Supreme Court, they will see themselves as having the right to exercise the royal prerogative in that way. And whilst we would look to discuss it, I'm not confident that they would see it as a matter of joint agreement.

[120] **Steffan Lewis:** And in terms of the JMC's further work programme, have you been given advance notice of the details of what each session of JMC-EN will be looking at—whether it will be Governments discussing specific elements of our future relations with the EU—and, if so, is there a conflict resolution mechanism so that it's not a matter of simply the UK Government listening to what everybody has to say, and then deciding to ignore everybody else, or to—? Or is it, in the case that you described with the UK Treasury earlier when it comes to financing, that the UK Government has the final say and might consult, but if it doesn't like what it hears, just carries on unilaterally anyway.

14:45

[121] **The First Minister:** Constitutionally, that's correct. If you look at the dispute resolution process that we have in the JMC, ultimately, if there's a

dispute with the UK Government, the matter is resolved ultimately by the UK Government. They are both party and judge in the same case, as it were. And that's an issue we've been arguing over for some time. As it happens, practically, there's never been a situation where it's been a problem, but that doesn't mean, of course, that it shouldn't be future-proofed.

[122] I've seen the agenda for the first JMC-EN, as it's called. It's not a particularly detailed agenda, but it does ask the three devolved Governments as to what their priority should be, and what they would want to see as part of the negotiations. I welcome that. But what we cannot see is a situation where the UK Government produces papers for that committee for the devolved administrations to like or not. Ultimately, of course, yes, the UK Government could ignore the three devolved Governments. I don't think it's going to want to do that, with the words that it's used, and the potential it has to undermine its own negotiating position. And I don't start from a position of trying to undermine it from the very beginning. But it is important that we can get as much agreement as possible as part of that JMC process.

[123] **Steffan Lewis:** Thank you.

[124] **David Rees:** In relation to the JMC, that's clearly part of the discussions with the devolved administrations as to the negotiating position of the UK, as it moves forward for Brexit. But what about the situation of representation at those negotiations? I think the Prime Minister's made quite clear that she believes it's a UK Government issue, and UK Government Ministers should be there. Is there any movement to allow Welsh Government, Scottish Government, Northern Irish Government Ministers, like when they attend council, to actually attend and be present at those sessions.

[125] **The First Minister:** There's been no discussion about that in detail yet. With regard to the Council of Ministers, the devolved Governments do not have the right to attend the Council of Ministers. We can attend, we can even represent the UK at times, as long as there's agreement amongst everybody to do that. What tended to happen at one time with the Council of Ministers was that we would take it in turns to sit in on the proceedings themselves, and then, other people would be outside listening in on the CCTV. That's the way it worked many years ago. For me, I don't think we necessarily have to be in the room in the negotiations, but it's important that there is an agreed position before those negotiations start. So, if the UK goes into negotiate with the EU, knowing it has the agreement, let's say, of the other three Governments for a particular position, that will be, I think, immensely useful.

[126] **David Rees:** From that answer, I take it that we're not there yet, and, as such, there is no formal mechanism for coming back to any devolved Government for consideration of any sort of agreement that's being proposed before they make a decision.

[127] **The First Minister:** I would anticipate that that's what JMC-EN would do. Where there are particular discussions, I see no reason why representatives of other Governments can't be present, at least, at those discussions, in order for us to understand what position the UK Government is taking. But if we can get to a position where the UK Government has an agreed position with the devolved administrations, to take forward a particular issue in a particular way, that, for me, would be satisfactory. But, getting there, of course, will take some time and some work.

[128] **David Rees:** Thank you. You've also indicated that you are leading on Brexit on behalf of Wales, but you've just informed us that the Cabinet Secretary for Local Government and Finance is actually going to be representing us at the JMC-EN. Would it be possible for the Cabinet Secretary to come to this committee for scrutiny at some point in the future?

[129] **The First Minister:** Well, it's easy for me to say, so yes.

[130] **David Rees:** That's wonderful. Thank you for that information, because it's also important that we have feedback from the Cabinet Secretaries with various responsibilities, because, as you highlighted, there are many areas that are devolved, affecting the environment and rural affairs, and where there's great involvement of Welsh Government, and those Cabinet Secretaries will have detailed knowledge of some of the discussions going on in their area.

[131] **The First Minister:** That's correct. I have responsibility for Europe, so did my predecessor, Rhodri Morgan, but we never attended JMC Europe. That was done by another Cabinet Minister, on the basis that heads of Government meet heads of Government. But it's very easy to discuss what is discussed at those meetings, and to agree what our position is going into those meetings.

[132] **David Rees:** Okay. Thank you for that. Hannah, future trade deals.

[133] **Hannah Blythyn:** Given that trade is an exception from competence,

First Minister, what's your view on the need to involve devolved administrations and legislatures in the negotiation of things that are going to impact on us indirectly or directly in Wales?

[134] **The First Minister:** Hugely important because there will be some areas that will be of particular interest to us that will be affected by free trade agreements. Let's take, for example, if there were to be a free trade agreement with New Zealand. The impact of that might be to remove the current controls that exist on the import of New Zealand lamb. If they were to go, that would clearly be a great difficulty for Welsh lamb producers. That issue might not be as apparent in Whitehall as it is in Wales, and that's one example there of why it's important that the views of the devolved Governments are understood and the interests of the devolved nations are respected.

[135] **Hannah Blythyn:** So, how would you perceive our role in those negotiations for the—*[Inaudible.]*

[136] **The First Minister:** We're a long way from free trade negotiations, but, clearly, one way that could work is that the UK Government outlines what it wants to see, takes the views of the devolved Governments as to what the effect is on the devolved nations and then tailors its position accordingly.

[137] **David Rees:** Thank you. On relations with the EU, First Minister, clearly since the referendum on 23 June, we've seen other devolved nations make visits to Europe and you've identified yourself that you'll be visiting Norway in the new year. Will you also be visiting Brussels to see how we, as a nation, can interact with the EU, be it pre and post Brexit, to ensure that the interests of Wales are recognised by the EU's different departments, by the EU's partners and by EU bodies?

[138] **The First Minister:** Yes, I'll be going to Brussels in three weeks. The focus has been, over the course of the time since the referendum, on trying to influence and understand what's been happening in London. I know that others have gone to Brussels, but I'm not sure what effect that has had. One of the issues that have been raised is: would it be possible for different parts of the UK to have a different type of relationship with the single market? I have to say that I can't see how that would work. I know that it works for Greenland, but Greenland is physically a long way from the EU and it doesn't have a land border with the EU. It's difficult to see how it would work, for example, with Scotland and England or with Wales and England, if there were

to be different regulations with regard to customs controls and market access. So, for me, what's usually important is being able to put the UK Government in the right frame of mind and position to represent Wales's interests in the negotiations.

[139] **David Rees:** I appreciate that. I suppose what I'm trying to get at is that it's very beneficial to Wales to build those relationships and partnerships up with partners and with the European Parliament at the present because, post Brexit, clearly we'll want a good working relationship with them.

[140] **The First Minister:** The relationship is good. We have our office, obviously, in Brussels, but over the years that relationship has been built up very, very effectively.

[141] **David Rees:** Thank you. Steffan.

[142] **Suzy Davies:** Can I just ask one quick question on that?

[143] **David Rees:** Is it on that particular point?

[144] **Suzy Davies:** Yes, on our relationship with the EU. I was just wondering whether you'd had an opportunity yet to meet with the four Welsh MEPs to talk to them about how the next two or three years are going to be managed—how they're going to retain and maintain a level of influence or voice.

[145] **The First Minister:** Not as a group of four. That said, of course, they are all members of the European advisory group. Three of them did come to the first meeting that I chaired. But it is something that I would want to explore with them, but I've not had the opportunity to do it yet. I assume that they will all be there at the advisory group and, of course, no doubt all four of them will be there in the future.

[146] **Suzy Davies:** Okay, thanks.

[147] **David Rees:** Steffan.

[148] **Seffan Lewis:** Thank you, Chair. On the point of relations with the European Union post Brexit, of course there's not an exact template that we could use, but there's precedent in terms of the Crown dependencies. They are not members of the European Union, but have a close relationship,

obviously, with the United Kingdom and are part of the European customs area. At the moment, it's the Ministry of Justice at Whitehall that is responsible for relations with the Crown dependencies and that includes, for example, the Crown dependencies having direct access to Whitehall, if the UK is negotiating on behalf of the Crown dependencies. It means as well that the United Kingdom isn't able to conclude treaties without their expressed agreement on certain matters and, furthermore, it means that the islands themselves can enter into international treaties on solely domestic matters, if the UK Government agrees with them. If we're going towards, as you've mentioned before, a federal model at UK level, is this an avenue that you think could be explored and used as a precedent for devolved administrations?

[149] **The First Minister:** The first thing to remember, of course, is that the Crown dependencies are, in effect, independent—apart from issues such as foreign affairs. They have a degree of autonomy far beyond what we have got. They've all got different relationships with the EU. Jersey and Guernsey are not part of the customs union. They don't have a customs union even with each other. So, there you have one particular model. The Isle of Man does have a customs union with the UK and, through that, with the EU. So, as far as Jersey and Guernsey are concerned, the effect on them is less than it is for the Isle of Man.

[150] The Isle of Man, in effect, is in a position where its indirect customs union with the EU will be broken, without it having a say in it, because the UK's customs union, in effect, might be broken in the future. The difficulty for them is they can't actually negotiate directly with the EU, because foreign affairs are dealt with via the UK Government. So, they find themselves in a position of potentially asking the UK Government to negotiate for them a settlement that's different to what the UK Government itself accepts. So, they're in a particularly difficult position.

[151] Having spoken to the previous Chief Minister of the Isle of Man, Allan Bell, it was a source of particular frustration to them that they felt they'd lost the relationship without ever being in a position of being asked their view on it. The difficulty is that the EU—it just wouldn't negotiate with them. The Isle of Man, anyway, is prevented—as is Jersey and Guernsey—from negotiating separately on international matters such as international treaties. So, that avenue will be blocked off, even for the Crown dependencies.

[152] **David Rees:** Jeremy.

[153] **Jeremy Miles:** There's a very complex set of negotiations happening at all levels here, both before and after Brexit. You've mentioned a few times in your evidence that some things would be not acceptable and you wouldn't agree to certain courses of action. I'm just wondering if you can articulate what you feel is the best source of our leverage in these negotiations and what we can do to improve it even further than where we are now.

[154] **The First Minister:** I don't think the UK Government would want to enter negotiations with there being public criticism from any of the devolved administrations. I think they'd want to avoid that. They might not be able to. I don't start from the basis of, 'Let's make this as difficult as possible for them'. I think it's important, at this stage particularly, that moderate leavers and moderate remainers work together, rather than concede the field to people who are of an extreme view on both sides. On that basis, I think it's hugely important then that we can work with the UK Government to get to a common position that the UK Government and ourselves are both comfortable with. We're a long way from that at the moment, because this is all in its early stages.

[155] **David Rees:** Dawn, did you have a question on other areas?

[156] **Dawn Bowden:** Yes. You touched on this a little bit already in response to a question from Jeremy earlier on around agriculture. There are significant numbers of devolved policy areas: agriculture, environment, marine policy, energy and fisheries, and so on. It's really about how far your thinking has gone about where all those areas of devolved policy—policy that comes directly from Europe to us—are likely to be developed, either independently by the Welsh Government or in conjunction with other nations of the UK. So, in other words, is the Welsh Government's thinking at this stage that we should be having common UK policies around these areas or is Wales going to be looking to develop its own policies in those areas?

[157] **The First Minister:** Well, there will be some areas where probably a GB policy rather than a UK policy would make sense. Animal health is one of them. It might be that there could be an agreed framework for agriculture—I stress the word 'agreed' again—that will provide the framework within which the different subsidy systems might operate. But these are, as I say, subject to negotiation. There are around about 5,000 sets of regulations that affect the environment, agriculture and fisheries that would need to be examined to make sure that they were still needed. I expect most of them would be

anyway.

[158] There would actually be nothing to stop the Assembly, if it wanted to, from actually transposing EU directives in the future, even if we were outside the EU, if that's what was decided. So, there would need to be an exercise in looking at all the different regulations to see whether they're still appropriate. There's another complication, particularly in the field of the environment, where traditionally, for many years, regulations were made jointly on an England-and-Wales basis, mainly because the EEA was cross-border. Well, we can't do that anymore, really, because it may be that England takes a different view on regulations than we do. That will all have to be factored into the decisions that we take on looking at future regulations. But, yes, there's no doubt that—. I mean, it does make sense, as I said earlier on, to enshrine what's already there in law, so it's not lost, to enable the different Governments and Parliaments to look then at what should be kept and what shouldn't be kept.

15:00

[159] **Dawn Bowden:** Also, what is our capacity to deal with all of that at the moment, or is that something that we need to come back to when we know where we need to go—literally, the physical capacity to deal with all of this stuff?

