



OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Relations Committee

Thursday 21 September 2017

Session 5



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CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
21st Meeting 2017, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

DEPUTY CONVENER

*Lewis Macdonald (North East Scotland) (Lab)

COMMITTEE MEMBERS

Jackson Carlaw (Eastwood) (Con)

*Mairi Gougeon (Angus North and Mearns) (SNP)

*Ross Greer (West Scotland) (Green)

*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)

*Richard Lochhead (Moray) (SNP)

*Stuart McMillan (Greenock and Inverclyde) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Sionaidh Douglas-Scott (University of London)

Mark Hanniffy (Consul General of Ireland to Scotland)

Dr Tobias Lock (University of Edinburgh)

Dean Lockhart (Mid Scotland and Fife) (Con) (Committee Substitute)

Dr Rebecca Zahn (University of Strathclyde)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 21 September 2017

[The Convener opened the meeting at 09:00]

Withdrawal from the European Union (Negotiations)

The Convener (Joan McAlpine): Good morning, and welcome to the 21st meeting in 2017 of the Culture, Tourism, Europe and External Relations Committee. I remind members and the public to turn off mobile phones. Any members using electronic devices to access committee papers should ensure that they are switched to silent, please. Apologies have been received from Jackson Carlaw. I welcome Dean Lockhart, who will be substituting for Jackson, and I invite him to declare any relevant interests.

Dean Lockhart (Mid Scotland and Fife) (Con): Thank you very much, convener. Good morning. I am a member of the Law Society of England and Wales.

The Convener: Thank you.

Our first item of business is an evidence session on the article 50 withdrawal negotiations. The focus of today's session will be on the circumstances relating to Northern Ireland and the Republic of Ireland. It is my pleasure to welcome the consul general of Ireland to Scotland, Mark Hanniffy. Mr Hanniffy, would you like to make an opening statement?

Mark Hanniffy (Consul General of Ireland to Scotland): I would, please. Good morning, convener. I thank you and the other committee members for your invitation to participate in this session to discuss the Irish Government's perspective on the United Kingdom's withdrawal from the European Union and on the negotiation process that is under way.

As you probably all know, we were deeply disappointed by the UK's decision to leave the European Union, but we respect the democratic decision of UK voters. Our principal objective now is to make the best of a Brexit that we hoped would never come to pass and to limit the negative consequences for Ireland, the British-Irish relationship and the European Union as a whole.

Our priorities are clear. We want to protect the gains of the Northern Ireland peace process, including by protecting the Good Friday agreement in all its parts and avoiding a hard border on the

island of Ireland. We want to maintain the common travel area between Ireland and the UK. We want to minimise the impact of Brexit on trade and the economy, and maintain a close trading relationship between the UK and the EU, including Ireland; and we want to influence in a positive way the future of the European Union.

The key priority issues for Ireland have been prominently reflected in the EU's negotiating guidelines and directives for the withdrawal negotiations, which are being led by Michel Barnier and his team at the European Commission on behalf of the European Union. In particular, the European Council and the European Parliament have recognised the unique situation and the specific circumstances that apply on the island of Ireland. As you know, the question of Ireland and Northern Ireland is one of the areas on which it has been decided that sufficient progress must be made in the first phase of negotiations before a second phase, which will focus on the broader question of the future UK-EU relationship, can begin. The European Council will take stock of the progress that has been achieved in the negotiations so far at its October meeting in about four weeks' time.

Although some progress has been made in the negotiations—in some areas more than in others—October is fast approaching and further progress is needed. It is not the case that all issues relating to Ireland and Northern Ireland need to be fully resolved before the next phase of negotiations can be opened—we acknowledge that it will be difficult to determine how certain border issues will be resolved until we know what new arrangements will be put in place between the UK and the EU—but it must be clear that both sides are beginning to converge on a shared understanding of how those issues should be addressed.

We very much hope that the British Government will engage fully on all of the phase 1 issues, including the financial settlement, citizens' rights and the Ireland issues, so that tangible progress can be made and the critical discussions on the future relationship between the UK and the EU can begin. Real progress on the phase 1 issues will help to build trust and confidence in the process and to ensure that the complex negotiations ahead have the best possible chance of a positive outcome.

Overall, we believe that we all—Ireland, Britain and the European Union—need to work towards the closest possible future relationship between the UK and the EU, an orderly exit and a substantial transition period that allows everyone to prepare adequately for new realities. Such an approach will provide certainty for businesses and allow companies to plan and invest. The Irish

Government believes that such a transition period must maintain the status quo in terms of membership of the customs union and the single market. It would be unreasonable to expect businesses to have to adjust to new arrangements twice.

Our key objective for Northern Ireland is to ensure that the gains of the hard-won peace process are protected. That involves protecting our all-island economy, which has supported peace, facilitated the normalisation of relations on our island and allowed people to get on with their daily lives. More than a third of Northern Ireland's exports travel south across our near-invisible border every year. Much commentary has focused on the challenges for the movement of goods across the border, but the Irish Government has consistently highlighted that the challenges of the border are about more than that: they are about people's lives and livelihoods, the border region being able to develop and prosper, and the potential psychological and social impacts on communities.

The European Commission task force recently published a set of guiding principles for the dialogue on Ireland and Northern Ireland as part of the article 50 negotiation process. The UK is a co-guarantor of the Good Friday agreement, and the paper makes clear that it is the UK's responsibility to propose workable solutions for the border to overcome the challenges that have been created by the UK's decision to leave the European Union. It stresses that the situation regarding the border on the island of Ireland will require a unique solution that cannot preconfigure other future arrangements for the EU-UK relationship, including those on trade and customs.

The Irish Government has carefully examined the ideas on a new customs relationship that the UK put forward in its position paper that was published last month. On the face of it, those ideas do not seem to be consistent with the shared objective of avoiding a hard border on the island of Ireland while respecting the integrity of the EU single market in which Ireland will continue to play a full part. Our Minister for Foreign Affairs and Trade, Simon Coveney, has made the point that streamlined customs arrangements are unlikely to be streamlined enough for businesses with tight margins and that, although a customs partnership has some promise as an idea, it will simply not be feasible if it is undercut by the UK making trade deals with countries that do not share our standards or systems.

If we value the peace and prosperity that has been built on the foundation of the Good Friday agreement, the obvious solution to address the difficulties that Brexit poses for Northern Ireland is for the UK to remain in an extended customs

union and single market—or some version of that concept. We believe that that option would be in the interests of Ireland, Britain and the European Union and that it deserves to be fully explored and considered rather than taken off the table before negotiations on a future UK-EU trading relationship have even commenced. We hope that we can move on soon to discussions on that future relationship and that we can achieve an outcome that provides for the closest possible future UK-EU relationship that is consistent with the integrity of the single market and the principles that have guided the development of the European Union. We have made it clear that the door always remains open for the United Kingdom on its future connection with the EU.

I will be happy to respond to any questions, convener.

The Convener: Thank you, Mr Hanniffy.

You said that the obvious solution is for the UK to remain in a customs union and as close as possible to the single market. Is that the progress that you would like and expect to see in this first stage, before we can say in October that we can move on?

Mark Hanniffy: It is unlikely that we will get there fully in the first stage of negotiations. As I said in my statement, it is clear that we do not expect all the first-phase questions to be resolved before the European Council can judge that sufficient progress has been made on those issues. However, it should be clear that both sides in the negotiation are beginning to converge on a shared understanding of the essential principles that are at stake and the direction in which the negotiations need to move to solve the key issues that need to be addressed, including the difficulties in relation to Ireland and Northern Ireland. I do not think that we need to get to a full exploration of those ideas, because they encompass questions that are connected with the broader future UK-EU trading relationship, which are not phase 1 issues but, if an openness to contemplating that solution was demonstrated as part of the phase 1 negotiations, that would be extremely helpful in demonstrating that progress in the negotiations is being made.

The Convener: Do you think that, because that solution has been taken off the table, progress cannot be achieved in phase 1?

Mark Hanniffy: No, I do not think that that rules out the prospect of sufficient progress being achieved. We await further information and suggestions from the UK side on the proposals that it will put on the table to address the difficulties that Brexit is likely to pose for Ireland and Northern Ireland, particularly in relation to border arrangements.

We make the point—the European Commission has also made this point in its essential principles paper that was published two weeks ago—that it is very much incumbent on the United Kingdom to come to us with suggested solutions. We are open to receiving and considering them but, in the absence of what we would consider to be workable solutions emerging from the United Kingdom side at this stage, the prospect of continued customs union and single market membership seems to us the obvious idea deserving exploration.

The Convener: Can you go into detail about some of the practical, day-to-day challenges that the all-Ireland economy could face if you do not achieve your objectives?

