



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Thursday 4 June 2015

Session 4

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**EUROPEAN AND EXTERNAL RELATIONS COMMITTEE**  
**10<sup>th</sup> Meeting 2015, Session 4**

**CONVENER**

\*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

**DEPUTY CONVENER**

\*Hanzala Malik (Glasgow) (Lab)

**COMMITTEE MEMBERS**

\*Roderick Campbell (North East Fife) (SNP)

\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

\*Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP)

\*Jamie McGrigor (Highlands and Islands) (Con)

\*Anne McTaggart (Glasgow) (Lab)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

David Frost

Professor Michael Keating (University of Aberdeen and Economic and Social Research Council Centre on Constitutional Change)

Dr Daniel Kenealy (University of Edinburgh Academy of Government)

**CLERK TO THE COMMITTEE**

Katy Orr

**LOCATION**

The Robert Burns Room (CR1)



**Scottish Parliament**  
**European and External Relations**  
**Committee**

*Thursday 4 June 2015*

*[The Convener opened the meeting at 10:00]*

**Decision on Taking Business in**  
**Private**

**The Convener (Christina McKelvie):** Good morning, and welcome to the 10th meeting in 2015 of the European and External Relations Committee. I make the usual request that mobile phones and other electronic devices are switched off or on airplane mode.

We have quite a good agenda this morning. We always have a good agenda, but it is a busy one this morning. Agenda item 1 is a decision on taking in private agenda item 3, which is a discussion on our deliberations this morning. Do members agree to take item 3 in private?

**Members** *indicated agreement.*

**United Kingdom's Future**  
**Relationship with the European**  
**Union**

10:01

**The Convener:** Agenda item 2 is on the United Kingdom's future relationship with the European Union, which is a new topic for us. We are considering the issue on the back of the announcement last week that there will be an in/out referendum. Who said that this committee was not reactive and topical?

We are delighted to have back with us Professor Michael Keating, who is professor of politics at the University of Aberdeen and director of the Economic and Social Research Council centre on constitutional change; and our erstwhile adviser on the white paper, Dr Daniel Kenealy, who is a lecturer at the University of Edinburgh's academy of government. With us for the first time is David Frost, the chief executive officer of the Scotch Whisky Association and a former diplomat—welcome, Mr Frost.

Good morning to you all, gentlemen. We are delighted to have you here to open up discussion on this interesting and exciting topic. I thank you for the written evidence that you have given us. I will give you a few minutes each, not so much for a formal opening statement but to explain your thoughts and feelings about the impact on Scotland of the in/out referendum. I am happy to start with whoever is first to open their mouth.

**David Frost:** Shall I go first, as this is my first appearance before the committee?

**The Convener:** Yes.

**David Frost:** Thank you, convener, for asking me to come. I first say briefly that, if I have something relevant to say to the committee, it is probably primarily because of my experience as a diplomat and in particular as the Foreign Office's EU director a few years back and as the lead trade negotiator for the UK until 18 months ago. Please take my remarks as drawing on my experience in that personal capacity. Obviously, where I am representing an SWA position, I will make that clear, but you can take it that the SWA is a strong supporter of EU membership and the trade benefits that come with it.

I will briefly make three points on the key issues of reform and the referendum. First, it is in the UK's national interest to stay part of the EU, because we benefit economically from it very much. The key issue is therefore how the Government puts itself in a position to win the referendum and keep those economic benefits. Secondly, the referendum is a big opportunity as

well as an important moment. The UK has probably not been amazingly comfortable in the EU over the years. There has been more domestic political tension about the EU here than there has been in other member states. The big prize for the Government would be to settle that and enable us to be a comfortable EU member going forward, but can it do that?

Finally, that uncomfotableness is reflected in the polling, because the majority for staying in the EU is thin and ambiguous but the majority for staying in a reformed EU is really quite strong, according to the polling. The Prime Minister's task is how to persuade people and convince them, and how to get real reform and convince people that something significant has changed. He therefore has to carry off the difficult task of bidding high enough to convince that there has been change but getting it low enough to make it negotiable. I guess that that is what he is trying to do at the moment in the first round of contacts. We will find out later this month at the European Council where the opening pitch is.

**Professor Michael Keating (University of Aberdeen and Economic and Social Research Council Centre on Constitutional Change):** First, I should say that our centre has a line of research on the issue. Over the next year, we will look in some depth at the European debate and the prospects for the referendum, particularly the impact on the devolved territories.

To pick up on David Frost's last remark, it is difficult to know where to begin, because it is not at all clear what exactly the UK's negotiating position is. All we know is that there will be negotiations and that there will be a referendum following their conclusion.

The UK Government has been clear that it wants to keep the single market but reform the European Union's more general decision-making apparatus and policy competences. The problem is that the single market more or less drives everything. That became apparent when the UK Government had its balance of competences review, which took place between 2012 and 2015. The 32 studies in the review looked at various aspects of the European Union. Lots of evidence was taken and some very interesting analysis was done, but the review did not find any competences that could be appropriately repatriated to the United Kingdom, and nor did it identify where there was a serious problem or competences that could be detached from the logic of the single market.

The balance of competences review is available on the web, but you have to dig to find it—I had to google it this morning, because it is not up front on the Government's website. It has more or less just disappeared. That is curious, but it indicates that the Government did not find anything seriously

wrong with its relationship with the European Union that it could have used in the opening gambit in negotiations.