[160] **The First Minister:** It's a big job. Some of the regulations, actually, even though they might be lengthy regulations, are fairly self-explanatory. People understand what they are. They are very, very humdrum in some ways, but they are important. So, we would need to look at all the different sets of regulations in order to see what we would want to keep and what we wouldn't want to keep. There are possibly one or two that we might want to look at again, but most of them, I suspect, we'd need to keep.

[161] If you look at farming, for example, many of the regulations that affect farming are to do with enabling farming to export. Some people have said to me, 'Well, we should get rid of sheep ID'. That's disastrous as far as the export market is concerned because we are able, at the moment, to say to potential buyers that Welsh lamb is born, reared and raised in Wales. If we don't have an ID system, we can't do it, and we can't sell the lamb at the premium price that exists at the moment. There are disease control implications. At the time of foot and mouth in 2001, no one had any idea where sheep were going because there was no ID system in place. Cattle,

yes; sheep, no. So, it'll be a question of looking at the different regulations, but I do suspect that most of them are perfectly sensible and we'd want to keep anyway.

[162] **Dawn Bowden:** And potentially, it opens up the opportunity for us to go even further with some areas that Europe hasn't delivered.

[163] **The First Minister:** Yes, if we wanted to. The cautionary note is, as I have said, that it would be difficult to see a situation where there are major differences in regulation between the UK and the EU, and the same applies within the UK. Clearly, we have to tailor regulations according to Wales's needs, but we have to be mindful of the fact that we don't want to create a barrier to our own businesses, in terms of them being able to sell to England, if I can put it that way, or a difficulty that puts them in a more difficult position competitively than would be the case with businesses elsewhere in the UK. So, yes, we have to be aware of what's happening elsewhere, but it would be ultimately for the Assembly to decide what it wants to do.

[164] **Dawn Bowden:** Thank you, Chair.

[165] **David Rees:** First Minister, you talk about 'would want to' and 'we will want to'. Are we doing it? Is Natural Resources Wales starting to look at these regulations and these rules now? We know Brexit is coming. So, the situation is: it's going to happen.

[166] **The First Minister:** We don't know what the model will be, though. That's the problem. For example, on procurement, procurement and the loss of state aid is an opportunity. If we are not bound by state aid rules, actually, there are opportunities there. I concede that. But we don't actually know where we will be—whether it will be an EEA-style settlement, which includes state aid rules, or whether it will be a customs union. Because we don't know what the final outcome will be, it is difficult at this stage to understand how much freedom we will have as far as procurement and state aid is concerned. We don't know whether the UK Government will try to substitute its own state aid rules and impose them on us to stop us from taking advantage of a freer system. So, there are a number of issues there that are not yet resolved before we can take a decision on how we move forward.

[167] **David Rees:** I appreciate that, but does that therefore raise concerns over the timescales and the pressures that we may be facing if we don't know our model until very late in the process?

[168] **The First Minister:** No. I don't think we are under the same pressure in terms of timescale. The great pressure in terms of timescale is article 50. To negotiate a settlement within two years is not easy. It is not easy. Once we are in a position where the settlement is known, then, of course, we will know what the rules would be as far as state aid and procurement are concerned.

[169] **David Rees:** Suzy.

[170] **Suzy Davies:** Perhaps all the more reason why NRW, for example, should perhaps be looking at what exists now to decide what should be kept, rather than what should be ditched, if the opportunity arises. I assume you are going to have to work with the other nations of the UK in order to have, I would have thought, minimum standards that would apply everywhere.

[171] **The First Minister:** It's sensible. In any case, with the environment, one would assume that there will be minimum standards that everybody will want to adhere to in any case.

[172] **Suzy Davies:** Yes, exactly.

[173] **The First Minister:** Again, that's another area where there might be discussion on common standards by agreement, in certain areas, in the same way as there would be, potentially, for other areas such as animal health. I gave the example of animal health as one obvious example, but it may well be that there will be agreement in other areas. This comes back to a point that's not been mentioned today but I've mentioned in the past: there needs to be a new mechanism in place for this to happen within the UK. The UK doesn't have a mechanism where governments can come together—call it a mini council of ministers, possibly—come together and agree these common standards and agree a common approach that benefits everybody. We don't have that structure in place at the moment and we will need it in the future.

[174] **Suzy Davies:** Does NRW have the capacity to even contribute to that conversation yet?

[175] **The First Minister:** I've no doubt they'll be able to contribute. They deal with many of these regulations on a day-to-day basis and they will, no doubt, have views on what works and what doesn't.

[176] **Suzy Davies:** Okay, thank you.

[177] **David Rees:** Mark, do you have a final question?

[178] **Mark Isherwood:** Very briefly. We heard evidence supporting proposals for a framework agreement between the four home nations on environment and marine. What are your views on the suggestion that we therefore need a UK environment court to oversee that? And finally, should Wales, post Brexit, retain an office in Brussels?

[179] **The First Minister:** 'Yes' is the second answer.

[180] **Mark Isherwood:** Good.

[181] **The First Minister:** We have to. We have offices in America and we're not part of the North American Free Trade Agreement. We have to—Brussels is going to be the centre of a market that's bigger than America and Russia combined. So, yes, that will continue of course.

[182] The issue of an environment court is a tricky one because the UK only has one—well, it doesn't even have one single court that covers the whole of the UK. Not even the Supreme Court does that, because Scottish criminal law doesn't come to the Supreme Court. So, I don't think a UK environment court would actually work. Scotland and Northern Ireland are already their own jurisdictions; we will be, I trust, at some point. So, it's difficult to see how that would apply. There would have to be a relinquishing of power within the different jurisdictions in order to create such a court. It would be something close to what the ECJ is, actually, in terms of how it would be set up, but again, that would have to be done through agreement. From our perspective, it could not be done by the UK Government agreeing on behalf of England and Wales to be part of that process. There may be good arguments for having such a court, but there are practical obstacles that would need to be overcome and there would need to be, above all else, a need for agreement.

[183] **David Rees:** Thank you. We've exceeded our time, First Minister. Thank you very much for your evidence this afternoon. From what you're saying this afternoon, I'm sure you would agree that some of the information we have just received as a committee has highlighted many concerns as to where we're going in future, but it seems very frustrating that we have yet to have the detail from the UK Government as to some of the direction and models we may be looking at, because that depends upon some of the solutions and

answers that people are looking for. So, we look forward to perhaps pushing the UK Government very much on where we are going as soon as possible, so we can get some indication as to perhaps the direction they're taking, which leads into possible options, so we can start exploring a bit better. I think, from your answers, that that's very much coming through at the moment—that that frustration still exists. We wish you the best on the Joint Ministerial Committee, but I think it's important we get those answers quickly. So, thank you very much.

[184] You will receive a transcript of the session for factual inaccuracies. Please let us know if there are any. Obviously, I thank you very much, all three, for attending. I suggest we have a break for 10 minutes.

*Gohiriwyd y cyfarfod rhwng 15:08 a 15:21.
The meeting adjourned between 15:08 and 15:21.*

**Gadael yr Undeb Ewropeaidd: y Goblygiadau i Gymru—
Strwythurau o fewn y DU
Leaving the European Union: Implications for Wales—
Intra-UK Structures**

[185] **David Rees:** Can I welcome the public back to this afternoon's session of the External Affairs and Additional Legislation Committee, where we continue our investigation into the impacts of Brexit upon the Welsh economy and Welsh civil society? We welcome this afternoon Professor Roger Scully, professor of political science, Cardiff University, and acting director of the Wales Governance Centre; Dr Joanna Hunt, reader in law, Cardiff Law School and also part of the Wales Governance Centre; and Dr Rachel Minto, research associate and also of the Wales Governance Centre. Welcome to you all and thank you for attending this afternoon. Clearly, your expertise in some of the issues relating to the intra-UK relationships is important to us to evaluate and understand, and, in that case, we'll go straight into questions and start with Jeremy Miles.

[186] **Jeremy Miles:** Good afternoon. I want to ask about the effect of the judgment last week in relation to the role of Parliament with regard to exercising article 50. My reading of the judgment is that the prerogative isn't appropriate, given that the effect of the termination of the two-year window would be, without another agreement, for rights conferred by primary legislation, effectively, to be repealed, and therefore it requires a

parliamentary Act in order to do that—although I don't think the judgment goes quite that far. I was wondering about your views on, assuming that will encompass devolved competences as well, for obvious reasons, would that require a legislative consent motion in the Assembly.

[187] **Professor Scully:** I think this is primarily Jo's area of expertise.

[188] **Dr Hunt:** Thanks for the question. The judgment last week, of course, is just one judgment. We've had the Belfast case as well, which took a different approach to that particular point, and I don't think either of them perhaps fully reflect the contingency of what might happen post triggering article 50. The Belfast judgment—the High Court in that case said, 'Once you trigger article 50, we don't know where we're going, we don't know what the outcome might be'. The language was, 'We know that the winds of change are blowing, but we don't know which direction we're blowing in, and there will be, we assume, a change in legal circumstances, but that will be affected by Parliament further down the line through whatever Act around the withdrawal agreement, if there is a withdrawal agreement, needs to be adopted.' So, that's the approach the Belfast High Court took, that was its starting point, and that's why it said the prerogative hadn't been displaced and there was no need to have any parliamentary input at this point. It was specifically looking at devolution legislation. It was looking at whether the devolved agreements, as far as they apply to Northern Ireland, had displaced the prerogative, but they hadn't even got that far, they just said, 'The issue is article 50's triggering alone does not generate legal effects', whereas the London court has said, 'We're assuming that it does.' And the Government had conceded on that point. As you say, if there is no agreement that, at the end of two years, as far as our relationship with the EU is concerned, we're over, we're out—now, there might be stuff in our national law that remains, but any reciprocal legal arrangements, free movement provisions, they can't be exercised any more. So, that's how the London High Court approached it.

[189] So, we don't know how that's going to work on appeal, but what we do assume is now an Act of Parliament is going to be necessary and that, of course, then brings back the place of the devolved administrations and the devolved Parliaments and Assemblies in that, because, if we are having an Act of Parliament—which I don't think has been confirmed, as such, whether it's a resolution or an Act of Parliament, but the majority view, I think, seems to be that it's going to be an Act of Parliament—then, of course, if there's legislation in areas that impact on devolved matters, then there may be an argument for the involvement of the devolved Assemblies. So, there's still

quite a way to go. Legally, the arguments can be raised. We know that, as far as the Scottish legislation is concerned, there's a clear statement that this is reserved—it's international relations, it's foreign affairs; it's reserved. The Welsh legislation is rather different—it's not conferred, but nothing's explicitly excluded. The Belfast court said, 'We can't deal with this either because it's just a convention. We can't give it legal force', but it did say things could be different in Scotland under the Scottish legislation, because of course there is the provision in the Scotland Act that the Sewel convention has legal force. The Belfast court also said, 'Scotland has a different interpretation of what devolved matters are, which could be broader.' So, it's pointing that Scotland would have the stronger claim that they needed to have some legislative consent motion in this. Whether actually the Supreme Court would ever entertain that, what it does create, I think, is more political leverage around those issues. We've got the law and the politics operating here.

[190] **Jeremy Miles:** That's a great point to end the question on, because my next question's about that leverage, actually, and I'd be interested in your comments generally about the sort of leverage that we have in what is going to be a very complex—is presumably already complex—set of negotiations both in order to get to Brexit and the arrangements that apply beyond that. I'd be interested in your thoughts on the mix of law and politics in our bargaining strength, if you like.

[191] **Professor Scully:** I think it would appear to be fairly clear that, in comparison to the other two non-English nations within the union, Wales's position is relatively weak for a number of reasons, but the two most obvious ones, I think, being, first of all, we did vote to leave, which politically puts both the Assembly and the Government here in a very different position from Scotland and Northern Ireland. Also, there's the second factor—the First Minister in his session earlier talked about wanting to have a co-operative relationship with the UK Government, and I've no reason to doubt his sincerity on that, but, even in discussions where one is hoping for a co-operative relationship, it can sometimes be useful to have somewhere in the background or in the subconscious a sense that there are some factors that you can use as leverage—some, frankly, effective, credible threats. It seems to me that both Scotland and Northern Ireland, in somewhat different ways, have the ability to make life difficult for the UK Government in London. It's much less clear, frankly, that Wales has any sort of potential leverage. If the London Government doesn't give Wales what Wales appears to want, what, in a sense—how can Wales respond to that in the sense of, 'If you don't give us

what we want, you'll regret it'? Frankly, I don't think we do have a great deal of leverage in that sense. So, I think that is almost certainly going to have to condition some of the approach of the Welsh Government. There's the old saying 'speak softly but carry a big stick', well, in our case, I think maybe we're going to have to speak softly because everyone knows we don't have a stick.

[192] **Jeremy Miles:** And is that because of the referendum result, presumably?

[193] **Professor Scully:** Well, it's the referendum result, but also because, in the case of Northern Ireland, obviously we know all about the history there, we know about the importance of cross-border relations and nobody wants to go back to the sort of situation or cause problems in relation to that. In Scotland there is the whole issue of Scottish independence, which is another form of potential leverage, I think, which the Scottish Government could look to use. It's very difficult to see there's anything remotely of that sort of weight or magnitude or significance that the Welsh Government could use, even if it wanted to.