Mark Hanniffy: The reimposition of a hard border between the Republic and Northern Ireland would have very significant impacts not only economically and politically but psychologically with regard to the progress that has been achieved in the peace process since the Good Friday agreement was signed in 1998.

Essentially, Northern Ireland and the Republic and communities on both sides of the border have gone through a process of social and economic integration. Much of the economy in border regions, particularly the agricultural economy, is highly integrated; not only do hundreds of thousands of litres of milk travel back and forth across the border every week for processing, but every year something like half a million pigs travel from south to north and 350,000 sheep travel from north to south for processing. It has become normal for businesses and economic actors on one side of the border to conduct business without hindrance on the other side, and any reimposition of a hard border or any difficulties that might be encountered by businesses, particularly small to medium-sized enterprises, in that region in continuing to operate and trade in that way could have very difficult consequences for the economy in border communities.

There is also the psychological impact of the reimposition of the border on the island. The move away from a highly controlled border arrangement in the past 20 years has helped to make the dividends of the peace process very visible to and tangible for communities in Northern Ireland and to ensure the normalisation of political relationships on the island of Ireland. Any sign of momentum in that direction beginning to reverse could have difficult and unpredictable political consequences and consequences for communities on the island. We would very much wish to avoid that as the process continues.

The Convener: And the UK proposals do not assuage your concerns.

Mark Hanniffy: The UK position paper that was published last month contains proposals that are interesting and certainly deserve examination. There are two key suggestions in the paper: the possibility of streamlined customs arrangements and the possibility of a close customs partnership between the United Kingdom and the European Union. We welcome a lot in the paper and the fact that ideas and suggestions have been put in writing and circulated to us is welcome, too. The commitment in the paper to avoiding any physical border infrastructure for any purpose on the border between Ireland and Northern Ireland is also very welcome, but that is a lot easier said than done.

However, in respect of the two suggestions in the paper, I said in my opening statement that we believe that highly streamlined arrangements are unlikely to be streamlined enough for businesses operating in the border region. We might start from the same place with regard to single market regulations on either side of the border, but it is inevitable that, as time progresses and the UK negotiates trade deals with third countries, as it intends to do, regulations and arrangements will diverge. That will inevitably mean the emergence of more paperwork, more customs checks and more red tape, which will chip away at the tight margins of cross-border businesses. That is without dealing with the impact on the peace process of having more of a border on the island.

The idea of the new customs partnership that was suggested certainly has some promise but, as currently proposed, it could be a logistical nightmare to operate. It would prove viable only if the UK were prepared not to negotiate separate trade deals with third countries and instead chose to take advantage of the trade deals that the EU has concluded or is currently negotiating with major economies such as Canada and Japan. The publication of a paper by the UK side is welcome, but we do not believe that the ideas in it are sufficient to solve the problems that we face.

09:15

Lewis Macdonald (North East Scotland)

(Lab): As you know, consul general, the UK Government has published a couple of papers, one of which relates to potential future relationships in some detail, and the other to Northern Ireland and Ireland specifically and issues arising from that. I suspect that the UK Government would say that there should not be a problem as it has set out its objectives and everyone agrees with things such as retaining the common travel area, protecting the peace process and maintaining free movement of goods and people across the border.

Can you outline what the problem is and what is required—apart from the statement of good intentions—in order for things to work in practice?

Mark Hanniffy: The problem is reconciling those objectives and whether the broader objectives that have been set out by the UK are mutually compatible. The big difficulty that we see is the potential incompatibility between solutions that might be proposed for the Irish border and the intention of the UK to leave the customs union and the single market and to conclude separate and distinct UK-only trade deals with other economies. It is very difficult to see how that circle can be squared and how border arrangements that are consistent with the integrity of the EU single market—in which the Irish state will continue to play a full part—can be designed in a context where the UK is determined to vary its customs and economic arrangements significantly from those that apply in the EU.

Lewis Macdonald: I was struck by your comment that it would be in everyone's interest, and would enable progress in Ireland in particular, if the UK were to remain in the customs union and the single market in the transitional phase, which would presumably run for two or three years beyond March 2019. Can you expand on that point and explain what that arrangement would do to enable the negotiation and agreement of longer term arrangements that would protect the position in Ireland?

Mark Hanniffy: Such an arrangement would certainly allow more time for further exploration of the future arrangements that might be agreed at the end of the negotiation process. We have consistently stressed the importance of robust transitional arrangements in order to provide certainty and continuity to both citizens and businesses as well as to ensure that there is an orderly and calm transition from the UK's withdrawal from the EU to a future UK-EU partnership. The importance and value of such transitional arrangements is broadly understood as being in the best interests of all parties concerned—the UK, Ireland and the broader European Union.

You mentioned the UK paper on future customs and trading arrangements. In that paper, the UK proposes an "interim period" of "close association" with the EU customs union. That is a positive indication of the thinking on the UK side. We are looking carefully at that and other proposals in the UK paper, along with our EU partners and the European Commission task force, in light of the parameters of the European Council guidelines and the negotiating directives that were agreed by the council.

However, it must be said that, regardless of the potential nature of those transitional

arrangements, we will only be able to address the matter formally once we have made sufficient progress on the terms of the orderly withdrawal and are able to move into phase 2 of the negotiation process. We hope that we will get to that stage very soon.

Lewis Macdonald: That is an important point. The easiest transitional arrangement would be one in which the current provisions continue to apply. Given that such a possibility exists for 2019 to 2021 or 2022, what would the Irish Government consider to be sufficient progress on the withdrawal agreement in relation to Ireland in the period between now and March 2019?

Mark Hanniffy: The formal judgment on what constitutes sufficient progress will be made by the European Council as a whole when it meets in October.

As I said in my introductory comments, we consistently make the point that there is sometimes a certain misapprehension about the nature and scale of the progress that has to be achieved. We are not suggesting that everything needs to be signed and sealed, and that a deal that comprehensively covers all the issues that arise for Ireland and Northern Ireland as a result of Brexit must be agreed, before the second phase of negotiations can be opened. However, it needs to be clear that both sides are converging on a shared understanding of what solutions might be arrived at and of the principles that should guide those solutions as the negotiations progress.

Once the second phase of negotiations begins, we will be in a parallel negotiation phase in which discussions on the future relationship will take place alongside discussions on the remaining elements of negotiation on the phase 1 issues and on tying down formal ways of addressing those issues.

We have two rounds of negotiations yet to come before the European Council meets in October and makes its judgment on the question of whether sufficient progress has been made on the withdrawal issues. We will see how those negotiations go, and whether we get to a point in mid-October at which it is possible for the European Council to make the judgment that progress has been sufficient, that confidence has been built in the process and that the foundations are there for phase 2 negotiations to begin.

Lewis Macdonald: Would an indication from the Prime Minister when she speaks this week that the UK Government understands the principles of that transitional period and of the ultimate destination constitute a signal, to your mind, of progress in the round and convergence on shared principles?

Mark Hanniffy: Yes—convergence on principles would be very valuable. The purpose of the papers on essential principles and guiding principles that the European Commission task force has published in the past few weeks has been to set out the understanding on the EU side of the key principles that should be reflected in any agreement or deal on the phase 1 issues. If there can be convergence on those principles, that moves us very far forward in the phase 1 process.

Dean Lockhart: I would like to explore the question of trade deals. If, post-Brexit, the UK enters into trade deals off the back of the existing EU trade deals with Japan, Canada—given the trade deal that came into effect today—and other countries, would that minimise your concern about the divergence of regulations as we move forward? The UK's trade relationships with third countries would in that case map or be the same as the EU's trade relationships.

Mark Hanniffy: It would certainly help. If there was a guarantee that the nature of the trading relationship between the UK and third countries paralleled the EU's relationship with those third countries, that would help to resolve certain difficulties that might exist with regard to the compatibility of single market and trading regulations within the EU and the UK's external economic relationships.

I imagine, however, that there would have to be a guarantee that there would not be subsequent divergence between the trading relationships that exist between the EU and third countries and between the UK and third countries, in order to ensure that arrangements for a very free and unfettered trading relationship between the UK and the EU could continue in the longer term.

Dean Lockhart: Obviously, while the UK is part of the customs union formal negotiations with third countries on free trade agreements cannot take place. However, that does not stop informal negotiations taking place to discuss what a trade agreement might look like post-Brexit. I appreciate that this depends on some different scenarios, but how far down the track do you think the shape of a trade agreement could be outlined between the UK and Ireland over the next couple of years before the UK leaves—assuming that it does, in one scenario—the customs union?

Mark Hanniffy: It is not the case that there will be a trade agreement between the UK and Ireland. There will not be a bilateral process as part of the negotiations—those negotiations will be handled between the UK on one side and the EU on the other. An ultimate agreement that is reached between the UK and the EU will obviously reflect elements that encompass the specific and unique circumstances on the island of Ireland, which have been widely recognised.