Various things have come out of the current Government and the previous coalition Government but mainly, of course, it is the Conservative party that is concerned about the issue. There was talk about the European Union's social dimension being excessive. At one point, the Conservatives were talking about the social chapter. That does not actually exist, because nowadays the social provisions are scattered throughout the treaties. However, there is a concept of social Europe, which is mostly to do with labour market regulation and the protection of rights at work, which is controversial because of its economic impact. That seems to have disappeared into the background, or it has simply become an argument about there being excessive regulation in the European Union, which is said to be hampering competitiveness. Other countries have an amount of sympathy for that position.

The Government then focused on the free movement of labour. Sometime last year, that became the central issue, because of public concern about migration. Opinion polls showed that there is a great deal more concern in the UK about migration than there is about the European Union itself. The concern is about the free movement of labour and the arrival of migrants, mainly from the new member states of central and eastern Europe. That is perceived as a problem, although whether it is a problem is another matter. However, the free movement of labour is one of the pillars of the single market. We cannot just opt out of that and keep the other pillars, which are the free movement of goods, services and capital.

The argument then became one about welfare entitlements. It has been suggested that our entitlements are too generous and that perhaps people are engaging in welfare tourism and migration. The review of the balance of competences looked at that issue and found no evidence that there was such a problem of abuse. Nevertheless, the topic is on the table. However, it is not clear whether trying to curtail welfare benefits for EU migrants is about deterring migration or addressing a problem of welfare abuse. We must decide which it is before thinking about what the appropriate remedy might be.

A lot of this country's welfare bill is caused by an economy with high employment levels but rather low wages. That has been a development over the past few years. Those low wages are topped up by lots of in-work benefits. Indeed, a peculiarity of the British system is that low wages are compensated by in-work benefits and credits. It is not quite clear how that can be disentangled from other questions to do with the labour market.

When it comes to welfare entitlements, we do not quite know what the issue is, and we must decide what it is before we can examine what might be done about it.

There has been some talk about the protection of the United Kingdom from eurozone rules since the UK opted out of the euro. Because the eurozone countries need to do certain things in common, they started doing things themselves that might have an impact on non-eurozone countries. I am not sure whether anything can be done about that, because the eurozone countries are always free to do things outside the treaty. Nevertheless, that is something that the Government has signalled.

There is the question of whether treaty change would be required to deal with whatever the outcome of the negotiation might be. If treaty change was required, that would create all manner of complications, because not only would all the other 27 member states have to agree but some of them would have to have referendums and some of those would use the opportunity to put other things on the agenda. I anticipate that the Government will try to avoid treaty change, as will the other member states. That will restrict how much can be done.

In Scotland, there is a pro-Europe consensus among political parties and civil society in general. That consensus is stronger in Scotland than it is in England. Public opinion is consistently slightly less Eurosceptic in Scotland. The Scottish Government has adopted a different opinion on migration—it sees that it is not a problem and that, for demographic, labour market and economic reasons, Scotland needs migrants. That is the view of the present Scottish Government and it was the view of its predecessor. Scottish Government European papers have indicated that it is in favour of the social dimension, which the Conservative Party is not happy about.

There is the question of whether Scotland can adopt a distinct position in the negotiations or whether it will just go along with the United Kingdom. Last year, there were negotiations about justice and home affairs in which the Scottish Government started out by seeming to have a different position but eventually fell in behind the UK position. However, if Scotland has a different position, what can it do about it? Does Scotland have a different vision of Europe generally from that of the present UK Government?

There is the question of what the role of the Scottish Government and Parliament would be in the negotiations. Whereas the Scottish Government is represented in the UK delegation to the Council of Ministers on a number of matters, it is not clear what the devolved Administrations' role would be in a constitutional negotiation. They

would certainly not have the same position as they have in relation to regular policy matters. That issue would have to be resolved fairly quickly. I do not know what the discussions are on that matter, although I will talk to people in the Government next week and may know more then. However, it is important that the devolved Administrations have a role.

Finally, there is the question of public engagement and informing the general public about what is going on. During the referendum, Scotland experienced a massive public debate with a huge degree of public engagement. It is important to try to build on that experience to get genuine information to the general public and ensure that they are engaged so that they can be carried along with whatever the decision might be.

**Dr Daniel Kenealy (University of Edinburgh Academy of Government):** The situation is tremendously uncertain at the moment, so everything that we say this morning will be caveated and hedged, because we do not know precisely what the set of demands and the negotiation strategy might be.

Picking through various Conservative speeches, statements and manifestos, I have focused in my written evidence on four areas that seem to be of concern—Mike Keating mentioned at least three of them, and possibly all four. One is the issue of EU migrant workers coming to the UK and their access to the benefits and welfare system. To me, that is the main part of the meal, and the rest seems to be garnish on the side.

To varying degrees, those garnishes are fairly symbolic. One of them is, of course, the phrase “ever closer union”. We have heard from the Prime Minister and other ministers, including the Foreign Secretary, that they would like an opt-out on that point, or perhaps even a revisiting of the phrase. That may be something that we could discuss. I am still not exactly clear what the phrase means. It is part of the preamble to the treaty of Rome and has no direct legal effect. In fact, it was inserted into the treaty at Maastricht by a Conservative Government, specifically to guard against what it saw as the potential for there to be a centralising Brussels bureaucracy—it changed “ever closer union” to

“ever closer union among the peoples of Europe”.

The aim was to emphasise the people of Europe coming together, rather than the states.

10:15

The prime minister has also talked about strengthening the role of national Parliaments to be able to block European legislation. That would build on the so-called yellow card and orange card

system, which is little used but already exists. There is a possibility there for additional power for national Parliaments.