[194] **Jeremy Miles:** From a legal point of view, are any points of leverage in the existing arrangements that we have, do you think?

[195] **Professor Scully:** Sorry, I didn't quite—

[196] **Jeremy Miles:** From a legal point of view, are there points of constitutional law that provide a basis on which we could—?

[197] **Dr Hunt:** Under a conventional reading of our existing constitution, then no. But our constitution is a thing in evolution, and this is a moment in that process. But, as things stand, not a lot, no.

[198] **Jeremy Miles:** Finally from me, this question that we discussed with the First Minister earlier, that his ambition is for all of the four Parliaments of the UK to be able to ratify the deal, ultimately—do you have any thoughts about how, in the context of an agreed outcome, that might be achieved? Or is it simply by virtue of an agreement that that would be deliverable, if you like?

15:30

[199] **Professor Scully:** Well, given the recent statements by the Prime

Minister, it's difficult to see that she would want to concede that as being a mandatory part of the process. I think there are very clear political problems in both Scotland and Northern Ireland with actually achieving that. There are, I think, some fairly likely political incentives for the majority of the Scottish Parliament to want to, unless the deal is very favourable to Scotland, at least question whether some deal should be ratified. In Northern Ireland, of course, there are the problems of the cross-community majority arrangements, which you need to have in place for passing many motions. And it might well be difficult to actually have any—given the very different positions that the DUP and Sinn Féin, for instance, took on the referendum, it might actually be difficult to find a majority within both communities for almost any position on Brexit, actually.

[200] **Dr Hunt:** I think there's a case to be made that good constitutional practice is to work together and to seek the support of the Assemblies and the Parliaments and, rather than pressurising for these legislative consent motions, that there's an agreement that they will be offered. But the reality is: at what juncture will these come? If this is going to be before article 50 is triggered, if we take the reading that triggering it itself leads to a change in law, then we've got a very—. March 2017 is not going to happen, necessarily, as far as that's concerned. If it's something else, if it's around a withdrawal agreement, it presupposes we get a withdrawal agreement, rather than being timed out after two years. Again, further down the line, the great repeal Act—around there. So, there are various junctures where a case could be made for the Assemblies and Parliaments being involved, as you say, and then it's whether or not there actually would be that agreement and what we do afterwards, if there is no agreement—where that leaves the Government and where that leaves the constitutional settlement. You can see why we might want to avoid it.

[201] **Jeremy Miles:** But there's no question, is there—? The article 50 mechanism and the great repeal Bill mechanism, whatever that ends up being, are two distinct stages. There's no prospect of that being one stage, is there, in your minds?

[202] **Dr Hunt:** No, definitely separate.

[203] **Jeremy Miles:** Okay.

[204] **David Rees:** Thank you. We have three supplementary questions and then we'll move on to Steffan's questions. Suzy, Mark and then Steffan.

[205] **Suzy Davies:** Okay. Thank you, Chair. Yes, it's just to go back to this question of leverage. We tend to frame these questions as, 'What can Wales do vis-à-vis the UK?', but actually there's a question about what can Wales do vis-à-vis Scotland and Northern Ireland as well, if they're likely to have stronger voices than Wales and, of course, coming from a different vote perspective as well. How much work should Wales be doing in speaking to those devolved administrations first, before they go anywhere near the UK table, because there are going to be occasions when the UK and Wales, perhaps, agree and the other two don't.

[206] **Dr Hunt:** Absolutely.

[207] **Professor Scully:** I think the Welsh Government, in a sense, should be looking to get allies wherever it can. Again, I think, with its relatively weak structural position, if it can ally with Scotland and Northern Ireland on some issues, then fine; if it can even get support, for instance, from other sympathetic Governments in the EU on some issues, such as the Republic of Ireland, that would be useful. I think it's going to have to be—

[208] **Suzy Davies:** I'm thinking more the other way around, actually. Agriculture's the obvious one.

[209] **Professor Scully:** Yes. But I think it's going to have to be very much issue by issue.

[210] **Suzy Davies:** Okay, thank you.

[211] **David Rees:** Mark.

[212] **Mark Isherwood:** The UK Government has argued that, in granting consent to the referendum, Parliament granted to Government the duty to carry out the will of the people, whatever that was, at that stage, in the referendum. The High Court, however, determined that the wording meant that that was only advisory. From a legal, as opposed to political, viewpoint, can you expand or explain why that should be advisory, rather than something binding on Government to carry through?

[213] **Dr Hunt:** Well, under our traditional practice, referenda are only advisory. That's the starting point: that unless explicitly within the legislation it's provided that this will lead to legal effects, that it gives a direction that

actually will be taken, they are only of an advisory force. It's simply how our constitutional practice approaches the issue of referenda. We have had experience in the past of a referendum question being set and legislation being adopted at the same time that will then be triggered by a vote either way.

[214] So, the alternative vote referendum that was some years ago was an example of where you actually lay out in the legislation what the consequences are going to be. We didn't see that in this piece of legislation. There were all sorts of things we didn't see in the European Union Referendum Act 2015. That would have been the place for devolution locks and special majorities, and that wasn't there. But the understanding of the practice is that these are advisory only, unless the legislation itself says otherwise, because we have no—. We have a piece of legislation from 2000 that sets out some general terms about how referenda and elections are to take place but, specifically, each referendum will have its own piece of legislation setting out how it's to proceed. We'd expect to see an explicit statement of what the consequences should be, otherwise we're treating it as advisory, and that's a demonstration of parliamentary sovereignty. Now we've got that clash of popular sovereignty and a parliamentary sovereignty, and we fall back and say, 'Well, it's the parliamentary sovereignty that is supreme within our system'.

[215] **David Rees:** Thank you. Steffan.

[216] **Steffan Lewis:** One of the outcomes of the High Court judgment could be that there's this awful Cromwellian idea of parliamentary sovereignty. In which case, does that then set up a political discourse whereby, if it came to legislative consent motions being ignored by the UK Government or UK Parliament, they could just say, 'Well, Parliament's sovereign. So, we can have all these lovely LCMs and we can vote them down every single time?', but, at the end of the day—. Is this something that is re-emerging now in British constitutional law—this idea, since Brexit, of parliamentary sovereignty? What's the impact of that long term on devolution, particularly on an issue—

[217] **Professor Scully:** I don't know about re-emerging, Steffan; I'm not sure if it ever went away.

[218] **Steffan Lewis:** At least it went quiet there for a while. The 1990s were nice.

[219] **Professor Scully:** Yes, sort of ignored it and hoped it had gone away, maybe. I think we're now in an issue that is so fundamental, where the stakes are so big, that we do get back to the fundamental principles. This basic principle of parliamentary sovereignty has never been abolished—has never been overturned within some sort of written constitution for the United Kingdom. It was, in a sense, in practice overturned, ironically because of our membership of the European Union, and parliamentary sovereignty didn't really apply for all relevant European law that had supremacy over UK-level law. But on issues like this—our membership of the EU—ultimately, the UK Parliament can pass laws to override the wishes, even the clearly expressed wishes, of the devolved Assemblies and Parliament.

[220] **Dr Hunt:** From a legal perspective, the legislative consent motion is phrased in terms of, 'Parliament would not normally legislate against the wishes and without the support of the devolved Assemblies and Parliaments'. That normally points—. It exists now in the Scotland Act 2016; we've had it put in law in the Scotland Act—the Sewel convention—but it's phrased in quite conditional and quite contingent ways. There was a House of Lords report, I think, from a couple of weeks back that emphasised that 'normally' point. So, yes, ultimately, it would be constitutionally possible in legal terms for these legislative consent motions to be ignored, and it would be constitutionally legally watertight, but, in legitimacy terms, where does that leave us?

[221] **Steffan Lewis:** On the other side, then, is there anything under the devolution frameworks that would prevent the National Assembly from holding a consultative referendum on the terms of Brexit, for example? Are we able, even though it's a non-devolved field, to have a consultative referendum in Wales on just about anything we want, because there's no such thing as a legally binding referendum?

[222] **Professor Scully:** I don't actually know if that—. You will recall with the Scottish independence referendum that there was an agreement between the Government and Westminster that specifically provided for that referendum to be held, but—

[223] **Steffan Lewis:** But that was to make it legally binding through an Order in Council, wasn't it, so that it wouldn't be just a consultative referendum?

[224] **Professor Scully:** I suppose you could, I would imagine—I'd need to go and check—hold some sort of consultative referendum. I think the question

then would be how widely that would be accepted as legitimate—as a proper vote—and, potentially, you would avoid the potential problem of, say, differential abstention by supporters on one side or the other, which can happen sometimes in non-binding referendums, or in referendums whose legitimacy is questioned, such as, for instance, when we had a border poll in Northern Ireland in the 1970s. So, I would need to go check on that, but it probably would be possible, through some mechanism at the moment, but the status of that would be very questionable, I think—not just the legal status, but I think the political status of that would be very questionable, and you could well get very differential abstentions and, therefore, politically, end up looking rather meaningless.

[225] **David Rees:** Thank you. Steffan, on to your questions now.

[226] **Steffan Lewis:** One of the recent developments has been the creation of a Joint Ministerial Committee on European negotiation. What have you gathered from the status constitutionally of that body and its significance?

[227] **Dr Minto:** On the status constitutionally, we know that the first meeting is going to take place in November. We know that the work programme is going to be set out and we should be given dates. There is no indication that it's going to have any statutory underpinning. We haven't had any information yet about the kind of reporting that's going to be coming from these JMC-EN meetings and, therefore, the level of parliamentary and public scrutiny that will be facilitated by the kind of formal structures that we put in place. So, at the moment—and maybe my colleagues will want to add further to this—we still don't have a clear idea of the shape that it's going to take, apart from that the model will be based on the Joint Ministerial Committee model that we have at the moment.

[228] **Professor Scully:** The only thing I would add to that, I think, is that this very much fits with the broad approach to inter-governmental relations that has largely characterised the devolution era, in comparison with most federal states, or states that have substantial sub-state autonomy. While devolution has advanced quite a lot in terms of what scholars sometimes term 'self-rule' for Scotland, Wales and Northern Ireland, we have very little substantial mechanisms and process of any type for what is sometimes termed, 'shared rule', whereby the sub-state units contribute to the formal decision making of the state as a whole, and will have formalised relations with the state-level Government. That remains to this day very primitive in the United Kingdom, compared to many international examples.

[229] **Steffan Lewis:** And, presumably, with our withdrawal from the European Union, there will be a need for a more formal, less primitive multinational body like the JMC. The First Minister referred to almost a mini Council of Ministers. How would that operate, especially, as I say, with that backdrop of resurgent parliamentary sovereignty and especially when you come to issues like agriculture, food standards, fisheries et cetera, where it is clearly in everybody's interest to co-operate but it's not a reserved matter? Therefore, would you support that call for a UK Council of Ministers, almost, I suppose?

[230] **Dr Minto:** So, we're talking about post Brexit here.

[231] **Steffan Lewis:** Yes.

[232] **Dr Minto:** Well, I think the important thing to note here is when we're talking about—. This will be the policy co-ordination between equal partners, and that's something different to the Joint Ministerial Committee at the moment when, clearly, they're putting together a UK line going to the European Union. So, post Brexit, the dynamics within this inter-governmental body would be different. Here, I think we can usefully draw some inspiration from the European Union level. I think that it was interesting that the First Minister mentioned the Council of Ministers, because the European Union is very active in policy co-ordination. Where there are areas where the EU doesn't have the competence to create legally binding legislation, it creates a European framework, and there are various instruments and mechanisms that facilitate that co-operation because it makes sense to have a common approach.

[233] So, as we are now thinking about how this post-Brexit policy co-ordination within the UK may work, I think we can usefully look to other models, particularly at the European Union level. Perhaps I say this because this is the area where I feel most familiar, but I think we can usefully draw some inspiration from there.

15:45

[234] **Professor Scully:** I think you could well argue that there's a very strong case for more substantial and more formalised mechanisms of shared ruling and inter-governmental co-operation anyway, but, in certain policy areas, such as agriculture, which Rachel was just referring to, there is going to be

substantial further impetus in that direction. But as, for instance, the First Minister was talking about in his earlier session with you, some of these sorts of structures and mechanisms, which you might think about putting in place, do rather go against the established practice within the UK and the established understandings that at least some elements of Whitehall have about how Government works within the United Kingdom.

[235] **Steffan Lewis:** The other complicating factor, of course, is that each nation in these islands, whether they're a part of the British state or not, also has a big constitutional and political and economic impact on the other. Nobody has mentioned Ireland. The Republic will be influenced hugely by whatever model of Brexit there is, not least because of Northern Ireland, but also because of trade with Wales through the ports and Stranraer in Scotland and all the rest of it. Part of me is thinking that we need to have joint ministerial and inter-governmental structures in the UK, post Brexit especially, but there is that British Isles level as well, in terms of the Channel Islands and the Isle of Man as well, which have a different relationship again. Is moving towards a Nordic-style model, where you have some that are in the EU, some that are not, some in the single currency and some not and some part of one state and some independent—? Should we be looking at that level of formal integration and co-operation?