However, the arrangements to govern the economic relationship between Ireland and the UK will be encompassed within a broader UK-EU agreement once we reach the end of the negotiating process. We very much hope that those relations can be as close and as productive as possible.

Mairi Gougeon (Angus North and Mearns) (SNP): You mentioned in your opening statement that it is not just a question of goods moving across the border; it affects people's day-to-day lives and it will have a massive impact. I would like to ask about that as well as the issue of citizens' rights. What are your views on the UK's position paper on that and how do you see it developing?

Mark Hanniffy: The impact that Brexit might have on communities and on society in Northern Ireland if things cannot be sorted out in a positive way is very significant. There are impacts on communities on both sides of the border. I have mentioned some of the economic impacts, and there are impacts on north-south co-operation in many sectors. It is useful to reflect on the fact that the Good Friday agreement itself, which is the founding document of the Northern Ireland peace process, was agreed at a time when the relationship between Britain and Ireland and the relationship between Northern Ireland and the Republic were always assumed to take place in the framework of shared EU membership.

There are regular references to the European Union and to co-operation within the framework of shared EU membership within the Good Friday agreement and the associated documents that govern both north-south and east-west institutions arising from that agreement. The North South Ministerial Council, for example, has a specific role in addressing EU policy questions. The British-Irish Council, which was established on foot of the Good Friday agreement to provide a framework for relations between the UK and Irish Governments and the devolved Administrations on these islands, as well as the Administrations in the Channel Islands, is also tasked with discussion of relevant EU issues.

The absence of that supporting EU framework for such co-operation brings us into a new paradigm, and it is difficult to anticipate precisely what impact the absence of shared EU membership might have on opportunities for cross-border co-operation, even in sectors such as transport and healthcare. The Irish Government is providing funding towards the upgrading of the road that stretches from Omagh up towards Derry and Donegal—I think that it is the A9. There are arrangements for cardiac patients who require access to emergency services in Donegal to access those services in Altnagelvin hospital in Derry, and co-operation arrangements that allow

children who require paediatric cardiac care and cardiac surgery throughout Northern Ireland to access those services at the Irish national children's hospital in Crumlin, Dublin.

We hope and assume that such cross-border co-operation can continue without hindrance in a post-Brexit scenario, but there will be more difficulties than were anticipated when the frameworks for that co-operation were originally put in place. That could present challenges for us, even in terms of divergence of standards, recognition of qualifications, and recognition of product standards for medical and healthcare products. Those issues could arise and could require some effort to deal with.

In relation to citizens' rights, we have examined carefully the paper and the proposals that have been put on the table by the United Kingdom. It is an issue that is being discussed in detail in the context of the negotiating rounds between the UK and the EU in Brussels. It seems that there is at least a degree of political convergence on what the UK and the EU sides want to see as the net effect in terms of the experience of EU citizens in the United Kingdom and the experience of UK citizens elsewhere in the European Union at the end of the process. There is still a divergence of views on the mechanisms and governance of those arrangements into the future. Those issues will be discussed during the next two rounds of negotiations, but I think that it is possible to say that we are hopeful of good progress in those areas reasonably soon.

09:30

Mairi Gougeon: Thank you. Further to that, what is the Irish Government's view on what needs to be agreed on citizens' rights as part of the withdrawal agreement?

Mark Hanniffy: Our position is very clearly aligned with the EU's position and the position paper on citizens' rights that the Commission task force has published.

We are looking at the issue from a unique perspective, as the regulations that govern the residence of Irish citizens here in the UK are derived principally from the common travel area arrangements between Ireland and the UK rather than necessarily from the rights of Irish nationals as EU citizens. That has been recognised by the EU side and the UK side.

There is a commitment on all sides to preserve those common travel area arrangements, which have been recognised in the European Council negotiating guidelines. We are obviously discussing the issue in great detail as part of the negotiating process and it is one of the areas on which we believe good progress has already been

made in the negotiations between the UK and EU sides.

Our legal analysis at this stage suggests that there is nothing in the current common travel area arrangements that is in any way incompatible with EU law, even in a situation in which one of the parties to the common travel area arrangements is a continuing EU member state and another party is not. The UK has made it very clear, very publicly, that it does not intend to put in place any regulations that would affect the ability of European Economic Area nationals to travel freely through the common travel area. That is extremely helpful and it means that we should be able to reach a good solution in terms of the maintenance of the common travel area post-Brexit.

Stuart McMillan (Greenock and Inverclyde) (SNP): I want to follow up on a couple of Dean Lockhart's questions. First, can you provide the committee with the percentages for the level of trade from Ireland to the UK and the level of trade from Ireland to the EU that travels via the UK?

Mark Hanniffy: With regard to the level of trade between Ireland and the United Kingdom, 17 per cent of our overall exports go to the UK, and between 40 and 45 per cent of our overall exports go to continental Europe to what will be the EU 27 post-Brexit. However, quite a significant proportion of the goods that are shipped from Ireland to continental Europe also transit through the UK; the British land bridge, as it were, is used to physically get them from Ireland to the EU. I cannot give you a definite statistic for that just now, but I can check it and come back to you. The importance of that land bridge and the issue of continuing to facilitate goods trade between Ireland and continental Europe via the United Kingdom have been recognised in the European Union papers that have been published, and it is being taken into account in the negotiations that are under way.

It is only fair to point out that quite a proportion of the trade that moves between Northern Ireland and the rest of the United Kingdom transits through the territory of the Republic; it might be shipped on a lorry to Dublin and then on a ferry to Liverpool or Wales. As a result, an equivalent issue needs to be addressed on the United Kingdom side, but we are confident that the issue is well understood on both sides and that progress will be made on finding an arrangement to ensure that that type of trade can continue post-Brexit.

Stuart McMillan: In your opening comments, you mentioned the transitional arrangements and said that it would be unreasonable for businesses to make changes twice if an agreement could not be reached. Do you agree that the figures that you have just highlighted and the issue of the land bridge strengthen the point about the importance of sorting out a transitional arrangement between

the UK and the EU to ensure that business in Ireland does not suffer as a consequence of Brexit?

Mark Hanniffy: Absolutely. Any change in regulations imposes costs on business. It does not seem reasonable to suggest to businesses, many of which, as I have said, trade across the border on the island of Ireland or between Ireland and the United Kingdom and operate on tight margins, that they be required to adjust themselves to one new set of circumstances, regulations and arrangements and then have to transition yet again to a completely new set a short number of years later. Our view, therefore, is that a prolongation of current arrangements through continued UK participation in the customs union and the single market during a transitional period would make the most sense for everyone involved.

Tavish Scott (Shetland Islands) (LD): I have a couple of questions about money. At the Council of Ministers in October, progress will largely be judged on the issue of money. We are told that Theresa May will say something about money tomorrow, but what do you think constitutes progress in that respect?

Mark Hanniffy: First, it has to be clear that what we are talking about in relation to the financial settlement is seeking a commitment from the United Kingdom that it will honour its obligations and the commitments that it has made as a member state of the European Union. We are not talking about imposing a bill or a charge on the United Kingdom for leaving, or about punishing the United Kingdom or seeking to dissuade it from taking the action that it has chosen to take.

The UK itself has stated clearly that it intends to work with the European Union to

“determine a fair settlement of the UK’s rights and obligations as a departing member state, in accordance with the law and in the spirit of ... continuing partnership”.

From an Irish perspective, we fully support the European Union position, which tries to approach the issue in what we think is a fair and transparent way, based on a clear, objective methodology that is agreed between both sides.

As for judging in October whether sufficient progress has been made on this issue, I repeat that we are not looking for a final agreement; we are simply looking for a situation in which it is clear that a convergence of views is developing, that a shared way of approaching the issue is emerging and that ultimately it will be possible to get ourselves, at the end of the negotiation process, to an agreed conclusion that both sides can accept.

Tavish Scott: And the view is that if the UK Government applies for a transitional period, however long that might be—I say “if”, because it has yet to do so; again, it is assumed that the

Prime Minister will indicate as much tomorrow in some way—that will mean a charge per year for it to remain in the single market and the customs union.

Mark Hanniffy: There are costs associated with single market membership—there are single market institutions that need to be funded, and there are regulatory bodies that have to pay their staff and fund their operations—so it is quite reasonable to expect a state that participates in the single market to make a financial contribution to its running and to those single market institutions. That principle is understood by states that, although outside the European Union, still participate, to a degree, in the single market, and I think that it would be understood that a similar provision should apply in respect of the United Kingdom.

Tavish Scott: We all hope that these things will be set out with some clarity tomorrow in the speech in Florence. That would help us all enormously with understanding the UK Government’s position.

Mark Hanniffy: It would help us all, and I admire your optimism.

