9. Are there areas where there is likely to be confusion as to whether powers repatriated from the EU lie with the UK or devolved administrations? How will these matters be settled?

Problems will not come neatly packaged, particularly because the list of reserved matters will cut across the main areas of problems that will arise. For instance, an agreement to continue to permit free movement of persons, which is a reserved matter on immigration, may have incidental effects on healthcare or education, which are devolved matters and impact on devolved budgets. In such cases, it may not be clear whether the particular topic is or is not a devolved matter. The sensible approach is to ensure that there is the opportunity for collaboration.

This important, because the UK devolution is asymmetric, so a matter may be devolved in Scotland, but not in Northern Ireland. There are distinct legal systems, so the rules of civil or criminal law and procedure may differ. This makes it important for the devolved institutions to ensure that acquis are domesticated in ways which are effective in their territory. For instance, Regulation (EU) 1143/2014 on the prevention and management of the introduction and spread of 37 invasive alien species has to be implemented by appropriate penalties and procedures for imposing them. The procedures for doing so might well vary from one devolved territory to another.

10. The Sewel Convention does not apply to delegated legislation. Are there ways in which the ‘Great Repeal Bill’ could provide for the involvement of the devolved institutions in relation to aspects of the acquis that are likely to lie within devolved competence? If so, how might the Bill address the question of devolved involvement in relation to:
   (a) decisions about which aspects of the acquis should be domesticated;
   (b) the amendment of elements of the acquis that need to be tailored to post-Brexit circumstances prior to domestication; or
   (c) the amendment or repeal, post-Brexit, of elements of the acquis that have been domesticated?

As I mentioned in oral evidence, experience elsewhere suggests there are three areas to consider.

(i) The rules for making delegated legislation can exclude certain matters from the exercise of UK government delegated legislation. For example, it could exclude “matters principally falling within the legislative competence of a devolved assembly”. Alternatively, it may impose a duty to consult or to seek the consent of a devolved assembly on designated matters. (This is easier to achieve if the Great Repeal Bill is structured in terms of areas of governmental activity, rather than having one broad generic delegated legislation power.)

(ii) The procedure for scrutiny in the UK Parliament could involve membership from devolved assemblies, allowing both communication and the possibility of objection from the devolved assembly. Although time will be short, there should be ways for conflicts of these kinds being ventilated and resolved. The issues for objection would not just be on legislative competence, but also on substantive issues of the political desirability of domesticating a particular acquis. Such
scrutiny will only work if proposed delegated legislation is presented in draft for comment to a relevant committee.

(iii) There really needs to be some form of body which can decide quickly on conflicts about competence including claims that certain matters are within the competence of a devolved assembly. This would need to be a new organ independent of the UK Government and reporting to the Speakers of both Houses of Parliament.

11. If the devolved institutions were to be afforded involvement in decisions about converting the *acquis*, should that be by way of:

(a) requiring devolved consent to the use of delegated powers by UK Ministers;
(b) giving direct authority to devolved ministers (e.g. in relation to the amendment or repeal of relevant elements of the acquis); or,
(c) some combination of (a) and (b)?

I would suggest none of the above. If a matter is devolved, then it is within the competence of the devolved assembly and should not, in principle, be usurped by the UK Parliament. Unlike the EU and Germany, we do not have a list of “shared competences” – they are either devolved or reserved. If an area is devolved, then the decision to domesticate an aspect of the acquis is for the devolved assembly to decide. It may well be necessary that this is undertaken by delegated legislation. But this is essentially a matter for the devolved assembly. The Great Repeal Bill should simply give a power to the devolved assemblies (not directly to ministers of the devolved administrations) to enable their ministers to make delegated legislation on such matters within devolved competence and by such procedures as the devolved assembly shall decide. For example, if Northern Ireland allows all EU nationals resident in the Republic free medical care, but England does not, that is a matter for each country, not for decision by the UK Parliament.

*February 2017*