[236] **Profesor Scully:** Again, as the First Minister was saying in his session earlier, I think there are a number of different models you can look at for co-operation, just as there are a number of models of Brexit that you can look towards. To some extent, what form of Brexit we have may well condition the sort of structures for internal co-operation within the UK and across these islands that we look towards. If we have the softest of Brexits, where we remain full members of the single market, for instance, that creates a very different set of policy imperatives and potential incentives for co-operation than if you moved to the very much hard Brexit end of the spectrum, where maybe there are more powers being repatriated and there are more distinctive UK-level policies being put in place. I would tend to think that the form of co-operation should follow the functions and the policies that are actually being repatriated or, in some way, the UK following a distinctive path. It could well be that, obviously depending on what form of Brexit we have, you also need, frankly, different forms of co-operation for different policy areas as well.

[237] People talked a lot about, for instance, animal welfare, assuming we're not going to be part of the common agricultural policy anymore. There have

been very compelling incentives for at least a GB-wide common structure there. In some other policy areas, there may be a need for an all-islands approach on some issues and it could well involve things like the Crown dependencies as well, or even some of the Crown dependencies but not others, very much depending on the specifics of the issue. It may well be that, in this area, one size very definitely doesn't fit all.

[238] **Steffan Lewis:** But would you agree, just finally, that we don't have the constitutional framework and the structures in place yet to accommodate any of those scenarios?

[239] **Professor Scully:** I think that both inter-governmental relations and what I've referred to as 'shared rule'—the contribution of the sub-state units to decision making at the state level—in the UK are really quite primitive compared to lots of international examples you see. Again, the First Minister, in his previous session, was talking about, on finances, the example of Australia. There is another very interesting example that my colleagues in the Wales Governance Centre are looking at with Belgium. There are various different models that one could look to try and adapt and borrow from. There are various different ways in which, in many states, the sub-state units contribute to the decision-making process of the state as a whole. In Germany, as many of us will know, the second chamber of Parliament, the Bundesrat, has direct representatives from the Governments of the Länder.

[240] There are very formal structures in some countries—Belgium, in many policies, being an example—whereby the regional level governments, or whatever you want to call them, contribute to important decision making and the allocation of resources across the state as a whole. That is very much under-developed in the UK, largely reflecting the UK's historic development as a sort of state of unions, as James Mitchell of the University of Edinburgh refers to it, in growing out from the English core with rather differently constructed unions for Wales, Scotland and Ireland—Northern Ireland. The predominant model that certainly Whitehall has understood has primarily been about bilateral negotiation at each of those individual unions, rather than incorporating them all into a structure that also then has to find some place for England, which remains the great unresolved question within the UK's constitutional structures.

[241] **Dr Hunt:** Can I just pick up on that as well to reinforce something that Rachel was saying about how we could use the European Union as a learning instrument in some ways? If, post Brexit, we are looking at reconstructing our

constitutional machinery, in some of these policy areas in particular that have been devolved but have been heavily Europeanised in terms of how we work in those areas, there's a lot to be learned about how competence is shared from the EU level down. If we replicate that at a national level, there are some areas of exclusive competence and some areas where competence is shared, but in those areas, the principle of subsidiarity is absolutely essential. We would expect to see any constitutional machinery going forward making it clear that there was a commitment to that principle of subsidiarity and decisions being taken at the lowest most effective level.

[242] **David Rees:** Can I ask a question, then? You said 'if' we look at the constitution. Do you think it would be appropriate and timely to look at those constitutional circumstances post Brexit, to ensure that we do have a more suitable constitution for the way forward with the devolved nations?

[243] **Dr Hunt:** I think Brexit gives us that opportunity. In a terribly British way, we pragmatically patch things up and move things on, but it's a juncture at which we can fundamentally look at things. Whether we will—. As I say, it gives us that point of—

[244] **David Rees:** The reason I raise it is that Professor Scully talked about established practices and whether it was time to change established practices and put in practices that are now efficient and effective.

[245] **Professor Scully:** My own view is that you should look at this after Brexit. I mean, if you are going to talk about a fundamental change, you want to have it in place for the time that Brexit happens. There are many problems there. One is fundamental constitutional re-engineering—there isn't a great tradition of that within the United Kingdom. If you are going back and trying to redesign the constitution as a whole, it's not something we tend to do. I think there's also at least one very obvious problem with this, if you are trying to think about constitutional conventions such as the First Minister and others have talked about: at least one and a half of the Governments in the United Kingdom, frankly, don't particularly want to be part of a re-engineered United Kingdom. They would rather be outside the United Kingdom, so would have no particular incentive to try and make a constitutional convention work.

[246] **David Rees:** Thank you. Jeremy.

[247] **Jeremy Miles:** You mentioned the example of Australia earlier, and we

were talking to the First Minister about the idea that a future funding arrangement might be predicated on a statutory basis that would deal with the principle of funding and, I suppose, the broad basis of that—so, not a detailed formula—and probably a dispute resolution mechanism as well. Could you just comment on the merits and deliverability of that, given what you've just said about this being a moment of constitutional flux, if you like?

[248] **Professor Scully:** Okay. I am quite a long way from being the world's greatest expert about the Australian fiscal adjustment process, but I have read a fair amount about it. It is based on the principle that all of the Governments at the state level and the federal Government contribute, but you also have some independent voices who are able to contribute, particularly towards the resolution of disputes. The difference of that with current practice in the UK is that, as the First Minister was saying in his session earlier, the Treasury is, in a sense, both a participant but also the decision maker. But, in a sense, that is very much in keeping with established ways of thinking about the UK constitution, whereby there is the core state and then there have been certain grants of self-rule to Wales, to Northern Ireland to Scotland, but no sort of fundamental re-engineering of the core state in London. I think that there's certainly a mood in significant parts of Whitehall to see very much the devolved level of government as subordinate rather than as equal partners. I think that to arrive at some sort of structure, such as they have in Australia, for the allocation of resources and the resolution of disputes about those resources would require a fairly fundamental change of mind-set as well as change of practices, and probably a change of constitution in the UK, particularly in London, in Whitehall. It would require recognising this Assembly, the Welsh Government and its equivalents in Scotland and Northern Ireland much more as equal partners rather than essentially a subordinate level of government.

[249] **Jeremy Miles:** But I suppose that the principle of funding exists as it does today. I mean, the element that is objectionable to many of us would be the level of discretion, I suppose, let alone the detail of the principle. The basis of it is already there in a sense that the UK Government funds the Welsh Government on a particular basis. Do you feel it's not imaginable to get to that end point of a legal basis for that within the context of the discussions that are likely to be unfolding over the next couple of years?

[250] **Professor Scully:** Well, I think it would certainly be a significant step for the Treasury that would involve them giving up significant power. And bodies tend not to do that unless there's a fairly compelling incentive for them to do

so, or unless there's a compelling leverage impelling them to do that.

[251] **David Rees:** Thank you. We'll move on now to Hannah.

[252] **Hannah Blythyn:** Thanks, Chair. On the details of the Brexit negotiation process itself, what do you think the main difficulties or differences or even disputes will be within the UK in the detail and the vision of the UK's Brexit?

[253] **Professor Scully:** Oh crumbs. That's a good question.

[254] **Dr Hunt:** We're getting a sense to the extent that we can define what the UK Government's position is on where it stands on market—. Market access is a term that we see being used, but in itself it isn't a particularly useful term. You think that might mean custom-free trade, tariff-free trade, but it's not membership of the single market, which would mean accepting the regulatory standards of the market and then producing in line with those standards, and then getting access to other markets on the basis that you meet those standards. So, we know that the UK Government talks about access to the market, but is not supporting free movement of people, however we want to define free movement of people, whether that is workers or others, but the market is the focus. We know that the First Minister has said that Wales has a red line around access to the market for trade in services and in goods, but not for people. But we are going to have to think about workers in particular key industries, and then we know from Scotland that there's a clear commitment to remaining a full member of the single market and everything that comes with that. So, there are clear issues around identifying the current position there.

[255] **Professor Scully:** I think it's bit difficult to be clear yet as to what the main lines of dispute might be because, frankly, we are still so far from having clarity on what the UK Government's position is going to be. So, how can people be in dispute with something when they don't quite know what it is yet? If it starts to emerge, if there is a much clearer UK Government line, then it may be more possible for the devolved Governments to engage with that and seek to influence it. And it may well become emergent as to what the major differences are within that.

[256] If I may just add one point to that. I think that I suggested earlier that I thought that Wales's relative sort of leverage in this process was probably relatively weak. I think one thing probably follows from that: for any attempts by the Welsh Government in Wales generally to influence this process, I think

that we're going to have to be very clear on what Wales wants, have probably a relatively small number of key priorities and just keep hammering away at them, hammering away and impressing on the UK Government and other actors, probably to the point where people are just utterly sick of hearing, 'So, Wales wants'. There should be probably three or four key priorities, and that has to be something that is hammered away at by the First Minister, by other Government Ministers, probably also by other political parties.

16:00

[257] Given that we don't have very strong bargaining hands, I think we're going to have to sort of take a team Wales approach on this and have a few key priorities and just keep hammering away and insisting, 'This is what Wales wants', almost to the point where people vomit at the thought of saying this again because they're so fed up of it. But just keep on until people probably get sick of hearing, 'Oh, God, the Welsh are on about that again.' It's probably the only way in which we're actually going to get the things that the UK Government might not otherwise be willing to push for. But just have a few key issues and just make them absolutely consistently the priorities that we keep pushing. If we have clarity on what Wales wants, at least, there's a chance that we might get it.

[258] **David Rees:** Could I seek clarification? We talked about this earlier—'membership of' and 'access to'. In your view, is 'membership of' equivalent to membership of the EU, or is it separate from membership of the EU? Is it simply membership of the regulations and the tariff-free without the free movement? What is 'membership of'? What do you consider 'membership of' to be?

[259] **Dr Hunt:** Well, 'membership of'—. There is the view that the four elements of being part of the European Union are completely indivisible and you have to take them all together. So, I can understand why, if you're talking in terms of 'membership of', there is a suggestion that you then have to be part of all of it, and also accept free movement of people, as it's been interpreted by EU law, and the court goes beyond free movement of workers. That said, it doesn't go that far beyond free movement of workers. It's a particular way that we in the UK have interpreted this, and the rules and the rights that we've made available. We could have done more within our legal system to control the free movement of people, should that have been something the Government wished to do. We see other countries doing the same thing. So, when we talk about having to accept the free movement of

people, what do we mean by that? There are various shades within that. So, when we talk about membership of the single market, we could say that that means the whole lot or we could be talking about membership of the single market just for goods and services. Purists would say, 'No, we can't say that', but you could make an argument about EEA membership, that they have rights to be part of the single market in goods and services that gives them the ability to produce in line with EU standards and then their products are assumed to then be lawfully—. They can be sold anywhere across the EU because they've met those regulatory standards. So, it's participation in the regulatory standards framework, and also the tariff-free provisions. For those countries as well, there is free movement of workers but not the same degree of free movement of people. So, there is a halfway-house type of situation.

[260] **David Rees:** So, it's membership of all four, but some control upon ones you wish to put a control on.

[261] **Dr Hunt:** Yes.

[262] **David Rees:** Thank you. Suzy.

[263] **Suzy Davies:** Yes, well, it's related to that, actually. The First Minister was pretty clear in his evidence to us that unfettered access to the single market is on his list. He said that business is pretty much of the same opinion—they don't really care about anything else as long as it's tariff-free access to the market. But, of course, your own poll shows that, in the general population, the leavers are twice as committed to a trade-only agreement than the remainers are to a wider Brexit, which would include free movement of workers. So, there's a disparity between what appears to be the position of the general population and business plus the First Minister. You mentioned what Wales wants. How is the First Minister going to square that circle to take a position to the UK table? He couldn't answer that question. I wonder if you can give him some guidance.

[264] **Professor Scully:** Well, with some difficulty perhaps.

[265] **Suzy Davies:** Well, I think those were his exact words.

[266] **Professor Scully:** The evidence we have on public attitudes suggests, I think, a couple of things. One is that there remains, several months after the referendum, quite big divisions between the people who voted 'leave' and

the people who voted 'remain'. There hasn't been a coalescing of public opinion behind some particular option. Related to that, leavers and remainers have very different ideas about what should be happening now, what sort of future we'd be looking to. And a lot of people who voted 'leave', which was the majority in Wales, for them, a very key priority appears to be controlling and reducing immigration. That appears to be the most important thing to them. For many people who voted 'remain', as well as much of the business community, they would like to retain the closest possible links, including economic links, to the European Union and its market. I think, you know, there is a policy difficulty of trying to resolve those. There's also a political difficulty, I think, facing the First Minister, of course, finding himself on the opposite side of an awful lot of traditional Labour areas and traditional Labour voters in the referendum.

[267] **Suzy Davies:** So, what Wales want is actually going to be really difficult to identify.

[268] **Professor Scully:** Yes, well, I think, I dare say, some people who voted 'leave' might be people—soft Brexiters—who might well be willing to accept a relatively soft Brexit—

[269] **Suzy Davies:** Nine per cent of them.