Tavish Scott: I am not optimistic, but thank you all the same.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I think that there is good will on both sides. Indeed, you have talked about positive steps to come to an agreed conclusion. It seems that Theresa May will make Northern Ireland and the financial settlement—the divorce bill, if you like—priorities, but what do you hope she will set out in her speech tomorrow over and above the status quo and the kind of frictionless border that you have been talking about?

Mark Hanniffy: To be fair, the United Kingdom Government has clearly acknowledged the importance of Northern Ireland and the priority that needs to be attached to it in the context of this negotiation process. It was in the Lancaster house speech that the Prime Minister made in January and in the article 50 notification letter that was submitted at the end of March. We know that there is good will and a commitment to work hard to find a way of resolving the issues that Brexit poses for Northern Ireland.

However, we have to make the point emphasised in the recent EU guiding principles paper in respect of Ireland and Northern Ireland that Brexit is a British choice. We are perfectly content with the status quo in respect of arrangements on the island of Ireland, and we would like it to continue; however, it is Britain that is choosing to change that status quo. In that context, it is incumbent on the UK Government to come up with solutions and suggestions for how it

wishes to proceed with its overall policy objectives in a way that allows us to preserve, in so far as is possible, the arrangements that currently exist on the island of Ireland in respect of north-south co-operation, the open border and the full continued implementation of all provisions of the Good Friday agreement.

We have suggested that a commitment to a continued single market and customs union membership would be one way of solving that. That is on the table, and we wait to see what other suggestions or ideas the United Kingdom wishes to put on the table as part of the negotiation process.

Rachael Hamilton: I do not foresee this happening, but have you made provision for the possibility of there being no deal?

Mark Hanniffy: Obviously, we are conscious of the risk of there being no deal and that nothing is certain in the negotiation process. We believe that a failure ultimately to reach agreement between the UK and the EU and the disorderly withdrawal that would result would be hugely damaging for everybody involved—for the United Kingdom, the European Union and, most particularly within the EU, Ireland. For that reason, it is incumbent on all sides to act responsibly and to approach the negotiations in a constructive, positive, flexible and ambitious frame of mind, to ensure that a no-deal outcome, with all its negative consequences, can be avoided.

Ross Greer (West Scotland) (Green): I am interested in who represents the north during the process and the level of scrutiny given to the issue. Obviously, strand 2 of the Belfast agreement is incredibly difficult to fulfil when there are no institutions in the north to be part of any north-south agreement. That means that not only is there no Northern Ireland Executive working with the Scottish and Welsh Governments, but there is no Assembly scrutinising the process. That is for reasons separate to Brexit, but the resolution of the issue is increasingly related to that. What impact is the lack of functioning institutions in the north having on scrutiny of the process?

Mark Hanniffy: Certainly, it is far from ideal that there is no functioning Executive in Belfast that can represent the interests of Northern Ireland in the discussions on Brexit among the devolved Administrations in the UK and between those devolved Administrations and the UK Government. Issues, problems and difficulties relating to Northern Ireland are possibly not getting the attention or the highlighting that they deserve because of the absence of the Northern Ireland Executive.

We are working hard to encourage the parties in Northern Ireland to come to an agreement that would allow the Executive and the Assembly to resume their work. Informal discussions continue all the time, and there is positive momentum in those discussions at the moment. Recent statements from the Democratic Unionist Party and Sinn Féin have shown encouraging signs with regard to the prospect of an Executive being put back together. We very much wish to see the Executive back up and running to ensure that the interests of Northern Ireland and communities in Northern Ireland have as strong a voice as possible as the negotiation process proceeds.

There is now a good understanding across Europe of the specific difficulties that Northern Ireland faces as a result of the process. Certainly, it has been prominently highlighted in the European Council guidelines and the European Parliament's resolution on the Brexit negotiation process, and the guiding principles paper that the Commission task force published has reflected those issues very strongly. We know that Michel Barnier has a well-developed understanding of the issues, and Guy Verhofstadt, the European Parliament's lead on Brexit, was in Belfast yesterday and visited the border regions. He is in Dublin today.

Certainly a good deal of attention is being paid to Northern Ireland and to border issues, but it would be extremely helpful if there was a functioning Executive that was able to use its voice in the internal UK processes to ensure that the issues relating to Northern Ireland can get the attention that they deserve.

09:45

Ross Greer: What are the intentions in the Republic with regard to parliamentary scrutiny of the process? Is there a Dáil committee or a joint committee? What is the plan?

Mark Hanniffy: The Joint Committee on European Union Affairs in the Oireachtas is following the process, and a number of sectoral committees are also looking at Brexit's specific impact on their sectors. The Irish Seanad—the senate—has recently produced a report on the impact of Brexit on Ireland, with a special senate committee set up to examine the issues.

That is all part of a broader process of nationwide and island-wide public consultation that has been taking place over the past months. We have an all-island dialogue on Brexit that so far has engaged about 1,200 different stakeholders in the process of looking at the overall issues that Brexit poses for Ireland and some of the issues that Brexit is likely to pose in various sectors. Another full plenary meeting of that all-island

dialogue will be taking place on the 28th. There is a wide degree of dialogue, consultation and stakeholder participation on the Irish side.

Ross Greer: That is grand. Thank you.

Richard Lochhead (Moray) (SNP): Some sectors that are disproportionately important to Scotland and Ireland, particularly agriculture and fishing, will be affected by the withdrawal negotiations. Do you want to shed any light on your Government's thinking with regard to the best way forward for those two sectors, particularly fishing, what with the quite complex situation in relation to the Irish Sea?

Mark Hanniffy: Fishing is complex, and it is an area that will have to be explored in detail in the withdrawal negotiations. I do not want to prejudge what might come out of those negotiations, but difficult issues will certainly have to be dealt with in relation to fisheries sector arrangements in a post-Brexit scenario.

More broadly, agriculture and the food and drink sectors—certainly in Ireland—are possibly disproportionately vulnerable to the impacts of Brexit. The agrifood sector in Ireland and Northern Ireland and indeed in Ireland and Britain is quite integrated; according to statistics, about 40 per cent of Irish agrifood exports go to the UK and about 45 per cent of Ireland's agrifood imports come from the UK. There is clearly a great degree of economic integration between the two countries.

The agricultural sector is also a key part of our economy in respect of employment, particularly in rural regions—obviously—and in the border regions. About 8.5 per cent of total employment in Ireland is in the sector, and we are working to mitigate the possible impact of Brexit on it. For example, we have taken some measures to support the sector in our 2017 budget, and we are working with our agricultural support and enterprise agencies to ensure that businesses in that sector are prepared for Brexit's impact, are ready to deal with the difficulties that it might present for them and are ready to diversify their export markets, given the risk that it might be more difficult or that the costs of exporting into the UK might be a little higher in the years ahead.

The decline in the value of sterling since 23 June last year has already had a relatively significant impact on certain parts of the Irish agrifood sector. Bord Bia, our overseas promotion agency for Irish food, estimates that Irish food and drink exporters to the UK took a hit of about €500 million in 2016 alone as a result of that decline and the decline, therefore, in the value of their export trade.

Richard Lochhead: In terms of the wider economy, you have outlined a lot of challenges

and hurdles to be overcome in this process. What upsides do you or your Government see from the UK's withdrawal from the EU?

Mark Hanniffy: There are potentially some, and we intend to take advantage of them in so far as we can. We are clear that the likely net economic impact of Brexit on Ireland will be negative, so we are determined to find ways to mitigate that negative impact wherever we can. In essence, Brexit will leave us as the only English-speaking member state of the European Union, which has benefits in terms of foreign direct investment. We can continue to offer free and unfettered access to a market of 500 million people post-Brexit, which the UK might not be able to do. We have already had some successes in certain sectors in attracting investments to Ireland from businesses concerned about future trading relationships between the United Kingdom and the European Union—including, for example, in the financial services sector, where a major global insurance company announced yesterday that it would base its European operations in Dublin.

The Industrial Development Authority, which leads on the promotion of Ireland as a destination for foreign direct investment, has been having some successes in promoting Ireland as a destination for foreign direct investment displaced from the United Kingdom as a result of Brexit. We have a very strong investment offering in Ireland, with a positive and favourable business climate, a very well-educated workforce and strong availability of skills. Ireland has a track record of being a good location for internationally trading businesses to base their European operations. As a result of that, we will seek, in so far as we can, to attract any foreign direct investment that might be displaced from the United Kingdom as a result of the Brexit process as it continues.

The Convener: Stuart McMillan asked about the balance of trade between Ireland and the EU and between Ireland and the UK. How has that balance changed as a result of Ireland's EU membership?