Then there is the issue of eurozone voting, which Mike Keating alluded to. The idea is that a bloc of eurozone members might vote in a certain way according to their interests and the non-eurozone members might end up being almost permanently disadvantaged. The way that the European Banking Authority was set up gives a precedent for looking at double majorities. However, if we wanted to change the system of voting on the single market, it would require very significant treaty amendments, which would be near impossible, although we can never say never.

To me, the four areas are migration, ever closer union, a stronger role for national Parliaments and ensuring that eurozone members cannot systematically outvote non-eurozone members to pursue their interests. We then need to think about the mechanisms through which any of those changes might be delivered. We can think of them on a sliding scale from the less difficult to the more difficult.

The least difficult thing is to amend our domestic legislation—that is, to do things differently at home. I dare say that, on a lot of the issues around welfare and so on, things could potentially be done differently at home. That could involve measures on the minimum wage, tighter restrictions on advertising jobs abroad or offshore only or pushing the envelope a bit more on what we consider to be a jobseeker for EU purposes. In a sense, that would be the easiest thing to do.

The next thing that could be done, which is a bit more difficult, is to seek legislative change in Europe, not to the treaties but to the directives and regulations that govern free movement of citizens and people. That would require getting the consent of the Parliament and a qualified majority of votes in the Council, so it has a higher threshold of difficulty. There would have to be negotiation and a coalition would have to be built.

The most difficult way to deliver change, with the highest burden and barrier, is through treaty change. From previous inquiries on the white paper on the Scottish referendum, the committee is well aware of how difficult treaty change is and of the different ways that it could be done. I dread to mention article 48 of the Treaty on European Union again, but that is where we would have to look if we were going to talk about treaty change.

On the issue of Scotland's interests in particular, the First Minister made it clear in her speech this week that it would not have been a Scottish Government priority to pursue a referendum and she took quite a strong stance on what Europe

means to her and to a lot of people. She discussed the need for progress on the digital single market and the single market in services, which can be accomplished without treaty reform—it just needs on-going work and coalition building in Brussels to pass new legislation.

On the Scottish dimension, welfare is interesting. If we imagine hypothetically that there will be changes somewhere down the road to, for example, the benefits that EU migrant workers or jobseekers can claim in the UK, there is then a question of whether Scotland could treat those same people differently if they lived and worked here. That brings us squarely to the provisions of the Smith commission, so there are linkages.

My reading of the Smith commission, which is by no means definitive, is that, if a future Scottish Government wanted to give different benefits to EU migrants here, which were in effect denied to them for a certain period of time—the Prime Minister has mentioned four years—there would need to be an amendment to the current draft legislation around Smith. Smith allows for the creation of new benefits in devolved areas and for the top-up of non-devolved benefits, but we are talking about allowing access to benefits to people who, in the UK system, would not have that access for at least a certain number of years, which, to me, is qualitatively different. There could be a specific Scottish interest there. This is all caveated and hedged, because we do not know what the Prime Minister will ask for.

The last thing that I would say on Scotland being able to pursue its interests in this particular area is that the intergovernmental system—the joint ministerial committee machinery—is certainly the hidden wiring in the issue. There is a push at the moment—again, it is partly a consequence of Smith—to strengthen the intergovernmental relations system and the concordats to turn the JMC into less of a talking shop and more of a forum where actual deliberation and decision making take place. I am not sure whether those changes will be made quickly enough or whether they will be received positively enough by the UK Government to make a difference to the negotiations that will happen in the coming months and years. That is to be watched as it evolves.

Other than that, on the public forum and public engagement, it will be very welcome if we have the Scottish ministers and Scottish Opposition politicians as an added voice in, I presume, the yes campaign to stay in the European Union. That would be a healthy thing. However, a lot of the interests that the Scottish Government might wish to pursue will have to be pursued through public pressure and attempts to raise issues and awareness. As far as I can see, the issues that the Prime Minister seems likely to push on do not



particularly touch on devolved competences, so it is hard to see a formal mechanism through which those interests could be pursued, other than persuasion through the JMC system, for example.

Obviously, the issue of the double lock has come up in the context of how Scotland can secure its interests. I suppose that it could be argued that, if Scotland, Wales and Northern Ireland effectively have a veto on whether the UK can leave the EU, their interests would be secured, because whichever way they voted would be the outcome. I wrote in my submission that I am not in favour of that system, which should be more accurately called a quadruple lock rather than a double lock, as it would give a right to four constituent units of the country to block an exit. I set out the reasons why I am not in favour of that proposal, but the issue is obviously in the air. The First Minister has taken a position that would allow Scottish interests to be secured.

**The Convener:** Thank you very much. That was very detailed and different information from you all.

Before we move to the opening questions, I draw the committee's attention to the written evidence that we received from Dr Eve Hepburn. She has not been able to join us, as she is unwell; we send her our best wishes for a speedy recovery. Her written evidence takes strong lines on the migration and immigration aspects of the debate.

**Jamie McGrigor (Highlands and Islands) (Con):** The Prime Minister has consistently said that he is looking for reforms that would benefit not just the UK but other countries in the EU, and he has spoken about the different preferences of different countries in the EU. For example, Germany looks after her car industry and France is very keen on supporting her culture. For the UK, a particular issue is the financial services industry, which is, of course, vital for Scotland and Edinburgh in particular.

Mr Kenealy said:

"It would be useful if the Scottish Government could be clearer about what, if any, distinct and specific interests Scotland has in this process as opposed to repeatedly calling for a multiple-veto lock."