[270] **Professor Scully:** —still retaining pretty close economic links. But, I mean, there is a strength of opinion on matters like immigration, which all politicians have to at least be aware of, even if they don't necessarily follow it in their policies. This referendum result was building for quite a long time, and one of the major issues was a feeling that the controls on immigration are far too lax. That is something that a lot of people who voted 'leave' still feel very strongly about, and want a deal that puts in place some quite tight controls on that.

[271] **Suzy Davies:** Okay. So, it's basically going to be difficult. That's all I wanted to get to.

[272] **Professor Scully:** Yes.

[273] **Suzy Davies:** All right. Thank you.

[274] **Dr Minto:** Can I add something in there? I agree with the point that Roger made—given the political leverage that Wales does have, it would be

really important to be clear about what the messages are coming from Wales. However, I imagine that these aren't going to be at the broad level of, 'We want full membership of, or access to, the single market', but kind of at a more detailed level, so we're looking at sector-specific industries, or even specific products. So, it might actually be a bit easier to galvanise support around those closer-to-the-ground issues, as opposed to the broader conceptual frameworks.

[275] **Suzy Davies:** Can I just say something quickly on the back of that? Does that mean that—in due course, should free movement be something that's accepted more than, perhaps, your poll shows—the First Minister could turn around to the people of Wales and say, 'Yes, I know, but actually Scotland really wanted this'? I'm looking for opportunities for buck-passing. [*Laughter.*]

[276] **Professor Scully:** That would have to be a political judgment that he would have to make at the time.

[277] **Suzy Davies:** Okay, that's fine.

[278] **David Rees:** We're not here to make assumptions on what the First Minister may make a decision on politically.

[279] **Suzy Davies:** Well, he's making some at the moment. Anyway, thank you.

[280] **David Rees:** I'll move on to relations at EU level. Mark.

[281] Buck passing

[282] **Mark Isherwood:** Thank you. You refer to the constitution—I would like the Burke model, which recognises that evolutionary constitutional change is likely to lead to greater stability. Of course, we've already had two referenda, three Acts and a forthcoming Bill as the federalisation of Wales within UK moves forward. But, accepting action by the UK Government to include devolved Governments and legislatures in negotiation on withdrawal at EU level, what role, realistically, can the devolved Governments and legislatures play?

[283] **Professor Scully:** In formal terms, their role would clearly appear to be fairly limited. It will be the UK Government that is conducting the negotiations with the European Union. The Scottish Government, the Welsh

Government and the Northern Irish Government are not formally part of that process. Their influence they must seek to have, either by influencing the UK Government's position, or by possibly working around and trying to influence the EU's position, in some respects, and trying to maybe have allies there. It's really interesting, for instance, to see so many apparent attempts by the Scottish Government to win allies, for instance, in Germany. But, you know, the formal status of the devolved Governments within what is coming from the UK in the process is very clearly extremely limited. It will be the UK Government that negotiates the deal. It will be the UK Parliament who's primarily responsible, then, for ratifying it. There may be some scope for legislative consent motions and so on, but the formal inputs of the devolved Governments would appear to be very limited indeed.

[284] **David Rees:** Can I expand upon that? The formal process made by the Prime Minister has been identified as she believes the UK Government is the member state and will be the negotiating body. But in the past, a precedent has been set where, where devolved nations have had responsibility, they've attended, either on behalf of the UK Government or alongside UK Government. Could that precedent be transferred to a situation like this where there are areas of this negotiation that will be important to the devolved nations?

[285] **Professor Scully:** Well, devolved Ministers can attend, with the permission or with the agreement of the UK Government. Then, at the Council of Ministers, they are effectively representing the United Kingdom. Now, for particular industries, there may be significant justification for a devolved Minister to actually represent that position, but when we're looking at matters of Brexit negotiations, one suspects it's pretty unlikely that the UK Government would be willing to concede that status, particularly, one suspects, to, for instance, the Scottish Government, which seems to have some very different ideas to the UK Government about where this whole process should be leading.

[286] **Dr Minto:** Can I just pick up on one of the points that Roger made earlier about potentially Wales seeking to influence via the European Union? I think it is worth remembering that we do have established representation outside, in the European Union, through direct representation in the institutions, and also in Wales House, and Wales is part of a number of networks—the Welsh Government, the Assembly and also civil society organisations—and that it will perhaps continue membership of some of these networks when it is outside the European Union as well, and maybe

shift focus. However, I think that, given already the level of establishment or the level of presence that Wales has at the European level, there is scope there. There is a platform there for Wales to articulate its priorities as part of the Brexit negotiations. So, I think it is worth remembering we've got that route and that platform there, built on existing relationships.

[287] **David Rees:** Thank you. Mark.

[288] **Mark Isherwood:** What is your comparative assessment of the visibility, credibility and influence of the three different First Ministers in the eyes of the EU institutions?

[289] **Professor Scully:** Do you want to have a go at this? It feels slightly unfair to pass comment on them—

[290] **David Rees:** You don't have to. If you feel it inappropriate, you don't have to. I suppose, in a sense, you've identified it. Have the actions of the other First Ministers, perhaps, been different? We've seen Nicola Sturgeon's example, clearly making every effort to attend the EU and seek support. Have you heard whether that's been successful or not—that relationship?

[291] **Professor Scully:** Obviously, post referendum, Nicola Sturgeon and the Scottish Government were in a very different position to the First Minister here and the Welsh Government. They had a very clear popular mandate for keeping Scotland in the European Union and she picked that ball up and ran with it and very quickly sought to take advantage of the political position that that puts her in. There are some established links, for instance, that the SNP seems to have with the Christian Democratic Union in Germany, which potentially could be quite useful. But, obviously, there are also Governments, such as the Spanish one, which might well take quite a sceptical view of the SNP's attempt to try and carve out its own distinctive position for its own domestic political reasons. Do you want to chip in on that?

[292] **Dr Minto:** Well, just that I think it's worth remembering that, for a while, regions across Europe have had an eye on what Scotland's been up to, and they followed the independence referendum and they followed the EU referendum debate and the result with interest in the UK. And I think, already, we should note that Scotland had already been highlighted as a special case of interest to other regions within the European Union. So, it has that resonance, if you like. Nicola Sturgeon is being watched.

[293] **David Rees:** Has the decision of the Welsh people not to support remaining in the EU, like the Scottish people did, had an impact on the views other European nations have of Wales?

[294] **Dr Minto:** I think it has certainly fed into a general—. I think it can't be ignored. I can only base this on my personal interactions and a general level of surprise from my European colleagues at the decision that was taken in Wales—an acknowledgement that Wales did vote differently from Scotland and from Northern Ireland. So, certainly, it's been noted. The actual impact that would have in terms of the standing and the presence of Wales—I don't know who necessarily we're speaking about when we speak about 'in Europe'. I don't really want to comment on that.

[295] **David Rees:** Thank you. Jeremy.

16:15

[296] **Jeremy Miles:** Can I just go back to the European repeal Bill that was touched on briefly earlier? Clearly, there is scope within that Bill to adversely affect the devolution settlement, depending on decisions that are taken about where powers are going to lie. The Scottish Parliament's equivalent committee to this heard evidence from Professor Sionaidh Douglas-Scott that a continuation Act of the Scottish Parliament would be, if you like, a kind of bulwark against some of that. Do you have a view on whether that would be something we should consider here in Wales and, indeed, whether it would be effective in Scotland for that matter?

[297] **Dr Hunt:** So, the continuation Act—?

[298] **Jeremy Miles:** It would be an Act that, passed by the Scottish Parliament in that case, would describe the retention of the swathe of the European legislation that Parliament wanted to hold on to. Presumably, that would happen, although I'm not sure, before the European repeal Bill would come into effect.

[299] **Dr Hunt:** Because, of course, the repeal Bill is a misnomer.

[300] **Jeremy Miles:** Yes, sure, of course.

[301] **Dr Hunt:** The 'repeal' itself—it's not about repealing, the idea is that, rather than leaving this immense legal vacuum on withdrawal, laws that have

come into UK system, because it was through the European Communities Act 1972 that they found their way into our legal Orders for UK law and through devolution actions—some of those things may just fall away on the repeal of the European Communities Act, so regulations that have come in directly, statutory instruments—and, of course, the majority of things come in through statutory instruments rather than Acts of Parliaments, so the concern is that they would just fall away. So, securing these things in law as UK law, and then there's talk of this sift—now, whether there will be a systematic sift through the thousands of pieces of regulation or whether it will just be on a needs basis of things arising, which I think is more likely. But we'd want commitment within that piece of legislation that devolved competences would be respected in that process.

[302] There are concerns more generally about the place of the Westminster Parliament and the use of Henry VIII clauses that could give power to Ministers to introduce changes to primary legislation without going through Acts of Parliament. So, there are concerns around what's going to be in that piece of legislation, but the Westminster Parliament will need to be properly on its toes, looking at what's in there—

[303] **Jeremy Miles:** But there may be other factors at play, in fact, though, mightn't there? There might be, effectively, as we've seen, many of us would argue, in the Wales Bill an opportunity for the Government, which might want to make some changes to the devolution settlement, frankly, to do it. So, the question really was whether we could protect against that outcome by this Assembly passing an equivalent of that sort of saving provision, if you like, for the body of European law that is within the devolved competences on which we would form a view here that we wanted to retain. Would that mechanism protect us against attempts by the UK Parliament or Government to row back on things that they weren't comfortable with in the existing settlements?

[304] **Dr Hunt:** I think, again, we fall back on the continuation throughout [correction: the constitutional point] that this is not a federal structure. The structure that we have in the United Kingdom is not constructed around the federal structures that we see elsewhere that have those areas that are carved out and cannot be touched, and we fall back, ultimately, on the sovereignty of the Westminster Parliament running throughout all of this. So, there's always that fall-back that Parliament would not normally—but it would retain that power. So, it would be a significant political statement and a symbolic political statement. Whether, legally, at the end of the day, it

would be able to survive the actions of a Government, getting its Parliament onside, that might want to then challenge what the Assembly had done—. But it would be a very politically potent statement.

[305] **David Rees:** I wouldn't make it more—. If the UK Government decided to actually start withdrawing things, they would have to virtually make the statement very clear. So, as you say, it would be more of a political statement.

[306] **Professor Scully:** I wanted to just add to Jo's point there, if the legal process of Brexit effectively becomes, in some respects, also another set of devolution legislation, which I think, in some respects, it very probably will, getting that right obviously depends on the competence, probably, of Westminster to legislate effectively for devolution. The precedents there, particularly for Wales, are not particularly encouraging. We are currently going through our—is it fourth, fifth or sixth devolution settlement for Wales, which is looking like being yet another in a series of boded jobs, so the prospect of Westminster dealing with a matter as complex as Brexit and also legislating for devolution as part of that fills me with considerable foreboding, frankly.

[307] **David Rees:** Thank you. I'm conscious of the time. We've come to the end of the session, but I know Dawn wants to ask a question on public funding, so we'll fit that question in.

[308] **Dawn Bowden:** I did, just around—and you may or may not be able to comment on this, or have a view on it—but it's really around the Barnett formula.

[309] **Professor Scully:** Oh, good. [*Laughter.*]

[310] **Dawn Bowden:** A nice little one to throw in there at the end of the session. But we've already talked about the way that Scotland voted and the way that Wales voted, and I kind of wonder whether part of the reason why Scotland voted the way they did is that they've always done very nicely out of the Barnett formula, so their funding arrangements have always been much more generous than Wales, and Scottish people felt much better about their whole funding arrangements than the Welsh did. So, put that to one side, because I do think that may have been a factor, and as you know, the Welsh Government for a long time, even before the European referendum, had been calling for reform of Barnett, and the First Minister's made it very clear that

he could see no way that any post-Brexit funding arrangement with the Barnett formula could continue. So, I'm just wondering, really, from your perspective, whether you think that Brexit has made it more or less likely that we're going to get significant changes, either to Barnett, or ditching Barnett and looking at a whole new funding formula for Wales.

[311] **Dr Hunt:** I think if that's going to happen, then this is the moment, because of the constitutional enormity of Brexit. It just creates that sort of rupture—if the will is there to pick it up and take it.

[312] **Dawn Bowden:** Because I was just wondering whether this might be the point you were raising earlier on, Roger, about Welsh Government's key priorities—would this be one of the key priorities? I was just wondering if this is one of those things that is a red line—that we've got to have a significant shift in the way that Wales is funded.

[313] **Professor Scully:** I think it's not up to us to say what the Welsh Government's priorities should be, clearly, but I think there are—in fields like agriculture, for instance—there are going to be, as the First Minister was saying earlier, very compelling reasons why, for Wales, it would be desperately important you do not simply follow a Barnett formula-type model for funding that. As part of this process of very large-scale change, then maybe that is, in a sense, an appropriate time in which to shift the funding formula. On the other hand, the Whitehall machine, which is significantly less extravagant—has far more stretched human resources than it used to have—is going to be dealing with probably the most complex set of policy, legal and constitutional changes in the last 60 or 70 years in the next few years. Throwing in the funding formula as well as another very complex issue to deal with, they may go, 'Well, we've got enough on our plate already, frankly'. So, yes, you can see some very strong reasons for this being a good time to do that, but you can also see very good reasons why Whitehall might feel, 'Frankly we have enough to deal with right now'.