Mark Hanniffy: Very significantly. Ireland and the UK both originally applied to join the then European Economic Community back in the early 1960s. I am open to being corrected, but I think that at that stage nearly 80 per cent of all Irish exports were sold into the United Kingdom market. Last year, the figure was 17 per cent. In contrast, we sold between 40 and 45 per cent of our exports into the continental European market—what will be the EU 27 market, post-Brexit.

That diversification in our export trade over the 40 years or so of our European Union membership has been really remarkable. The ability to access continental European markets freely and without hindrance and Ireland's participation in the single

European market have revolutionised our economy and allowed us to trade in a very different way from the way in which we could trade prior to our European Union membership. The consequences for Ireland have been significant.

The Convener: Has that led to an attitude towards the EU among Irish people that is strengthening as a result of the Brexit process?

Mark Hanniffy: There is very widespread support for the European Union and for continued Irish EU membership. The latest figure that I have seen was from a survey carried out in August, suggesting that 88 per cent of the Irish population is in favour of continued Irish membership of the EU. That is an overwhelming figure.

Ireland has a very strong European identity. We see European Union membership and participation in the European mainstream as an important part of who we are, and it has been key to the effective assertion of Irish sovereignty over the past 40 or 45 years. The fact that we are participating as an equal in discussions with the traditional great powers of Europe around the table in Brussels and that we can influence EU policy in so many areas as it evolves is very important for our international influence and our ability to shape the world around us in a way that is favourable to our interests. I think that that is understood and appreciated by Irish people.

The Convener: Was Ireland a more inward-looking place when it was tied to the UK?

Mark Hanniffy: That is probably fair comment in that, geographically, we are an island behind an island. There was perhaps a sense of our being politically, socially and economically cut off, to a degree, from the European mainstream up to the early 1970s. We were always very keen participants in processes of European dialogue and integration; we were founder members of the Council of Europe in 1949, for example, and we have always had a strong commitment to multilateralism in our membership of the United Nations and broader multilateral policy processes. Membership of the European Union significantly changed Ireland socially, economically and politically and allowed us to broaden our political and economic horizons in a very important way.

The Convener: Thank you for giving evidence to the committee, Mr Hanniffy. We will now have a short break to allow a changeover of witnesses.

09:55

Meeting suspended.

09:59

On resuming—

Withdrawal from the European Union (Citizens' Rights)

The Convener: Our second item of business is an evidence session on the current debate on EU citizens' rights in relation to the article 50 withdrawal negotiations. I welcome our witnesses: Professor Sionaidh Douglas-Scott, who is the anniversary chair in law and the co-director of the centre for law and society in a global context at the Queen Mary school of law at the University of London; Dr Tobias Lock, who is a senior lecturer in EU law and the co-director of the Europa institute at the University of Edinburgh; and Dr Rebecca Zahn, who is a senior lecturer in law at the University of Strathclyde.

I invite Professor Douglas-Scott to make a few opening remarks.

Professor Sionaidh Douglas-Scott (University of London): Thank you, convener. I will make three brief remarks: first, on the possible future status of EU citizens; secondly, on the state of the negotiations and its relevance for citizenship; and, thirdly, on the specific role of Scotland and immigration in all of this.

First, as a result of what we have seen so far, we cannot be in any doubt that the role of EU citizens generally is going to change after Brexit. That contrasts with some of the remarks that were made before the EU referendum—by the vote leave campaign, for example, which said:

"It's irresponsible to scare EU nationals in the UK by hinting that their status might change after Brexit. No one's suggesting such a thing."

What we have seen of the UK's documents so far suggests that the status of EU citizens will change. I am sure that we will talk about the details of that, because some of the questions that I have heard so far this morning have suggested that the details in which the status of EU citizens will change will be brought up in this discussion. Rules on family reunification and the fact that EU citizens in the UK will have to apply—or reapply—for settled status are very important changes.

I know that there may be a question on acquired rights. The weakness of the application of that doctrine—again, as distinct from remarks that were made before the referendum—suggests that citizens' rights may not be as protected as some might have thought.

Secondly, on the state of the negotiations, citizens' rights are specifically itemised in the first stage—the so-called divorce settlement—as one

of the three key issues, along with Northern Ireland and the budget. We know that those negotiations are in the process of stalling somewhat; Theresa May will give an important speech tomorrow in Florence to try to move things on.

I flag up two points in that context. First, there seems to be no indication so far that negotiations and agreements on citizens' rights can be ring fenced in any way. Quite a few people would like that to happen so that, if there is controversy or lack of agreement—over the budget, for example—citizens' rights agreements can still go ahead. Secondly, I do not hear much being said about the European Parliament, although its agreement will be vital because it must agree to the withdrawal agreement. An eye should be kept on the European Parliament and what its view is.

My third and final point concerns Scotland. Free movement and immigration is of particular importance in Scotland. That point has been flagged up in various reports and in evidence to the committee, but I do not see the UK Government taking a great deal of account of it so far.

I will flag up two points on that. First, the UK Government's recent response to the House of Lords European Union Committee's "Brexit: devolution" report suggested that the argument that is being made for a differentiated settlement for Scotland, with particular reference to immigration, is not being taken account of.

A second point concerns the context of the European Union (Withdrawal) Bill. I know that the First Ministers have written a letter and that amendments to the bill will be lodged. According to the bill, some of the EU competences that will be returned after Brexit will be held in some sort of holding pattern by the UK Government. Given that some of those competences—for example, the free movement of healthcare, migrant access to benefits and the recognition of professional qualifications—make specific reference to citizens' rights, it is important that we keep an eye on that bill.

The Convener: Thank you very much, Professor Douglas-Scott. You mentioned three areas, one of which concerned the ring fencing of citizens' rights. Are you suggesting that, as things stand, even if we appear to make some progress on citizens' rights, that could fall through if the whole deal falls through and we could, in effect, find ourselves back at square one?

Professor Douglas-Scott: That is my impression. I might misunderstand what is going on—I do not have an inside ear at the talks—but I know that Brussels has said in the past that nothing is agreed until everything is agreed. The

EU budget is seen as being a particularly important point, and any talk about Theresa May's speech tomorrow seems to focus on what she might offer with regard to the budget, particularly in the context of a transitional deal, rather than anything to do with citizens' rights. It would be possible in law to come to a separate agreement on citizens' rights, but I have so far seen no great will on either side to do that.

The Convener: You also talked about not much being said about the European Parliament. Mr Barnier, whom the committee met last week, has been very strong in the attention that he has paid to the European Parliament; indeed, at his latest press conference, he said that one does not ignore the European Parliament's important role in signing off the deal. I take it that, when you say that not much is being said about the European Parliament, you are talking not about Mr Barnier but about those in other quarters.

Professor Douglas-Scott: Possibly not. So far, the European Parliament has less to object to in the proposals from the EU side. However, even now, with regard to the situation of UK nationals in the EU, there are a couple of things that we should be worried about the European Parliament not being so happy about, including the question of the free movement within the European Union of UK nationals who are situated in another country. It is important that the UK Government bears in mind the vote that has to be taken in the European Parliament. Guy Verhofstadt, who is very influential in that regard, has certainly been making a lot of comments about the role of citizens.

The Convener: I wonder whether Dr Lock or Dr Zahn wishes to comment on those specific points.

Dr Tobias Lock (University of Edinburgh): I agree with Professor Douglas-Scott about EU citizens' rights being bound up in the whole package of issues that will need to be resolved in the withdrawal agreement. Apart from the economic problems that would result from a no-deal Brexit, one of the most worrying results would be the situation of EU citizens, who are already facing quite a considerable amount of uncertainty. After all, they do not know what their status is going to be in 18 months' time. Of course, that uncertainty now seems to be translating into their finding it difficult to find jobs, because employers do not know what their situation is going to be in 18 months' time, and to find housing, because landlords are, according to media reports, reluctant to take them on as tenants. It is a huge problem for both sides, and there is an absolute need to come to an agreement.

Dr Rebecca Zahn (University of Strathclyde): I agree with everything that has been said. I will pick up on two points, the first of which is the

change in the status of EU citizens after Brexit. I assume that we will come back to that issue in questioning, but I think that the new settled status category is particularly problematic for a host of different reasons that we will, no doubt, get into. On a basic level, it creates legal uncertainty for landlords, employers and even the national health service with regard to knowing whether an EU national can be treated and on what grounds they can be treated post-Brexit, depending on what status they fall into.

The other thing to flag up in relation to the European Union (Withdrawal) Bill is that a lot of the detail on settled status and the requirements for that will, I assume, be contained in the proposed immigration bill, which will be introduced at some point in the near future. I wonder how feasible it is for the EU and the UK to come to a deal on the future of EU citizens' rights when answers to a lot of the questions—for example, about how settled status will be dealt with—are not clear at the minute but will, I assume, be in a bill that will be forthcoming at some point.