He went on to say:

"For the Scottish Parliament to be able to effectively scrutinise the performance of the Scottish Government in this area, it would be useful if the Cabinet Secretary could explain clearly what the objectives being pursued are and via what mechanisms they are being pursued."

Everybody seems to complain about the European Parliament's visits to Strasbourg as a waste of money but, as far as I can see, that will be very difficult to change, as they are such a basic part of the treaty in the first place, which the

French insisted on. I do not know whether that could be addressed.

Mr Kenealy talked about changing directives. Is it possible for the UK and Scotland to do something about supporting the financial services industry? That really would be reform that would matter to this country, and particularly Scotland.

**Dr Kenealy:** Is that question to me?

**Jamie McGrigor:** Yes. Could you also expand a little on what you said about the cabinet secretary making it clear what Scotland wants?

**Dr Kenealy:** Absolutely.

It is difficult to hold somebody to account for something if we do not know what their aims and objectives are. All that I said in the submission is that it would be helpful if we could have as clear a statement as possible about what the aims are. That is true of the UK Government as well as the Scottish Government at the moment.

Obviously, my submission was written before the First Minister gave her speech this week, so I did not have sight of that. She clearly stated in that speech that the Scottish Government would not have the referendum if it were up to it and that it does not think that it is a priority but, given that it is, she said what the Government thinks about it. It does not think, for instance, that migration is the key issue, and it would not make that a priority. It is more concerned with pushing forward on a digital single market, a single market in services, co-operation in energy and so on.

All of that can be done through the normal business of Brussels; it does not require us to stop and renegotiate anything. This week, though, we have certainly gone some way towards seeing what might be the interests of the Scottish Government—or, I should say, the interests of Scotland—as distinct from those of the rest of the UK in these negotiations.

As for your question about financial services and regulation, I think from piecing together things from different statements, speeches and paragraphs here and there—and I appreciate that it is fair enough for a Government not to publish its entire negotiating strategy up front; indeed, that would be rather bizarre—that the concern seems to be that eurozone member states might do things that would be in their interests but which might not be in the interests of the non-eurozone states. I have seen a suggestion from the UK Government that we need to move to what would basically be a double majority system in that area; in other words, for business to move forward, there would have to be a majority or qualified majority of eurozone members as well as a majority of non-eurozone members to ensure that one side could not put the other out.

However, moving forward on that would, I think, require treaty change. You asked whether any of this could be done through directives, but if you really want to hardwire into the Council a different voting mechanism to govern these sorts of areas, you will have to look to the treaty. Nevertheless, there is precedent for that sort of move. For example, member states have shown a willingness to have a double majority system for the European Banking Authority that has been set up. I am not saying that such an approach is impossible—as I have said, the precedent seems to be there—but I think that, in order to hardwire a change in the Council's voting mechanism, we would really need to look at treaty change.

**Jamie McGrigor:** Your comments about eurozone and non-eurozone states are interesting, because it appears to me that the Prime Minister has a number of allies. There are the Dutch, but there are also the Finns, the Danes and the Swedes, who I believe are all outside the eurozone—certainly the Swedes and the Danes are—and they seem to be allies for reform. However, other states still need to look at this issue and see whether there are any possible reforms that could benefit the whole of the EU. Does this debate have to go on within the other EU countries to ensure that we get a proper perspective on it?

**Dr Kenealy:** I suspect so. First, though, I make it very clear that I am not suggesting that the UK Government is going to Brussels with absolutely no friends to talk to on these issues. We have heard statements from the German Government and, as you have suggested, the Dutch Government, particularly on welfare and access by EU migrant workers to their countries' benefits systems. I do not think that the UK Government is pushing on entirely closed doors on all these fronts. I presume, though, that there will have to be some process of building up alliances and support for the specific lines that the UK Government wishes to pursue, whatever they might be, and there are other non-eurozone members that would at least be interested in having a conversation about whether we need to look more closely at voting rules.

My expectation is that the debate that we in this country are about to have on our EU membership will have a knock-on effect on other states. In his opening remarks, Mike Keating mentioned that one of the dangers of opening up the treaties is that everyone will come forward with what they do not like about the EU, and it is politically difficult to imagine that the other 27 states will say, "Okay, let's open up the treaties, but we'll do it just to address your grievances." That might be theoretically possible, but it does not seem politically imaginable. I would imagine, therefore, that our debate will trigger discussion—in fact, it

already has triggered discussion—in other member states about the areas where they would like to see reform. In other words, yes is the very short answer to your question.

**Jamie McGrigor:** Thank you.

**The Convener:** Mr Frost, do you have any insights you can share about the conversation that we have just had?

**David Frost:** Perhaps I can make just a couple of points. I agree with a lot of what has been said but, on the issue of allies, I think that, before our election, the British problem was seen as a kind of second-order issue for most states in the EU. They could see it coming, but it was not yet live. In the month since the election, however, the issue has become live, and it is now regarded as a first-order problem on the same level as the eurozone, Greece and so on. I am confident that everyone is thinking very hard about this and, in fact, has been for some time.

One of the useful things about the Prime Minister's agenda, as we understand it, is that it is designed to tap into sympathy around the EU. There is quite a lot of sympathy in some places for things such as a greater role for national Parliaments, more liberal economic reform and more openness in trade. Particularly across northern Europe, that opinion is probably fairly widespread. Whether people will want to spend a lot of effort writing that into the treaties is a different matter, but there is definitely a constituency there that we should tap into if we want to succeed and to move forward on some of the issues.