[314] **Dawn Bowden:** Going back to the point you were making about leverage, I accept your point entirely that if it's going to happen at any time, this would be the time for it to happen, but perhaps the leverage from Wales to get a better deal isn't there. Is that what you were suggesting earlier on about leverage?

[315] **Professor Scully:** Yes. I think we will need, as I said, to decide on a small number of key priorities, and just continue trying to push them.

[316] **David Rees:** And on that, I'll draw this session to an end. Can I thank Dr Hunt, Professor Scully and Dr Minto for your evidence this afternoon? It's been very interesting. We actually haven't had time to complete all our areas, but thank you very much for your time. You will receive a copy of the transcript. If you find any factual inaccuracies, please let us know as soon as possible. Thank you very much.

[317] We'll take two minutes, Members, and we'll remain in public while we just transfer witnesses.

16:25

Gadael yr Undeb Ewropeaidd: Y Goblygiadau i Gymru—Strwythurau o fewn y DU
Leaving the European Union: Implications for Wales—Intra-UK Structures

[318] **David Rees:** Can I welcome to the final session for this afternoon Dr Lee McGowan of Queen's University Belfast, Professor Michael Keating from the University of Aberdeen and Akash Paun of the Institute for Government? Welcome, all, and thank you for attending this afternoon. I want to move on as quickly as possible, if I can, because I'm conscious that we're already running late and I don't want to take too much of your time. So, we'll go straight into questions, and the first question is from Jeremy.

[319] **Jeremy Miles:** Thank you. Good afternoon. I'm interested in the High Court judgment last week and the equivalent, or parallel, judgment, if you like, in Northern Ireland and whether you foresee those decisions in any circumstances leading to arrangements whereby the devolved administrations would be required to give their consent to the exercise by the UK Government of article 50.

[320] **David Rees:** Professor Keating.

[321] **Professor Keating:** Yes, there are two elements here. One is consent by the UK Parliament and the other is whether that would require legislative consent by the devolveds. Now, the position of the UK Government has been that it doesn't require parliamentary consent for the triggering of article 50 and that the devolved administrations would not have to give legislative

consent—(1) because this is an exercise of the prerogative; (2) because it's foreign affairs, which is reserved; and (3) because of parliamentary supremacy. So, it's a kind of overkill argument. Now, the first one has been knocked down by the High Court, and is going to the Supreme Court, and there will have to be parliamentary assent. That does open the possibility that there might be a need for legislative consent. The second argument, that it's to do with foreign affairs, I think, is essentially unsustainable, because the EU covers domestic policy in a very, very wide way. And the third one runs into the idea of the Sewel convention and the growing understanding that the devolved assemblies would have to give consent to changes in their powers. This was most recently reaffirmed in the Scotland Act in only April of this year. The UK Government's position has been, 'Well, the Sewel convention only says that legislative consent is normally required, and this is not a normal situation'. Again, that's contentious, because it seems to be the UK Government deciding that 'normal' means: 'Whatever we say it means'. So, what is the meaning of it?

[322] Now, the only thing that's actually gone to court is the first one; those other things are probably not justiciable, but nevertheless, they do raise serious constitutional questions. So now we've got this judgment, I think we'll get constitutional arguments about the other ones all the way through to the final legislation about leaving—article 50, the great repeal Bill, and the final—. I think all of these will be contested in various ways as raising constitutional questions.

[323] **David Rees:** Mr Paun.

[324] **Mr Paun:** I wouldn't disagree with anything Michael has just said. My interpretation of the legal position is that there's obviously an argument that the UK Government has made, and may well continue to make, that under the terms of all the devolution legislation, relations with the EU are in the category of reserved powers, but I think, like Michael Keating, on Brexit, that argument is going to be quite difficult to sustain, because withdrawing from the European Union is clearly going to affect quite significantly the operation of the devolution settlements, the powers and budgets of the devolved Governments, and therefore it seems to me highly likely that legislative consent will be debated and voted upon at the devolved level.

16:30

[325] On the article 50 ruling, whether we will see legislative consent

motions on that Bill, assuming the Government loses the appeal and does have to legislate to authorise this, I suppose, first of all, it does depend on exactly what's going to be in that Bill, and the UK Government is almost certainly going to try and draft that Bill, if it's forced by the courts to have a Bill at all, as tightly as possible, both to avoid the possibility of unwelcome amendments at Westminster as well as to avoid, maybe as a secondary concern from their perspective, any argument that that Bill would stray into devolved areas and therefore trigger legislative consent.

[326] But it's interesting, because I can see an argument one could make that's analogous, actually, to the argument put to the High Court last week: that article 50 notification is deemed by the court to start an irrevocable process that will end up with the extinguishing of rights guaranteed by the European Communities Act 1972, and therefore requiring legislation. Equally, one can make the argument that issuing article 50 notification will start a process that will lead to changes to the devolution settlements in a similar way. So, I can certainly see the argument being made in a month or two, or whenever this Bill comes forward, that legislative consent should be sought.

[327] **David Rees:** Thank you.

[328] **Jeremy Miles:** Can I just ask—? There's no question in your mind that it would be legislation—I suppose you'd have to wait for the Supreme Court to adjudicate—but the assumption is that it would be legislation that's required, rather than a resolution of one or both Houses.

[329] **Mr Paun:** I've seen some debate about that, actually. I think most commentators on the judgment read it as implying, 'Yes, you would certainly need primary legislation', but I'm not sure if that's—. It wasn't in the text of the judgment, so that might be something—. I've also heard it suggested that the Supreme Court at the appeal stage may formally address that, but others may have more detailed knowledge of that specific point. I'm sure if the Government could do it via resolution, they would prefer to do it that way rather than by legislation. So, they may well—

[330] **David Rees:** Since you've asked the question, does anyone else have more detailed knowledge?

[331] **Professor Keating:** No; it's a question of how much detail there would be in the legislation and how that could be amended, potentially, by both Houses of Parliament.

[332] **David Rees:** Okay, thank you. Jeremy.

[333] **Jeremy Miles:** On the question of the European repeal Bill, which is the next challenge after that, I guess, that could be used to roll back some of the devolution settlement in all parts of the devolved administrations. The Scottish Parliament has had evidence in the equivalent committee about the merits of a continuation Act, which would be passed by the Parliament there to preserve the European legislation and the devolved competences there that the Parliament chose to continue, so to speak. And that would be a bulwark, in some way, against the ability of the repeal Act to roll back on devolution. Do you have a view on whether that position is correct and whether there's merit in this institution considering an equivalent piece of legislation?

[334] **Professor Keating:** The question of what happens to those devolved powers that are also European powers is a very live one. I'm actually adviser to the Scottish Parliament committee, and we got clear indications from the Secretary of State for Scotland that this would not be an opportunity to roll back on devolved powers. In Scotland, it would be politically extremely difficult to do, and were there to be a rolling back on devolved powers—that is to say, to get agriculture and environment policy back to the centre again—that would, according to the normal constitutional practice, require an amendment to the Scotland Bill, rather than just being a consequence of the European Bill. If it were not, then that would be a violation of the understandings. But my understanding at the moment is that the UK Government would probably steer away from such a challenge. Certainly, people in Scotland are not talking about these powers being taken back to Westminster.

[335] **Jeremy Miles:** But do you have a view of whether that sort of Act would be a backstop against that, in the event that there was that sort of—?

[336] **Professor Keating:** Well, no, no Act of a devolved legislature could be. We don't have that kind of constitutional protection. We only have the conventions to go on, and the conventions have that weasel word, 'normally', which can always be invoked by Westminster.

[337] **Jeremy Miles:** Thank you.

[338] **David Rees:** Steffan.

[339] **Steffan Lewis:** I wanted to touch on your thoughts on the role of the Joint Ministerial Committee, particularly the new sub-committee on European negotiations that's due to meet this week. How do you see that functioning if it is to meet its own aims and objectives, which sound quite ambitious to say the least—to find a common UK position on exiting the European Union, for example?

[340] **Professor Keating:** I'll take that one. I think that that committee is weaker than the existing JMC mechanisms, which are themselves quite weak because the existing JMC mechanisms require circulation of papers; they require civil service back-up, committees at official level, and they're tied to a mechanism according to which devolved Ministers can actually go to the Council of Ministers as part of the UK delegation. Now, what I've seen from proposals for this committee has none of those extra features. We don't know about free circulation of papers, but everything the UK Government is saying is that the negotiating position will be rather confidential, not shared with Parliament, let alone the devolved legislatures. There may be some civil service back-up, but probably not very deep. We don't know. It will be more of a consultation committee.

[341] As in the other JMC formations, the UK Government will have the last word, and there's been no suggestion that devolved Ministers will actually be in the room with the negotiations. That has not been suggested in any of the papers that I've seen. So, I regard it as a rather weak mechanism.

[342] **Dr McGowan:** I could even possibly go further and maybe use the word 'symbolic'. A lot of statements have come out since the vote for Brexit about engaging with the various devolved Assemblies, devolved regions, but you look at—and we said it in Northern Ireland—Liam Fox, David Davies, and the Prime Minister, all making those same statements about wanting to actually engage and that the regions and nations actually matter. And you begin to wonder about this idea of getting access as one thing, being listened to, or at least heard is another thing, but what actually is influence? I think this is the real big issue in many ways. Is this symbolic in the sense that you create this new Joint Ministerial Committee? And Michael's right—it doesn't look as powerful as the original Joint Ministerial Committee, and there are issues with those as well, in terms of how they're led by London and how often they actually met and what was discussed. But this looks slightly weaker, and the challenge for the devolved nations is how they actually get that input into the negotiations.

[343] **David Rees:** Mr Paun.

[344] **Mr Paun:** I think I take a slightly less negative view than the other two, although that's not difficult to do, I suppose, at least just to say that the new committee hasn't met yet. We haven't seen what might come out of the first meeting. The existing structures, both the JMC in plenary and the specific JMC on Europe, have been, according to everybody who's studied them—various parliamentary committees and so on—quite weak and limited in providing an opportunity for the devolved Governments to influence UK Government decision making. This new body, yes, I don't think it's—. Some of the signs have been quite discouraging; I would agree with that, but there is, at least, an agreement that this body will meet regularly. There'll be some kind of, according to what I've seen from Nicola Sturgeon's recent statement on it, published agreed work programme, presumably setting out some sense of key milestones in the process. And, at least, I think, we are seeing some kind of commitment to having regular consultations. I don't think, from the UK Government's perspective, it's going to go a long way further than simple consultation, and I do think—and we've argued this from the Institute for Government—that there is a need on this issue to come close to something much more like joint working, or partnership between Governments. I don't think the culture of Westminster and Whitehall is there yet, but, I think, at least we should see what may come out of the first meeting of the committee.

[345] **Steffan Lewis:** Certainly, the First Minister here is hoping that it'll be far more than just a consultative mechanism, but you touched on the point of no indication yet from the UK that Ministers from devolved Governments would be allowed into the negotiating room with the European Union once those negotiations start. How significant is that for other devolved Governments? The First Minister here said this afternoon that he's not particularly bothered about Welsh representatives in the room; it's whether there is an agreement on the position before the British representatives go into the room in the first place.

[346] **Professor Keating:** Being in the room is shorthand for a lot of other things. It's knowing what is going on, it's being there when the trade-offs are made, it's getting all the papers and being briefed for the meetings in advance. It seems that we're not going to get that, partly because the UK Government is taking the position that these are diplomatic negotiations in which it can't give its negotiating hand out in advance. It can't share that

with Parliament and therefore it can't share it with the devolved administrations either. That's a very different mode of working from the normal joint ministerial committees that deal with much more humdrum matters but where there is agreement—the issues coming up at the council are discussed, the agenda is discussed and then there's an attempt to get a joint UK line. Given the way that the UK Government seems to be dealing with the Brexit negotiations, it would be difficult to see that happening.

[347] **Dr McGowan:** Can I just add that it might work better if you actually had the heads of Government around the table discussing some of those issues? But we've taken a step further back that presupposes that—I'm thinking in a Northern Ireland context—the actual region knows exactly what its key interests are and how it begins to push those forward at this level. Certainly, in Northern Ireland, there are issues here.

[348] **Steffan Lewis:** Is it possible to read into that, then, that this JMC European negotiating body is doomed to fail because the British Government is not going to share its negotiating position with anybody beforehand? Do you think that's a sustainable position for their part? Is it going to come to a point where they take soundings from the devolved administrations in the JMC-EN and they take all that on board? What do you expect, practically, is going to be possible—to reveal nothing, go into the room on their own with the European Union and not feed back until they publish the final draft treaty and that goes to Parliament? I just wonder what the point is in them—unless it's just a cynical political ploy to be seen to be listening. Is it practically possible for the UK Government to get away with not sharing a position with the devolved Governments at the JMC?