The Convener: Since you are on the topic, can we tease out what you think the problems are with the UK Government's proposed settled status?

Dr Zahn: There are a number of problems with the idea of settled status. I do not see the point of it for EU citizens who are already here. Anybody who has permanent residence up to the cut-off date—we do not know when that will be, but we assume that it will be 29 March 2019, for want of a better date—will, under the UK Government's proposals, have to apply for a new category of settled status. It is not clear what the criteria for that settled status will be. Will they be the current criteria contained in the citizens' rights directive? There are hints that they will not be. What kind of identification will be needed?

The leaked Home Office document suggests that, following Brexit, the UK Government will accept only passports rather than identification cards, which are forms of identification that a lot of EU citizens would use to live and work in the UK. What will the fees for the settled status be? The joint technical notes that the European Commission has prepared seem to suggest that there is agreement between parties on the fees. However, if the UK is going to apply the fees that it currently applies to third-country nationals, there is no agreement, because those fees are prohibitively expensive. It is not clear what the fee structure will be.

It is also not clear what the role will be regarding temporary absences. For example, for anybody who has arrived pre-Brexit or during the transitional period, how will periods of unemployment be dealt with? Will they be dealt with under the current EU rules, or will different

criteria be taken into account? What about somebody who is a part-time student and a part-time worker? At the minute, under EU law, they could apply as a worker as long as they are engaged in a genuine economic activity. How will that kind of mixed status affect an application for settled status? At the moment, EU citizenship is a fluid concept. Someone can be a student one day and self-employed the next. They can be a worker and then they can be self-sufficient. None of those things affects their status as an EU citizen in the UK and the rights that they derive from that, but how will that work under the settled status?

I could go on and on, but I will stop there.

Lewis Macdonald: There are clearly a lot of questions about the negotiating positions of both sides. Sionaidh Douglas-Scott mentioned freedom of movement for UK citizens in the EU, and Dr Lock highlighted the question of whether the EU's negotiating position proposes more favourable circumstances for EU citizens in the UK than would apply to UK citizens—for example, in terms of family reunification. The UK's position of refusing to set a date on which any of this applies looks very much like a negotiating chip. The suggestion that Brexit should apply for this purpose from this year, rather than in two years' time, does not seem to be a serious proposition.

I ask the witnesses to comment on how far the negotiating positions are there to be traded away and how far they are serious obstacles to reaching agreement.

10:15

Dr Lock: The document that has been produced by the European Commission has red, amber and green lights in it. On the one hand, the EU's current position on EU citizens is what I would call maximalist: it wants indefinite conservation of the status of EU citizens who have exercised their free movement rights to come to the UK. As well as the right to remain, which is uncontroversial, it wants lots of additional rights, such as the right to family reunification without having to meet the income threshold that is currently required of non-EU citizens who want to bring in spouses. On the other hand, the EU's position on UK citizens is less generous. There is a box where the UK has asked for free movement rights for UK citizens, including the right to move from their current member state to any other EU member state in the future. If a British citizen who currently lives in France decided after Brexit to take a job in Austria, they would not be able to do so under the EU's proposed withdrawal agreement; they would have to meet Austrian immigration rules. Under the UK's proposal, they would be allowed to do so because they would continue to benefit from all their EU rights.

The EU's position is inconsistent in that regard, and I imagine that that is one of the areas where the EU might budge, granting that right to UK citizens in return for concessions on the rights of EU citizens in the UK. I suppose that there will be movement in those areas in the end. There is room for it.

Lewis Macdonald: Is the issue of the jurisdiction of the European Court of Justice in a different category? Is it a more difficult obstacle to agreement because the European Union cannot compromise on that issue but the United Kingdom cannot accept it under its current policy?

Dr Lock: That is possibly the case. From the EU's side, it is probably reasonable to demand that some sort of dispute settlement—speaking very broadly—will need to be agreed, especially if the UK introduces its proposed settled status, which would be completely new. The EU is unlikely to accept that UK courts can decide whether the status complies with the EU's withdrawal agreement without any external body looking at it. Whether that external body must be the European Court of Justice or whether it could be some other external body is a different question.

If we step back and look at the rights of UK citizens in the EU, an example could be that of a UK citizen in Germany who has got into trouble with the law. If Germany decided to kick him out and send him back to the UK, he might say that he has rights under the withdrawal agreement—that he is a permanent resident and that the crime must be of a certain seriousness regarding the danger that is posed to society. The case would go to the German courts, but they would still be able to refer the question to the European Court of Justice, because it is likely to reserve the right to interpret the withdrawal agreement, which it will consider to be an integral part of EU law. However, in a similar situation involving an EU citizen who was living in Britain after Brexit, the case would have to be brought before an immigration tribunal, or whatever tribunal was competent to hear it, and go through the UK courts.

I think that the EU will require either an international law body or, if we are lucky, a specialised tribunal in the UK that promises to follow the ECJ's judgments—in substance, at least—on those questions. The UK might accept that and the EU might accept it as a compromise solution, but there will have to be an independent adjudication on the withdrawal agreement and the rights under the agreement for EU citizens living in the UK. That will be the bottom line of the EU's position.

On the UK's position, the Prime Minister has formulated a red line as far as the direct

jurisdiction of the ECJ is concerned, but it is not a technical, legal term and does not make any sense in that regard. I think that she means that the ECJ cannot adjudicate a UK case but that that can be done by a different international body, which might even apply the same law or follow indirectly whatever the ECJ says in substance.

I think that there is room for compromise and that matters can be resolved, but it will be a technical challenge and might create a monster in adjudicative terms.

Lewis Macdonald: Do other witnesses have a view?

Professor Douglas-Scott: I completely agree with what my colleague said, but I will add a couple of short comments. On how much room there is for agreement or compromise, the EU and the UK differ on bits and pieces, but the fundamental difference is that it is clear that the UK foresees a totally independent, new, settled status in UK law. In some ways that is understandable, because Britain will have left the EU and the whole point is to apply Britain's own laws. The UK Government has said that equality with UK nationals should be the basis. Why should an EU citizen 20 years from now, say, have a more favourable right to bring in their foreign national spouse than a UK national has? One can understand to an extent the UK Government's approach, and that is a basic difference. The status of citizenship will change and EU citizens will not have the same rights.

Enforcing those rights will clearly be important. I will add two short comments to what Dr Lock said. First, the withdrawal agreement, if it is concluded, has to be clear. The EU has said that it should have direct effect, but the UK has not said that. Having direct effect would mean that the agreement could be directly enforced in UK courts without the need for an intervening act of the Westminster Parliament. However, the UK is a dualist country, which means that we enforce international treaties through acts of Parliament, so there is a difference of opinion over that.

Caught in the middle are citizens who might have concerns about their rights being violated and what they will do about that. It is all very well to say that there might be compromise on the Court of Justice of the European Union having a role, but we have to remember that the ECJ has not always been very co-operative. Tobias Lock knows more than anybody about the recent accession agreement to the European convention on human rights, where the ECJ stepped in and said "No, this won't do. This conflicts with certain aspects of EU law, which is autonomous, and we should have the final say." That is a problem to think about.

Mairi Gougeon: I will move on from the line of Lewis Macdonald's questioning and tease out something. Dr Lock's written evidence to the committee refers to dispute resolution under the Treaty on the Functioning of the European Union. It says:

"According to Article 344 TFEU ... This means that the EU cannot conclude an agreement with a third country—such as the UK in the future—which would hand over such jurisdiction to a court other than the ECJ."

Do you think that the EU will stick to that position or will there be room for manoeuvre?

Dr Lock: The proposal that some have mooted—it was probably in some blogs or whatever—is that of a joint international court that would decide on such rights in a binding manner, both for the EU and the UK, which would seem the fairest option but is constitutionally impossible under EU law. The EU cannot agree to that because, if it does, the ECJ will say that it is invalid.

That is why we are likely to get a bifurcated system where we have two courts, as there are under the EEA agreement. An attempt was made to have one common EEA court that would decide for the EU and the other countries—Norway, Liechtenstein and so on—but the ECJ struck it down and said that the ECJ had to be the body to interpret EU law.

The ECJ could change its mind—you never know with courts, because they can find ways to distinguish earlier precedent—but the EU would be unlikely to risk that by agreeing to something with which it cannot constitutionally comply and which would then have to be reopened for negotiation. The EU is very aware of the issue.

One important aspect to bear in mind about the negotiations as a whole is that there are constitutional limits to what the EU negotiators can agree. They are not political limits and they are not set by the Council, Mr Barnier or anyone else; they are limits that are contained in the treaties. Certain limits could not be negotiated away unless—and this is not going to happen—the EU member states were to say that they were going to put it into the treaties that the ECJ must not interfere with their agreement with the UK in any circumstances. It is important to realise that.