10:30

**Hanzala Malik (Glasgow) (Lab):** Professor Keating, you mentioned migration and benefits in passing. The First Minister has laid out her stall and suggested that immigration might not be so high up on her agenda. Nevertheless, immigration and migration are issues. What would happen if we tried to pursue the issue separately from the rest of the UK while still being part of the UK?

**Professor Keating:** It is entirely possible for Scotland to have a more welcoming attitude to migrants within Europe. As neither Scotland nor the UK Government has control over that issue, it is simply a matter of how welcoming we are, what opportunities we provide for migrants and what benefits are available. Scotland could do a certain amount to realise a pro or welcoming attitude to migration, and it is doing that. The competences on housing, education and health can be used to integrate and anchor migrants better and to provide the kind of support that they need.

One issue that Dan Kenealy mentioned and which is mentioned in Eve Hepburn's written submission is the discretion that there will be to provide different kinds of welfare benefits. Eve Hepburn raises an important point, although Dan Kenealy is right that we do not quite know what will come out of Smith. However, at least at the margin, one can imagine that there will be a more generous attitude towards social entitlements of various sorts than there is in England. It has been demonstrated on numerous occasions that migrants make a net contribution to taxation, so it is not as though we are giving something away. It is about recognising the contribution that they make. It might be important for Scotland to be able to get the tax payments that those people make rather than those going to London. That is also on the Smith agenda—the income tax receipts will come to Scotland, following the Smith recommendation.

I do not envisage the flow of migrants being affected in a big way but, at the margin, the effect could be fairly significant. It is something that Scotland could do a little differently.

**Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP):** I want to pick up on Mr Frost's comment that the Prime Minister's objective is to secure EU membership. Focusing on immigration and the free movement of labour seems a funny way of going about that, as those are surely fundamental parts of membership of the EU and any substantive measures would require treaty change. What could actually be done to alter the current arrangements on the free movement of labour that would satisfy the Prime Minister's political objectives—I assume that they are to deal with Eurosceptics and the UK Independence Party approach—but would not require treaty change, which other countries would not entertain?

**David Frost:** I will do my best to answer that. As I said earlier, I am giving a personal view, which is based on the work that I have done on the single market and so on over the years.

It looks as though the Prime Minister and the UK Government have shied away from some of the more ambitious attempts to constrain free movement and to attack the fundamental principle of it as one of the four freedoms—at the moment, it does not look as though that is their objective. Instead, a debate is taking place about welfare and other issues that are at the margins of free movement. I am not really an expert in that aspect of the single market, but it seems possible that, if there is a political consensus, some of the rules around free movement could be amended through secondary legislation without attacking the fundamental principle.

I draw an analogy with the free movement of goods and free trade, which is an area that I know

a bit better. A while back—10 or 15 years ago—court opinion and legislation were going in the direction of saying that virtually any difference in a member state's terms of trade, such as opening hours of shops, was a disguised restriction on trade, because it made that country more difficult for non-members to trade in. If that direction of travel had been pursued, virtually every difference would have been eliminated over time. Implicitly and, to an extent explicitly, member states, courts and others said, "Hang on a minute—we don't really intend to go that far." They decided that they were not obsessive about implementing the principle to the furthest limit.

For me, there is a parallel with free movement. It is possible to take a pragmatic view at the margins about how to implement the principle without critiquing the basic way in which it works. It seems to me that that is what the Government is trying to do, and that that has been done previously in other areas without affecting the single market as such.

**Adam Ingram:** My question for Professor Keating and Dr Kenealy is whether that would satisfy what we regard as the political opposition to the EU and the free movement of labour within the EU, or whether a Pandora's box has been opened.

**Professor Keating:** I suspect that it would not satisfy the political opposition, but we have a window of opportunity, which might be one reason why the Government seems to want to get the referendum over earlier rather later—possibly 2016 rather 2017.

David Cameron has a political momentum because of his unexpected election victory. He has a majority in Parliament, albeit a small one, and he has the attention of other member states. He has started talking to them and they have started talking to him, which was not the case in the two years before the election. Relationships had deteriorated significantly and the UK had been regarded as an awkward partner by the other member states. Now, it is engaged in the debate. It is elaborating an agenda that seems to be about incremental reform. It is opening up the issue and taking it beyond that of the UK getting powers back to the question of what can be done to reform the EU as a whole.

Public opinion is turning—it is more pro-European—but, although the polls have turned in recent months, that could easily disappear and we could get a return of the strongly Eurosceptic tendency. Short of withdrawal, there is nothing that will satisfy UKIP. Within the Conservative Party, there is a Eurosceptic wing that is in favour of withdrawal, but it is not very vocal at the moment.

Over the next few months, an opportunity exists to get right a package that can be taken through a referendum, but if the process drags on for two years I think that it will all fall apart. What the Government is talking about at the moment will not satisfy the diehard Eurosceptics. Those who want us to get out of the EU are not interested in such rather small changes.

**Dr Kenealy:** I agree with most of what Mike Keating said.

You asked specifically about free movement and access to the welfare system. The background is that the European Court of Justice has been on a bit of a journey—of late, at least—whereby, after years of being quite expansive in its rulings on the rights of EU citizenship, it has slowly started to pull back a bit; it has gone from having a bit of a tin ear on the issue to being a little more politically attuned. The so-called German benefits tourism case from last year—the Dano case—received a lot of high profile attention in that regard.