[349] **Professor Keating:** I think the UK Government's position is going to leak out all over the place, in Brussels and in other countries, anyway—

[350] **Steffan Lewis:** Just not in the JMC. [*Laughter.*]

[351] **Professor Keating:** The JMC are probably the last people who'll hear about it. It depends on the level of the issues. If one of the devolved administrations were saying, 'We want to stay in the single market', that's clearly right against what the UK Government may well be arguing when the UK Government's position is clear. But, on the detailed matters, there may be scope. Once it gets to very, very detailed matters about how you implement it, if the devolved administrations have a radically different view about the future relationship with Europe, this mechanism is not going to overcome

those differences; those will have to be fought out in the political arena.

[352] **Dr McGowan:** The regions and nations need to agree these current British positions. If they can do that, that's really good, but the issue is what if the actual nations therefore have different issues and different views. That's when it becomes a little bit more problematic. How then do they—? Is it a room of four equals or are some more equal than others? How then to begin to determine what that British position may actually look like?

[353] **Mr Paun:** I was just going to add, going back to the article 50 ruling, as well as the previous concession by the British Government on allowing more time for parliamentary debate before article 50 notification, I think those developments mean that the Government's likely to have to provide more information on its negotiating strategy publicly to Parliament. We'll see exactly what happens with legislation, but there's likely to be pressure at that point. On the Bill, if there's any possibility, the opposition may seek to amend the Bill to include requirements to provide more information than I'm sure the Government would like to do. So, you know, the Government is not in the strongest of positions in some respects, even if its preference is to provide very little information. So, I think that may, likewise, mean that the devolved Governments are able to get access to additional information.

16:45

[354] There is one other thing I wanted to draw a comparison with, when we are talking about whether the setting up of this committee is better than what has gone before. I know that during and before David Cameron's renegotiations of the terms of British membership of the EU, the inter-governmental machinery didn't really operate at all in that period, as I understand it. I know that your First Minister said at one point that he only found out about the UK Government's negotiating priorities because he read about them in the *Sunday Telegraph*. As I said before, I think the fact that there is going to be these regular meetings provides more of an opportunity for devolved influence than would otherwise be the case.

[355] **Steffan Lewis:** It certainly sounds, though—just as a final point—that there could be a clear split in terms of how the UK Government might see the JMC-EN as the basis for discussion on the more detailed practical issues, but reserves the right to shape the fundamentals of our relationship post Brexit. In which case, from a practical point of view, doesn't it make sense for the devolved Governments to enter a JMC of their own to agree on the

fundamentals and take that to the UK JMC? If we are trying to create leverage and overcome the constitutional obstacles, it sounds like there might be more commonality between the devolved Governments than with the UK Government. In which case, shouldn't they perhaps look a bit more creatively at how they approach inter-governmental relations?

[356] **Mr Paun:** Where there is common interest, I think that certainly would seem sensible. I mean, on guarantees around funding, I think there has been some degree of joint working or joint statements already. So, yes, to the extent that there are common interests—. I mean, I'm not sure that the three devolved Governments are in the same place overall in terms of their vision for what Brexit should mean. The Scottish Government is still pushing for the softest form of Brexit possible, shall we say, whereas the Welsh Government seems to have conceded more that there will need to be action on restrictions on EU freedom of movement. Northern Ireland's Government is obviously internally divided. So, I don't know how much common ground there is, I suppose, is the short answer on that.

[357] **David Rees:** But is that partly reflective of the way in which the nations voted in the EU referendum? Clearly, Scotland and Northern Ireland voted to remain, whereas Wales and England voted to leave.

[358] **Professor Keating:** Yes, it is. That conditions a lot of it. The Scottish Government would say that it has a mandate to stay in the EU, but, if not stay, then come as close as possible to the single market. The Welsh Government is aware of the fact that there was a 'leave' majority in Wales.

[359] **David Rees:** I know that the situation in Northern Ireland is slightly different.

[360] **Dr McGowan:** Northern Ireland is slightly different again: a vote to remain, but of course it divides—as Northern Ireland votes tend to do—along the backgrounds of various voters. That also makes it a little bit more complex in terms of how that region, particularly, moves forward.

[361] **David Rees:** We will move on to the next question, on details of the negotiations. Hannah.

[362] **Hannah Blythyn:** Thank you, Chair. You have touched already on how the UK nations could input into negotiations and the complexities created by nations potentially having radically different views on key areas. From your

perspectives, in terms of the actual Brexit negotiation process, where do you think the main difficulties or differences in positions are going to come from within the UK nations, both in terms of the detail and the overall vision as well?

[363] **David Rees:** Mr Paun.

[364] **Mr Paun:** I don't mind. Okay.

[365] **David Rees:** [*Inaudible.*]

[366] **Mr Paun:** I was just thinking. We've obviously touched upon some of the obvious big dividing lines. The central question seems to be: what is the trade-off that the country is willing to make between access to the single market and the ability to control migration from the European Union? On that point, I think you can see, to some extent, a spectrum in terms of where the four Governments of the UK fall—you know, what would be their ideal place on that in terms of that balance. The UK Government has made it clear that controlling migration is more of a priority, and certainly the Scottish Government is much keener to maintain full access, if not membership [correction: full membership], of the single market, including freedom of movement. So, that's the high-level negotiating starting point. Ultimately, the UK Government will, presumably, take the final decision about what that position will be. But I would certainly argue that, as far as possible, they should seek to reach consensus with the other Governments. Then there'll a set of various other detailed issues about continued participation in EU co-operation around criminal justice, around research collaboration and funding, and all sorts of other things.

[367] **David Rees:** Professor Keating.

[368] **Professor Keating:** I think it might be useful here to make a distinction between reserved and devolved matters because the big difference is, as Akash has said, on the single market, the customs union, and so on, which are reserved matters but where the devolveds may feel that they have a different perspective, a different voice. Free movement, similarly, is a reserved matter, and then there are a lot of devolved matters as well, where the devolved administrations clearly have a greater case for involvement in this, and these would include agriculture and fisheries, and research and development. And there are also areas where it might be possible to have a certain degree of differentiation. It's not possible, in my view, to have

differentiation on the single market, but there may be possibility for differentiation in some other matters.

[369] **David Rees:** Dr McGowan.

[370] **Dr McGowan:** One of the big issues for Northern Ireland would be agriculture. It'll probably be the main issue, well, all bar one—the second issue in terms of the importance. Agriculture: if you remember Northern Ireland only represents 3 per cent of the UK population, so you begin to wonder to what extent Northern Ireland's dependence on farming and the agri-food business actually will feature in the wider UK discussions towards a British final position. So, it's huge. And the other big issue, of course, in Northern Ireland is the nature of the border. And, again, it links back to different types—and we know the different types of border regimes: hard borders, soft borders. And they could look around in terms of Norway and Sweden, they could look at a hard border—I guess it would be somewhere like Serbia and Croatia—and different borders in terms of places like Cyprus. But it's the nature of that border and what that border might look like in terms of freedom of flows of people and goods that also raise issues about the wider sort of UK final arrangements.

[371] **David Rees:** Thank you. We have a question now from Suzy Davies, on policies of divergence, as it happens.

[372] **Suzy Davies:** Yes. All three of you have indicated that there could easily be tensions between the constituent nations of the United Kingdom in determining its pre-Brexit position, as opposed to just each individual one against the UK. But, looking post Brexit, the First Minister has been quite pragmatic about how he expects to see powers repatriated, and there might be just arguments, using agriculture as an example, where, at least to start with, a UK position or a framework would be appropriate. How do you see these post-Brexit frameworks working, bearing in mind those tensions that I referred to earlier? How easy will they be to actually set up?

[373] **Professor Keating:** Well, if nothing else is done, then a lot of competences that are shared between the devolveds and the European Union will come back to the devolveds. The question is what are the consequences of that and whether the UK Government would want to recentralise some of these, and, if it doesn't, then what arrangements might have to be put in place to have a level playing field in agricultural products, for example, or a competition policy, state-aids policy. Something would have to be done

there. That might be done by Westminster taking the powers back. I think that's politically extremely difficult. Maybe there would have to be some kind of inter-governmental mechanism to resolve that. There would also be some—

[374] **Suzy Davies:** Could you suggest some models, perhaps?

[375] **Professor Keating:** Well, one is you say, 'Well, let's just have more divergence in agricultural and environmental policy and celebrate it'. Another is to say, 'No, we can't have that. Let's have some mechanism for co-ordinating, since the EU no longer does the co-ordination'. That could be via London or it could be horizontal. It could be genuinely inter-governmental, and, with England, it's just one player. The other difficulty, of course, is the funding for all of this, because agricultural policy is essentially about funding. Environmental policy is about regulation; agriculture is about funding. We don't know what the funding mechanism would be. You can't just put it through the Barnett formula. You can't just carry on existing levels. The devolved nations have got proportionately rather higher shares of spending in agriculture than England has. Do we keep those? Do we not? That's going to become critically important. The existing funding mechanisms in the UK are in crisis at the moment. We don't have a funding mechanism; we have four different funding mechanisms. It's chaos as it is. Add all this extra money coming back from Europe and that poses a serious question of what principles would you use to distribute that money and what strings would go with it. Would it go back into block funding, or would it have to be spent on agriculture? All of those things would have to be negotiated.

[376] **David Rees:** Mr Paun.

[377] **Mr Paun:** Thanks. Yes, I think the starting point for this is that it's not a coincidence, I don't think, that these competences that we're talking about—environment, agriculture, fisheries—are the things that were controlled so heavily, or regulated so heavily, at the European Union level because they're things that don't naturally respect borders. So, then, when they are repatriated to the UK, if they are just fully devolved, as, on the face of the existing devolution legislation, as Michael's explained, they would be, certainly I think the question would be raised—and I know people in Whitehall are thinking about this issue, certainly—would pulling out of the EU single market also then have the effect that we start to fragment the UK single market, and what mechanisms do we therefore need to co-ordinate

across the UK? I do think that, if that's the approach taken, it would need to be on the basis of four nations coming together and agreeing to, effectively, pool some of their sovereignty in a—the word 'federalisation', I think, was used earlier by one of the committee members. That is the kind of model of constitution we may need to start moving towards in some of these areas. Because, for Westminster to simply say, 'We're going to, through legislation in the UK Parliament, create a new version of the common agricultural policy and impose it', would clearly be to rip up established convention. We can debate whether article 50 needs the consent of the devolved bodies, but there's no question that, if Westminster were to try to renationalise competences like agriculture and environmental regulation and other things, that would be in breach of established conventions. So, I do think it would have to be on that kind of federal model, and, on those issues, the relevant bits of Whitehall would have to, in a way they're not accustomed to, think about themselves as the English Government. It wouldn't be the UK department of environment; it would be the English department of environment, working with its Scottish, Welsh and Northern Irish counterparts.

[378] **Suzy Davies:** Well, the First Minister said that he—. Oh, I'm sorry. I was just going to say that the First Minister said that he wouldn't accept an imposed framework anyway. Everything has to be through negotiation. But, as previous witnesses said, Wales—and it would apply to Northern Ireland as well—they're small within the whole scope of the United Kingdom. How are they going to be able to throw their weight around against the mighty England?

[379] **Dr McGowan:** And the other issue to think about is capacity. If these powers that are currently EU competences come back to the regional level, and I'm trying again to think in my mind of Northern Ireland—but also for Scotland and Wales, I guess—are the people—? As to what would a Northern Irish agricultural policy or environmental policy look like, the level of the funding is another huge issue that comes with this as well, but do they have the actual capacity and people power to actually deal with some of these issues, which, again, I think, is a really key issue that we actually don't hear enough about?

[380] **David Rees:** Thank you. Okay?

[381] **Suzy Davies:** Yes, fine. There's no more on that.

[382] **David Rees:** Dawn, on funding and public finances.

[383] **Dawn Bowden:** I think, to a degree, you've answered it in response to Suzy's question earlier on, but I'm just wondering—. Certainly, Wales has, for a long time, been calling for the reform of Barnett. So, do you see Brexit and post Brexit being the opportunity for that, because there has to be a new funding settlement around that? And is that something that Scotland, in particular, would be keen on? Because Scotland do very well out of Barnett, or course, and may have more leverage than Wales or Northern Ireland around those kind of funding asks, if you like, post Brexit.

17:00

[384] **Professor Keating:** I remember when the Barnett formula came in—or was discovered by David Heald to exist—nearly 40 years ago, and, since then, everybody is saying, 'It won't last', and it's lasted all of that 40 years since then. The system becomes more and more anomalous as, incrementally, various things are added to it. But the trend we've got now is that there are funding settlements for the various parts of the United Kingdom, negotiated bilaterally, without any reference to each other. And, as you say, the Scottish Government has not been keen on a review of Barnett—I don't think we should be talking about Barnett, there are four different Barnetts now, but, whatever it is, it wants to keep what it sees as an existing consolidated position. The Welsh have been very unhappy for a very long time about it, without any great effect. It would be nice to think there'd be a more rational system, but I don't think, politically, there will be. I think we'll have another fudge. We'll have another muddle. But this is a new challenge to Barnett because, previously, Barnett has coped with incremental changes in functions, and incremental changes in expenditure level. It's never had a really big hit like this, a whack of new money coming through all at once. But I just don't see any willingness in the UK Government to get a grip on that or, indeed, a capacity to do so.