Mairi Gougeon: Does anyone else want to comment?

Professor Douglas-Scott: I do not want to comment on the specifics of an external tribunal—whether it is some kind of joint committee, arbitration, the CJEU, or something that approaches the European Free Trade Association court—but I would like to say something at some point about enforcing people's rights. The situation in the UK will change quite radically after Brexit

and it is important not to forget that and important to think about how those rights can be enforced. I do not know whether this is the right moment to talk about that.

Mairi Gougeon: I do not know whether you were able to catch any of the really interesting evidence that we took last week, when we heard from Professor Sir David Edward. With reference to the UK's position on certain points, he said:

"It is a bizarre kind of dream-wish that we can play on this playing field on equal terms but still have our own referee. It is just absurd."—[*Official Report, Culture, Tourism, Europe and External Relations Committee*, 14 September 2017; c 7.]

Is that a fair assertion to make about the UK's current position?

Professor Douglas-Scott: It is fair but, given that the whole implication of Brexit is to take back control, a lot of people will be disappointed if the outcome does not involve a much greater competence for UK authorities. That takes us to the point that I was trying to get at. At present, if an EU citizen in the UK receives a wrongful notification from the Home Office—as happened recently, when, in error, 100 people were sent letters telling them to leave the country—they can go to the UK courts and enforce their EU rights there. If the point is not contentious, they do not even have to go to the European Court of Justice.

However, that will no longer be the case after Brexit. If there is an argument that the UK—specifically the Home Office—is doing something that seems to contravene the withdrawal agreement, a huge question will arise about what will happen and who will determine whether the interpretation is in line with the agreement. UK courts might say that that is a matter of international law, which they can try to observe but, if they are faced with an act of Parliament, they will have to apply it. That is where a joint committee or some other tribunal would be useful, but then the obstacles that Dr Lock referred to would be faced in relation to the autonomy of the ECJ and so on.

There is also the point that David Edward has made: if we have a third type of tribunal, how will it be funded, how many personnel will it have, who will be its judges, who will appoint them and how much will it cost?

10:30

Mairi Gougeon: That is one point that makes me really concerned for the future, given all the questions that you have raised about settled status and the fact that millions of EU citizens could apply for it. How will the Home Office cope with that in light of everything that will have to be

set up to deal with it? The situation is very complex, and I am grateful for your comments.

Ross Greer: I have a relatively brief question. The UK Government is not really capable of fulfilling its own position, is it? On a purely logistical basis, the demand that it would create would far outstrip capacity and result in astronomical waiting times for European citizens who live here to have any applications processed.

Dr Zahn: I think that that is right. I read a statistic last week that showed that it would take the Home Office somewhere between 30 and 140 years just to process permanent residence applications at the rate at which it is currently operating.

I read the report that the committee produced on citizens' rights. The majority of EU citizens in the UK, and certainly in Scotland, will have been here for five years or longer when the UK leaves the EU in March 2019, and anecdotal evidence suggests that a lot of them are now applying for permanent residence, so the easiest thing could be to simplify life by saying that they can send in their permanent resident cards and receive settled status or indefinite leave to remain, so that we just slot citizens into the current immigration system. That would make the most sense.

Professor Douglas-Scott: That is the point that I would have made. The UK Government says that the process will be streamlined and efficient, but so far what we have seen from the Home Office is the reverse. The misinformation and errors make one a bit sceptical about a future streamlined process.

Stuart McMillan: My question is about residence rights. We have received evidence from the UK law societies that

"Residence rights alone may become meaningless if not accompanied by the right to continue economic activities."

The situation, particularly with multinationals, is that a growing number of people work from home, but the office that they are associated with could be in a different country in the EU. How will the situation be resolved? Is there an understanding of that situation?

Dr Zahn: Are you thinking of someone who works from home in the UK but whose actual place of work is in Germany, for example?

Stuart McMillan: That could be the case. Because of restructuring, for example, somebody who used to work in an office in Paris for IBM may now live somewhere in the UK and work from home.

Dr Zahn: I suppose that the answer depends on when a person started doing that in the UK and whether they fulfil the residence criteria to get

settled status, which, according to the UK Government proposal, would give them equality with UK nationals to continue to work in the UK, even if they were a virtual worker who worked from home.

Another question concerns frontier workers, who may live in one place and work in another. I am not sure that I can give you a satisfactory answer on how they would be dealt with, but my fellow witnesses may have views on that.

Dr Lock: If people are frontier workers at the cut-off date, they will probably be caught by that agreement. The red, amber and green lights document that the European Commission produced seems to have reached agreement on such workers. I do not know what exactly that agreement is, but I suppose that their status will continue as it was. Of course, such workers might not be able to produce evidence as easily as those who are resident here and who, for example, have a mortgage and can show that they have lived and worked here for X amount of time. That would be more difficult for frontier workers, but it should be possible to sort out such practicalities.

The situation that Stuart McMillan mentions is important, because it is probably quite common—especially with spouses of people who physically work in the UK and who might come along and do their work from home because they could not relocate or find a job in the UK that was adequate for them.

Professor Douglas-Scott: Frontier workers are important, and the negotiations are extremely vague on that issue.

To move away from the negotiations, if somebody who is working from home, say, in Scotland, provides a service in Germany and can show that they have a property or a contractual right here—a private law right—they may be able to rely on acquired rights or on the European convention on human rights to enforce the right to property. Article 1 of the European convention covers the right to property, so they might have a claim against the UK Government on that basis. Litigating is probably the last thing that they will want to do, but it should not be forgotten.

Stuart McMillan: That is helpful—thank you.

The Convener: I have a supplementary question. Notwithstanding the specific point that Stuart McMillan made, I understand that the UK law societies' concern was that there is no right to continue economic activities; there are only residence rights.

Professor Douglas-Scott: That is right.

The Convener: So is the point broader than the specific example? It is about the right to engage in cross-border business activity. Does the panel

share the UK law societies' concern that such rights are not properly entrenched?

Dr Zahn: I think so. That also raises a point about the free movement of services and freedom of establishment—for example, the freedom to set up a business or to provide a service in another country—which are related rights that EU citizens also have.

One category of worker that is mentioned in the proposals is posted workers. The EU has said that such workers will not be dealt with under citizens' rights, because they fall under free movement of services rather than under the citizenship and free movement of workers provisions in the treaty, whereas the UK wants them to be included in the discussion on citizens' rights. It is concerning that the citizens' rights paper does not take into account all the ancillary rights from which EU citizens benefit, such as the right to provide a service or to set themselves up in business in another country. As far as I know, we have not seen a UK position paper on either of those areas.

The Convener: I imagine that the position will become even more complicated in the future, because all the free-trade agreements that the EU has signed do not cover services. Do you see a problem developing for people who are engaged in service industries?

Dr Zahn: I see a problem in that area if cross-border aspects are involved. There will be an option post-Brexit. The EU has adopted directives in relation to, for example, intercompany transfers that might come into play for British workers who work abroad for short periods and come back. Those directives are aimed at third-country nationals at the minute and they do not contain nearly as many positive rights for workers who are being transferred or sent into the EU and who are currently protected under citizens' rights.

Dean Lockhart: I have a follow-up on the potential alternative to the European Court of Justice that Dr Lock mentioned. As I understand it, there is a bifurcated system, whereby there is a separate court for disputes between EEA members and the European Union. That could be a template for a compromise between the EU position and the position in the UK paper. Could you briefly talk us through what that separate court involves and its functionality?

Dr Lock: Sure. As you know, there is the European Free Trade Association, which has four members: Liechtenstein, Norway, Iceland and Switzerland. Three of them—all of them except Switzerland—decided to join the EU member states in the European Economic Area, which, simply speaking, extends the single market to those three countries, but not to Switzerland. The court that is in charge of looking after issues that

arise in those three EFTA countries is called the EFTA Court—it is a bit of a misnomer; it should be called the EEA court or something like that. It is based in Luxembourg. It works in a fairly similar way to the ECJ, in that the courts of Liechtenstein, Norway and Iceland are allowed to ask the EFTA Court for interpretations of EEA law, in much the same way as the courts of the EU member states are allowed to ask the ECJ for interpretations of EU law. The main difference is that the answer that they get back is not strictly binding on them—it is an advisory opinion rather than a binding judgment, which is what we get from the ECJ. That is one difference.