Crucially, we need to understand the key relationship between EU legislation, the EU treaties and the European Court. Without knowing specifically what the Prime Minister may or may not wish to pursue, amending EU legislation that is underpinned by a provision in the treaties would still give the European Court the right to come in at some point in the future and say, “We don’t accept that amendment; we don’t consider that legal. That violates the treaty.” The treaties include provisions on non-discrimination and equal access for EU workers and jobseekers. A change in the directive or the regulations might buy us a little time, but if we change things in a way that does not satisfy the European Court and we have not changed the treaties, eventually someone will bring a case to the Court, it will come back and say, “That’s no good” and we will be back to square 1. The interaction between the legislation, the treaties and the role of the Court is significant.

Transition controls could be introduced under the status quo, meaning that we would not need any real change. Let us think purely politically for a minute about a potential package of reforms that could be sold as serious change. A new member state joins the EU, and for a number of years, or until its gross domestic product or average wages are at a certain level, free movement does not kick in. We could do that through the next accession treaty and we would not need to change the European Union treaties. We would not even need to get agreement, because the accession of new member states is done through unanimity. The UK could seek to win round more people in Europe to that idea of transition controls, and it could also exercise vetoes on new membership if it was not happy with the terms of the accession treaty—I

mention that because transition controls have been specifically mentioned by the Prime Minister, and that could be done as is.

On welfare, however, the interaction between the directives and the treaties gets really complicated.

**Adam Ingram:** Okay. Thank you.

**Roderick Campbell (North East Fife) (SNP):** I will follow on from that. The other 27 member states are trying to protect their citizens in relation to welfare benefits. Apart from litigation at the European Court of Justice, what practical steps can they take if they want to oppose some of the moves that might take place in the UK?

**The Convener:** You need to sit nearer the microphone, Rod.

**Roderick Campbell:** Sorry. Basically, apart from going to the European Court of Justice, which is important, what steps can the other 27 member states take to protect the interests of their citizens against the adverse consequences of welfare changes in the UK?

**Dr Kenealy:** The European Court of Justice would be the principal mechanism—I am trying to think off the top of my head for others.

Member states could, of course, simply block whatever proposals come forward from the UK if they do not like them. To change a directive or pass a new one requires a majority in the Parliament and a qualified majority in the Council, so if enough member states did not like a measure, they could simply kill it dead at that point. If a change needed to be underpinned in a treaty, other member states would have a veto on that as it would require unanimity, so they could stop it that way.

I am trying to imagine scenarios. If member states agreed to something but did not like the way that it was playing out in reality after the directive had been amended, short of them—or one of their citizens—going to the Court to challenge the UK Government I cannot think of another mechanism. That does not mean that one does not exist; it just means I cannot think of it.

**Roderick Campbell:** Are you aware of the current view of any of the other 27 member states on the proposed welfare changes? Have any of those Governments expressed vocally their views on those issues?

**Professor Keating:** The Dutch and German Governments have expressed some concern about welfare—Dan Kenealy referred to the case in which a Romanian woman who was denied welfare benefits in Germany, and that decision was upheld by the courts. Those have been the main cases. Some people in Spain are unhappy

about the health benefits that British citizens are drawing on the costas, which is a substantial amount of money. If Britain starts trying to restrict things, there will certainly be reciprocal action against British citizens elsewhere.

10:45

**David Frost:** That is one of those areas in which member states are only now tuning into the specifics of the questions that the UK has been asking. The debate has not been highly political, but in the next few months that will change.

My impression is that there is a degree of understanding of the fact that countries have different welfare systems that generate different incentives and outcomes. The UK has a non-contributory system and an in-work benefit system that is not the same as some other countries' systems. That variation generates different degrees of access to benefits for migrants at different times in different member states. That is a technical problem, and if it is generating political problems for member states, that needs to be addressed.

Is there sympathy for a significant attack on free movement? No, I doubt that very much.

**Roderick Campbell:** On a separate point, do you have a view on the pros and cons of going early or late to a referendum based on the outcome of the negotiations?

**The Convener:** Perhaps Professor Keating can answer that.

**Professor Keating:** Ideally, there should be a proper debate about the subject, and the public should be informed. It strikes me that a year may not be enough for that.

Furthermore, if the idea is to have a fundamental change in the relationship between the UK and the EU, which was the language that was used last year, that would require quite a bit of time. Things seem to have changed rapidly since the election, and the idea now seems to be to have very minor changes. I am reminded of what happened with Harold Wilson, back in 1975, when very minor changes were put through and then there was a referendum. That is probably what is going to happen. The Eurosceptics are on the lookout for that.

In many ways, it would be a pity not to have a debate about the UK's relationship with the European Union in general, whatever the outcome is, in order to decide whether we want to be in or out. We have never made up our minds in 40 years, and we should have a big public debate. I would like that to happen whatever the outcome, because then the outcome would be legitimate

and informed, and the referendum would resolve things for a very long period of time.

I suspect that we are not going to have that. I suspect that we will have something that is done very quickly, in which the UK will probably vote to stay in but not with the conviction that it might do if there was a proper and informed debate.

**Roderick Campbell:** Does anyone else want to comment?

**Dr Kenealy:** I agree: the longer, the better. The issue is complicated, and—as Michael Keating said—it requires a longer, more informed debate. I hope that the debate is recast as slightly more of a dialogue. The stomach for a longer debate might depend on how it is framed and on its political tone.

If there is a dialogue between the UK and Europe about reforming the European Union for the benefit of everybody, in which other interests are brought in, the public may have more of an appetite for a longer debate, as opposed to what would happen if the debate is presented as a battle with Europe. If that is the way that it is pitched—as a fight between us and them—it is probably better to get it over with quickly rather than let it carry on and sow further seeds of resentment.