[385] **Mr Paun:** I would have to agree with that assessment. I think the interesting thing about this moment, and the change is that the simplest thing to do—and almost certainly the preferred model from a Treasury perspective—will be just to add on the replacement funding for common agricultural policy and structural funds and other things on top of the block grant and then to 'Barnettise' it. So, then it just gets uprated with spending decisions for England, because that's administratively simpler, and it avoids dragging them into annual—or on whatever basis—conflict with the devolved

Governments. But the effect of that, of course—and that particularly hits Wales, in some respects—is that the needs-based element of these funds is stripped away. So, at the start of it, if you took that approach, Wales wouldn't lose out, but if the underlying different growth rates continue between Wales and England, then there wouldn't be automatic—

[386] **Dawn Bowden:** Structural funding, of course, does take account of need, which Barnett doesn't.

[387] **Mr Paun:** Yes, exactly. That's exactly my point. So, at the moment, there's a needs-based element to this funding, which compensates for the fact that Barnett funding isn't needs-based, officially.

[388] **Dawn Bowden:** So, if we went down that road, just 'Barnettising' the extra money, then Wales could see itself considerably worse off.

[389] **Mr Paun:** Over time, either if—. Yes, either if the needs continue to diverge, or, indeed, if the UK Government decided to cut spending on these things in England, which it might well do—agricultural support is less of a priority in England. So, yes, that would certainly create a risk that Wales would lose out.

[390] **Dr McGowan:** Just to add the perspective of Northern Ireland: £3.5 billion's come her way in the current EU financial perspective. If that money then comes from the Treasury after 2020, all well and good, but there are questions, again. Most of that goes to agriculture, and, again, one of the stats that's often quoted is essentially for—. We have, as I say, a large agricultural community, both directly involved and indirectly involved, and, again, it was estimated that, for every £1 that every farmer in Northern Ireland made—again it's a generalisation, we need to differentiate between different types of farmer, but, for every £1 that farmers made, 87 pence came from the common agricultural policy, or the single farm payment to be exact, and aspects of rural development. The idea is: does that money still come? If it still does, our farmers will be happy, but, again—. You were talking earlier on about public opinion. One of the biggest groups to vote for Brexit was the farming community and, again, we tried to—. Why were the reasons that you're voting against? It was regulation and red tape was the thing they brought back, which will, of course, exist in another form, but that's another issue.

[391] **David Rees:** Thank you. We'll move on to questions now from Mark.

[392] **Mark Isherwood:** In your views, is the UK facing a constitutional crisis following Brexit and how could this be prevented?

[393] **Professor Keating:** It is. I think one of the things that's not appreciated sufficiently in London is the way in which the devolution settlements are deeply embedded in EU membership, because we've only ever had devolution under the EU. This has permitted a much more expansive version of devolution than otherwise would be possible, because regulation was done at the European level, and therefore, Westminster was not worried about competition policy, state aids and so on, compared with what was proposed in the 1970s. Secondly, it has provided a space in which you can rehearse ideas about divided sovereignty, shared sovereignty. Sovereignty debates don't become zero-sum. This has been really important in Northern Ireland where you can have multiple perspectives on authority, rather than saying there's unitary authority.

[394] Finally, there's an entrenchment of European law in the devolution settlements themselves, which takes care of a lot of issues that otherwise might have to be dealt with at UK level. And, at a minimum, you're going to have to take away that third bit; you're going to have to amend the devolution statutes so as to remove the application of European Union law. So, yes, that destabilises a settlement that was already quite precarious, because the Northern Ireland settlement is always on a knife edge, Welsh devolution has been evolving quite remarkably over the years, and in Scotland, the unresolved independence question is there. So, a crisis, strictly speaking, is an unsustainable situation that then gives way to something else. I'm not sure it's a crisis in that sense, because I think this instability and uncertainty may persist for a very long time, but it certainly presents a challenge that the system's going to find very difficult to deal with.

[395] The other feature about mostly Europe and devolution is that they've been put through without any regard to principle. For example, Westminster has never formally admitted the supremacy of European law—formally. In practice, of course, we know it's always got around it. Similarly, there are all kinds of lacunae in the devolution settlement: is the Scottish Parliament sovereign, or is it not? These things don't really have to be answered. You can deal with these things by just skating around them. That's the pragmatic British tradition. That's going to be much more difficult to do. If you take an issue of principle: take back sovereignty—to where? To London or to Cardiff or to Edinburgh? So, yes, it means that the basis of the UK evolving

constitutional settlement has been seriously undermined. There may be a crisis in the form of a Scottish independence referendum. That would a kind of a crisis, there may be a crisis in the collapse of the Northern Ireland institutions, but, at least, there will be a series of tensions that are greater than we've seen so far. So, it's going to be difficult in the future to avoid these questions and to somehow muddle through post Brexit.

[396] **Mark Isherwood:** Is it fair to say that there are many international examples of federalised or federal states with state legislatures, Executives, and separation of power, tax-raising powers and all the rest at lower levels, which, nonetheless, function very effectively at a state level? In America—. It's confusing which terminology we use—the federal state, as opposed to the nation comprising that state or the states comprising that state or the Länder comprising that state. So, there are many models, are there not, globally, which show ways of sharing that power without compromising unity, that we could be examining between the four nations, as we move forward?

[397] **Professor Keating:** Yes, but we haven't got that. All federal constitutions have an entrenched division of power, which also limits the central level—it's at the central level as well. That is the secret. And whenever anybody comes up with a constitutional problem in the United Kingdom, everybody says, 'Well, the answer is federalism', but we never do it, and the difficulty there lies in the asymmetry and what you do about England. If you could resolve those questions, and we could have, frankly, a federal settlement, then, yes, these things could be managed, there would be a framework for managing conflict. But we haven't got that, and taking away the European framework exposes that lack even more clearly than it was exposed before.

[398] **Mark Isherwood:** In the States, for example, you've got individual states with populations the size of the combined UK and others with a population the size of a large UK city, yet they manage to constitutionally—

[399] **Professor Keating:** Yes, but the federal Government is subject to the constitution, just as much as anybody else, in the States, and we don't have that here. It's not just the size of the units, although there's no American state that has 85 per cent of the population, they don't have that degree of asymmetry, but it's also the constitutional asymmetry here and the fact that we don't have the federal principle there and we have a Government in Whitehall that's partly English and partly UK in a very unclear way. So, if we

were able to get to that federal principle, yes, these things could be manageable, but so far the UK has always chosen not to go down that road.

[400] **David Rees:** Mr Paun.

[401] **Mr Paun:** We are very, very far indeed from a fully federal system, which would imply the things Michael's outlined: England becoming a federal unit or breaking up England into regions with its own parliament [correction: with their own parliaments]. People have talked about federalism as a possible solution or answer to the West Lothian question and that kind of thing for a long time, but nobody's spelt out how a fully federal system would work. I do think, though, that elements of federalism have been part of our evolving territorial constitution and could become more so. I mean the Scotland Act does now recognise the permanence of the Scottish institutions. The Wales Bill will do likewise when that comes into law. There is, I think, a sort of evolving recognition that pure, untrammelled parliamentary sovereignty no longer exists, even if it's slightly just in those, sort of, symbolic statements so far.

[402] I do think Brexit, potentially, creates a constitutional moment. It creates a context for reconsideration of some of these fundamental principles and, potentially, for a reformulation of the relationships between the nations and the Governments of the UK. We were talking about it a bit a few moments ago, whether we'll need new four-nation systems to pool sovereignty and to co-ordinate policy in certain areas. I think these kinds of questions are going to come onto the agenda. I don't think that there's appetite at Westminster for fundamental constitutional change or codification, but things may be moving in an incremental direction towards something more like a federal system.

[403] **Mark Isherwood:** Well, certainly, we've been on a federalising journey since 1997, I would argue. But finally, what, if any, research have any of you conducted since the referendum on public opinion around the matters we're discussing and, if you have carried out that research, have there been any changes or key messages that you have identified?

[404] **Professor Keating:** I haven't carried out research, but I think we've all looked at the research that is being carried out, which shows a remarkable stability of opinion across the UK since the referendum.

[405] **David Rees:** Thank you. Steffan.

[406] **Steffan Lewis:** Just to go on with that point again about the notion of a federal UK—it will never happen, because they will have to concede one of the very reasons that we're being taken out of the European Union, which is that Westminster's not sovereign. The only way a federal system can work in any multinational state, especially, is if there is a concession that everybody's subjected to a federal level, which means Westminster would not be sovereign. Would you agree with that?

[407] **Professor Keating:** Yes.

[408] **Dr McGowan:** Yes. It's a lovely idea and we academics do play around with—could we federalising the UK and what would it actually look like? I don't think it's in any danger of happening any time soon, for the reasons you have said, but also the fact, in terms of this referendum and the result—'constitutional crisis' is too strong. Maybe the verb to use is it could 'unsettle' the links between the various nations of the UK. Again, I think the federal model—I know some people back in Northern Ireland of the unionist persuasion would love the idea of a federal UK, which they'd be an integral part of. But on the other side, therefore, you'd get the nationalist side saying, 'No, that's taking us further away. It brings us closer to the UK, we're now outside the European Union. We're actually very unhappy about where we may actually be', which leads you back then to problems in Northern Ireland—division again and where that may go. It could be problematic, but I stress 'could'. In terms of the whole nature of the negotiations, it's all got to be very carefully played out by the UK Government or it could unsettle things.

17:15

[409] **Steffan Lewis:** It could be argued that the UK's been in crisis since 1707, constitutionally. But what Brexit might give us the opportunity to address now is: how does each constituent part redefine its relationship with the centre? That's probably a more realistic prospect than an inter-governmental, quasi-federal partnership of equal nations. Would you agree that it's probably going to be a good old-fashioned bilateral between the centre and the constituent Governments?

[410] **Professor Keating:** Yes, I think that's likely. There's been talk about a UK constitutional convention, a grand settlement. I'm profoundly sceptical about this, because there's just not the consensus about that. There are very

different visions about where the UK should be going or about sovereignty and the nature of political community. That doesn't stop our institutions from working. It does mean that institutional design does become important, but the illusion that somehow we could reconstitute ourselves as a homogenous unitary state again, albeit federal—I think it's an illusion.

[411] **David Rees:** Just a final point from me: does that therefore lead to dangers in the negotiating position, in the sense that Westminster becomes dominant and we may lose sight of some of the interests of the individual nations at the price of something that Westminster has greater interest in, particularly the south-east of England?

[412] **Mr Paun:** Westminster will be dominant. That's hard to get away from, I think. That is clearly the risk for the devolved Governments. There isn't a simple solution to that. I do think that the UK Government is, in some respects, in a weaker position than might be assumed. It doesn't have a big majority in the Commons, it doesn't have a majority in the Lords, they're facing legal challenges, there may be attempts to use legislative consent to create problems in the process, the Government doesn't have a united party behind it—there are various weaknesses, I think, structurally that mean that the Government is going to have to find allies, shall we say, to make a success of this whole thing. I don't think it's going to be able to just unilaterally push through a position.

[413] **David Rees:** Thank you. Do Members have any further questions? There are no further questions. Dr McGowan.

[414] **Dr McGowan:** I was going to say, this is the challenge, in many ways, in terms of the devolved nations—to actually make their case, and what it is they're actually after. How do they actually go about doing it? I think my colleague to my right is correct: the UK can't be seen as laying down what is actually going to happen, but at the same time, it's up to the actual nations to make the case. They've got to try and get that agreement, if they possibly can, and whatever way possible—if it's through joint ministerial committees, do they actually work? Is it bringing in other member states? For example, is it the Irish Government? Because, of the two states, which one loses most by Brexit? I'd argue it's the Republic of Ireland rather than the UK in terms of the economics of this, leaving Northern Ireland out of this for the moment. So, are there other mechanisms, like the British-Irish Council? There are all these various ways to actually put more emphasis on the UK Government, or the London end. How we accommodate everyone to try and get an agreed deal,

whatever that might look like?

[415] **David Rees:** Thank you very much. Can I therefore thank you for your attendance this afternoon and for your evidence? We very much appreciate it. It was a very interesting perspective, from outside of Wales in particular. You'll receive a transcript of the session. If there are any factual inaccuracies, please contact us as soon as possible so that we can get them corrected. Once again, thank you very much for your time.

17:19

**Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o
Weddill y Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public
for the Remainder of the Meeting**

Cynnig:

Motion:

*bod y pwyllgor yn penderfynu that the committee resolves to
gwahardd y cyhoedd o weddill y exclude the public from the
cyfarfod yn unol â Rheolau Sefydlog remainder of the meeting in
17.42(vi).*

*accordance with Standing Orders
17.42(vi).*

Cynigiwyd y cynnig.

Motion moved.

[416] **David Rees:** Can I move now that, under Standing Order 17.42, we resolve to meet in private for the remainder of this meeting? Are Members content? I see they are.

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 17:19.

The public part of the meeting ended at 17:19.