Of course, the EFTA Court interprets broadly the same—in fact, often exactly the same—rules as the ECJ. A lot of EU regulations will have been translated into EEA law and will be binding on EEA members. In those interpretations, strictly speaking, the EFTA Court is bound to follow only everything that the ECJ has done before 1992, when the EEA agreement entered into force. Much of that is still relevant, but some of it is no longer relevant, because the legislation might no longer apply. In practice, the EFTA Court will follow new ECJ judgments if they apply to the EEA; strictly speaking, it is not technically bound to do so, but it follows step in order to achieve the overall aim of the EEA agreement, which is homogeneity. The single market is supposed to work in the same manner in Norway and in France—the whole point is that there should be no difference for operators. We have the two courts only because the ECJ threw a spanner in the works in 1991 and said that it had to decide what the EEA agreement meant for the EU member states, of which there are now 28, while the EFTA countries could decide that for themselves, but following the ECJ as far as possible.

That is the main difference between the two courts. There is evidence that the EFTA Court does not always follow the ECJ. Of course, cases come to courts in a random manner, and the EFTA Court will often be the first court to be asked a certain question; there might be no ECJ precedent, and it will have to answer the question. There are situations in which the EFTA Court deviates a little from the ECJ, especially on immigration, because there is, of course, no EU citizenship in the EEA. The EEA has free movement of workers and freedom of establishment, but it does not have the added umbrella of EU citizenship, which provides an additional status. The individual rights are not that different at all because, broadly speaking, the EEA will accept whatever is in the citizenship directive. However, the overall aim of achieving EU citizenship, which the ECJ calls the fundamental status of EU citizens, does not apply in the EEA. There is some evidence of the EFTA Court

deviating from ECJ case law in such cases on those grounds.

Dean Lockhart: Thank you. That was very helpful.

Lewis Macdonald: I want to come back on the question that I asked earlier about whether a bargaining position was being adopted in relation to the EU's approach on a number of areas. It seems to me that the most obvious example of a bargaining position being adopted from the UK point of view is on the question of what the cut-off date is.

As I understand the UK position, anyone who has arrived here from another EU country since March does not know whether the UK proposes that they should be eligible to apply for settled status or whether any other provisions of the withdrawal agreement will apply to them. That seems to be on the table as a negotiating chip. What is the consequence of that uncertainty? We do not yet know what the cut-off date will be. What does that mean for those people and for the overall shape of the withdrawal agreement?

10:45

Professor Douglas-Scott: That is partly not a legal question but a question simply about how living in a state of uncertainty impacts those people's everyday lives. On the legal impact, the UK should bear in mind that claims might be brought under article 8 of the European convention on human rights—the right to respect for one's private life—on the basis of the uncertainty and stress that could be caused by not knowing one's status. Article 8 lies behind a lot of the discussion about citizens' rights, because it covers people's personal and private lives. That is relevant and should be borne in mind. I agree that those people's status is being used as a bargaining chip. I do not know what one could do legally to change that situation; it seems to be a political matter for negotiation and discussion.

Lewis Macdonald: Is the UK's position on the matter potentially inconsistent with its position, and with the legal position, on other things? Presumably, everything else, including trading arrangements and existing treaty obligations, will come to an end on a given day—probably 29 March 2019—so the UK's position on the matter might be out of step with its position on all those other obligations. Is that a legally defensible position in its own right?

Dr Lock: Legally, the UK could, if it chose, have different regimes for everything, but that would of course create a logical inconsistency. We must not forget that, under the current legal position, EU citizens still have a right to come here, to take up work and to do whatever else they were able to do

before March 2017 and, indeed, before the EU referendum was ever mentioned. Those are rights under the EU treaties and they will continue to be protected up until the moment that the UK leaves the EU.

It is a general principle of law that we must always be careful when it comes to the retroactive and retrospective application of new rules. There must be very good reasons for doing that. In criminal law, such application is always prohibited and we can never do it. Because immigration status and knowing where one will live and how one will earn a living goes to the heart of a person's existence, I would be very careful with that, too, especially in the light of human rights law and the European convention on human rights.

There is some precedent on expulsion and article 8 of the European convention. There is also a precedent on the deprivation of permanent residency, which happened in the aftermath of the disintegration of Yugoslavia. Certain individuals, because they had the wrong citizenship—they were Croatian but they were living in Slovenia, which of course did not matter before the dissolution of Yugoslavia, because it was the same state—were deprived of their status as residents. Even though there was a registration period, they missed it for various reasons—they were in hospital, for example, or they simply did not know about it. The European Court of Human Rights intervened, saying that that was contrary to the right to family life.

Of course, those are extreme circumstances, and not every change in the status of EU citizens will automatically be a violation of article 8 of the European convention. However, retrospective arrangements are always suspicious from the point of view of legal certainty and the rule of law, and that is where one might win in Strasbourg.

Professor Douglas-Scott: We do not yet know what the exit date will be; the withdrawal bill says that it is for ministers to determine, and they could determine different exit dates for different aspects of the law.

Dr Zahn: One example that might make a legal difference to the cut-off date relates to family members of EU citizens in the UK. There is a differentiation in the UK's position paper and that of the EU between current and future family members, and the cut-off date is the date at which it will be determined whether someone is a current or future family member, with all the implications that that will have not just for EU citizens in the UK but for UK citizens in the EU who want to come back with an EU family member—who after the cut-off date will presumably be a third-country national and will have to apply for a visa under the immigration rules—and UK citizens who want to come back with third-country-national spouses

from another EU member state. At the minute, a UK citizen who comes back after living abroad in another EU member state exercises their citizenship rights and therefore can apply for a visa for their third-country-national spouse under EU rules on family members; however, that will not apply after the cut-off date. In those circumstances, they will have to apply under the immigration rules, which will have serious cost implications as well as serious implications for the family member's right to work.

Lewis Macdonald: So if the UK Government wanted to avoid a complete legal minefield, it would abandon any proposal for a cut-off date that was earlier than the date for withdrawing from the European Union.

Dr Zahn: Or it could give legal certainty as to when the cut-off date would be. If the cut-off date was to be earlier—say, March 2018—it would be fine if the UK Government announced that tomorrow, because people could work with it and know what the implications might be. However, the current uncertainty, in which it is almost being suggested that the cut-off date was six months ago, creates havoc not only in individuals' lives but for landlords, employers and so on.

The Convener: What would be the implications of the talks collapsing without a deal?

Professor Douglas-Scott: Not very good.

Dr Lock: It goes without saying that there would be legal uncertainty, but I think that what would happen is that on 29 March 2019, the UK would leave the EU and no longer be an EU member state; EU law would cease to apply to the UK and would no longer be directly applicable in the UK; and, presumably, the same would go for EU law for UK citizens living in the rest of the EU.

I think that on both sides there would need to be unilateral rules to deal with the fallout of all this, and some of those rules would have to relate to the status of EU citizens living in the UK and UK citizens living in the EU. What would their future status be? There will be a separate immigration bill, but I imagine that, under the European Union (Withdrawal) Bill, a lot of the rights in the citizens' rights directive would simply be transferred into UK law. If the Government was in a benign mood, it could decree that the rights would just continue and everything would be fine.

The same could happen at EU level, of course, but there is no guarantee that that would be the case. It is almost certain that the rights of UK citizens in the EU and EU citizens in the UK will differ, although that is something that both sides want to avoid at the moment.

I am not sure whether everyone will agree with this, but we do not know whether there are any

broader protections out there either in the common law for people who have exercised rights in the past and have been deprived of them or, indeed, in EU law for UK citizens living in the EU. Will EU law still somehow apply to them? Will they still be able to go to the courts? Will reference be made to the European Court of Justice with regard to individuals who have lost their EU citizenship because their member state has left the EU? Can they still rely on, say, acquired rights? There is absolutely no certainty on that point at all—we will just have to wait and see.

Professor Douglas-Scott: There might be one difference between the situation of EU citizens in the UK and UK citizens in the EU, in that the EU has its rules for third-country nationals and a long-term residents directive. They might apply to UK nationals who have, say, lived in Spain for five years or more, so their situation might be a bit more certain than that of the EU nationals in the UK.

Although those EU rules are not nearly as generous as the rules for EU citizens, they provide a level of protection, even with regard to free movement of certain types of long-term residents from one member state to another. The problem is that they generally protect residents who can demonstrate that they have a stable income of a certain amount, that they have been resident for more than five years and so on. In other words, they cover those in the better-off categories, not, say, someone who has gone to work in a bar in Spain.

Dr Zahn: I agree with the previous comments. I assume that in the event of there being no deal UK citizens living in the EU would eventually fall under limited EU rules on third-country migration and/or the member state rules of the member state in which they find themselves. At EU level, there are certain common rules on third-country migration relating to students, researchers, highly-skilled migrants and intercorporate transfers and very limited protections for seasonal work, and there is, of course, also the long-term residents directive. However, in a lot of those rules, there is limited or no equal treatment, and there are limits on the amount and kind of work that you can do and the extent to which you can move between employers. Eventually, I think that all of this will just fall under the common rules.

The Convener: Thank you very much for your evidence. We now move into private session.

10:58

Meeting continued in private until 11:14.

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