**Roderick Campbell:** What about the impact of domestic politics on the timetable? For example, the possibility of agreeing something with Angela Merkel might not be available with a new German chancellor.

**Professor Keating:** Yes—2016 is one of the windows of opportunity when there are no elections in the major European countries. I cannot remember who is voting when, but I know that France and Germany are voting in 2017 and Spain is voting this year. In that case, 2016 might be an opportunity in the electoral calendar, which would be another reason for having a referendum next year. In 2017, there are elections in France and Germany, and domestic politics would then put a huge amount of pressure on the leaders of those countries, which could make life difficult.

**David Frost:** I do not have a view on the dates. There are arguments in both directions, and a lot depends on how the negotiation goes and how long it takes.

Other than national elections, the other relevant factor that will affect the timing is that the UK will hold the EU presidency in the second half of 2017. I am guessing, but I imagine that it could be awkward for the UK Government to be holding a referendum and running the presidency at the same time. That may be a factor in the planning, because we know for sure that the presidency will happen then.

**The Convener:** Dr Kenealy touched on a fundamental issue—the tone of the debate. Commentators have distilled the issue into two issues: welfare and migration/immigration. The migration and immigration issues have been conflated—possibly deliberately—to create an issue that may not exist. However, it is the debate’s tone that I am interested in.

If we are having a debate on Europe—which we are—it must be wider than just those two distilled points. It should be about the type of Europe that we want to be citizens of; it must be about the support that we give to people who risk their lives coming across the Mediterranean; and it should be about the support that we give to people, especially young people, so that they have the best opportunities no matter where in the EU they decide to take their education, or where they decide to work or have their lifetime experiences. If we forget those key aspects of, as it was called many years ago, the social contract of Europe, and distil the debate into a couple of points and some numbers, that would be an injustice not only to us but to the foundation of the European Union.

I know that the witnesses are all political scientists with their own experience—Dr Dan, we so remember articles 48, 49 and 50 and are probably the most educated committee in the world on those articles. However, such things do not mean much unless people are at the heart of them; they do not mean much unless everything that Europe does is underpinned by the European convention on human rights through domestic human rights legislation dealt with by national Parliaments. Those are the issues that matter. We need a debate in that tone. What are your impressions on having such a debate? Should we be having such a debate, or have I got it completely wrong?

**Professor Keating:** That is absolutely right, which is why I said that it would be useful in this country to have a debate about what kind of Europe we want and not just about whether we want to be in or out of it or whether we want to opt out of the bits of it that we do not like.

Euroscepticism is on the rise everywhere in Europe, because of the crisis. However, in most other countries that scepticism is about the policies coming from Europe and not the principle of Europe, apart from the right-wing populist parties. The mainstream parties look at what we get from Europe, but new parties such as Syriza and Podemos are not anti-European but anti the particular European policy mix that we are getting. That is an important debate to have.

The convener mentioned the migrant crisis in the Mediterranean and Europe’s abject failure to respond to it. Responding to the crisis is exactly what Europe could do by considering the broader

question of migration and how Europe can handle that. There is also the question of austerity and unemployment, particularly among young people. Therefore, there is another European reform agenda, which is about how we can address the deficiencies in Europe, to cope with the big problems. It is important to debate that side of the argument, too.

As Professor Kenealy said, the danger is that it becomes an argument about them and us. The debate should be about the kind of Europe that we should have. There are different visions for Europe, so such a debate would be extremely helpful. If you go to other European countries, they have those arguments. Even though they grumble about Europe the whole time, they are not saying that it is them doing things to us; rather, it is about what Europe they want and not liking the way it is going. However, in this country the debate is always along the lines of them doing things to us.

If the debate were framed in the way that others frame it and we talked about what we can do for Europe as well as what it is doing to us, that not only would be healthy for the democratic deliberation but would enhance British influence in Europe

**Dr Kenealy:** I agree with you, convener, but my inner realist is sceptical. I know that you did not say this, but I do not think that, however the debate is conducted, the UK’s culture of interaction with Europe will be transformed. If that is what we are hoping for then, unfortunately, we are setting the bar too high. Perhaps that is just me being overly cynical. However, your approach could take the edge off the “them and us” and the “look what Europe is doing to us” mentality. I agree that that will depend on how the tone of the debate progresses. However, it is also about how the campaigns might be structured.

We are now hearing, for example, that there will be no unified yes campaign but multiple campaigns that will talk to each other and broadly push in one direction. Who the spokespeople for those campaigns are and what kind of tone they set will be important. Politicians across the spectrum will need to lead by example on the issue. However, I doubt whether politicians of certain parties will do that, because they are obviously vehemently opposed to the EU and present an image of the EU that is very loosely connected—if at all—to reality, and I do not think that that will change.

That is why I said earlier that I would seek Scottish participation in the debate. The fact that we have a Europe minister in Scotland—a shadow Europe minister—who can be a spokesperson for the positive campaign that the convener is talking about is a good thing. It is not about division within the country or Scottish ministers and MSPs

treading on terrain that they should not; it is about making the case that matters to all of us in our communities—I agree with the convener on that.

A great disappointment for me for a number of years with the euro debate is that we never seem to put it explicitly in the context of Britain's role in the world. If we decide to leave the European Union on the back of a rather narrow and potentially nasty discussion about migration and access to benefits—although, as Mike Keating said, all the evidence is that EU citizens who come to work here are a net contributor to our economy—that will potentially be the single biggest foreign policy decision since Suez. It would be quite dangerous and a missed opportunity to not put the debate in the broader context of what kind of country we think we are in the world, how we interact with our neighbours and how we balance our historic connections with the Commonwealth with our historic connections to Europe and the transatlantic bridge. In addition to the people side of the debate, I would like more discussion about what we see as the future foreign policy of our country.

**The Convener:** Yes. You have just covered our committee's remit, which is Europe and external affairs.

**David Frost:** I have a couple of points to make. Like others, I hope that the referendum debate is a real one about everything that Europe offers. We have mentioned quite a few of those things, but I would add to them the single market and the single trade policy. Although estimates vary about how much wealth the single market has generated for the UK since we joined, it is probably of the order of a 5, 6, 7 or 8 per cent uplift to GDP. For somebody on an average salary, that amounts to about £1,500 a year, and most people think that that is worth having. When we put the debate in those terms, there is a very clear benefit but, because we do not see it every day, we have forgotten about it. However, it is there and we would begin to lose it if we were not part of the EU.

Picking up on what colleagues have said, I think that it is possible sometimes to be a bit too self-critical of how we in the UK attack these problems and of our debate here. I always jokingly called that the Laurence Sterne syndrome when I was in the Foreign Office, because of his book "A Sentimental Journey Through France and Italy", the first line of which says:

"They order, said I, this matter better in France."

There is a tendency here to think that others always do it better. However, if we look at policy making around the eurozone, in which the UK has not been involved at all, I think that it is hard to argue that that is a model of good policy making

and domestic engagement. It is possible for us to be too self-critical, given that all member states in Europe have to face problems in different ways. What we are going to have to find in the next few years, whether through the EU renegotiation or other things, is a way of reconciling our differences and finding a status of membership that we can all be comfortable with—that is a lot of what the debate is about.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** Good morning, panel. What might the UK Government's negotiating position be and how might it develop? Do you see any evidence that the UK Government is embracing, or is planning to embrace, the Scottish Parliament and the Welsh and Northern Irish Assemblies in thinking about what case to present for the UK remaining in Europe, or is that case very much to do with the Conservative Party and its issues?

11:00

**Professor Keating:** It is not quite clear to me. To pick up on David Frost's last point, historically the UK has been a rather effective operator in Europe—it has been rather good at negotiation and has been well focused, in contrast to the rhetoric that seems to surround it. That would give rise to some optimism.

I do not know what the role of the devolved Administrations will be. They will certainly be consulted. However, although they were consulted over the balance of competences review, they were not involved in the decision-making process—being involved would imply that they would get all the papers, be fully informed and be part of the working parties prior to negotiation meetings, and that Scottish ministers would participate in the way that they do with regard to the Council of Ministers.

I do not know what the proposal is for that, but I have not seen any evidence that there will be a full incorporation of the devolved Administrations. As I said, it is important to get that right quickly, before the negotiations start. We have just had rounds of preliminary discussions so far but, before the negotiations start in earnest, we want to know what the position of the devolved Administrations will be in the process.

**Dr Kenealy:** To my knowledge, there has been no formal briefing as yet from the UK Government to the devolved Administrations on how the negotiation line is developing. The JMC Europe is coming up—from memory, I think that it is on 15 June. If we are going to move quickly on this and start to table things in the European Council this year, that would be the moment to, as Mike Keating says, seek clarity on the issue. The JMC has become a little bit more transparent in recent

years, but there is still work to be done to make it more transparent in terms of what goes on inside it and what the conclusions are.

My understanding is that the UK permanent representative in Brussels is keen to ensure that devolved officers and representations in Brussels are co-ordinated, involved and fully streamlined into the process. Of course, that brings up the distinction between how officials interact versus how politicians interact, which can be quite large. The sticking point might be more at the ministerial level than the official level. From what I have heard, there is a willingness—at least on the part of the UK permanent representation in Brussels—to operate in an open and inclusive way. However, the tone for that is going to be set by the UK Government ministers and, on the other side, the Scottish, Welsh and Northern Irish ministers.

We should not forget that the devolved Administrations could and should work collectively on this. I know that the First Minister met yesterday with the Welsh First Minister. From what I hear, there is a plan—it is not a secret plan or anything—for the devolved Administrations to co-ordinate their activities, because this is an important issue that they have distinct interests in. However, as Mike Keating said, none of us has heard anything so far to suggest that there will be a radically different type of interaction between the UK and the devolved Administrations on this matter.

**David Frost:** I would make a distinction between relationships between Governments and devolved Administrations and relationships between devolved Parliaments. There are different ways of dealing with those different relationships. For the relationships between Governments and Administrations, the JMC Europe is the formal basis for engagement. Like most Cabinet committees, it is dignified rather than efficient, to some extent. A lot of the real interaction about policy takes place in different ways. The Brussels interaction, as well as the interaction between the four capitals in the UK will be an important part of that. I would not exaggerate the importance of the JMCE in terms of making the arrangements work between Governments. I think that all the Administrations have to make efforts to collaborate. I would imagine that that is happening—I do not know that it is, but I would imagine that it would be pretty essential.

The parliamentary angle is different. We have not talked about it, but I would imagine that the UK Government is thinking about some way of involving the Europe committees of the Commons and the Lords, and ensuring that they know to some extent what is going on with regard to the negotiation. In February, I wrote an essay for the Open Europe think tank—you might have seen it.

In it, I said that I thought that, if the Government was doing that for the UK Parliament, it ought to think about what it is doing for the Scottish Parliament and the other devolved Parliaments. I do not know whether that argument found any favour, but I would have thought that it is pretty important to engage parliamentary opinion in an explicit way, as well as ensuring that there are good Government-to-Government relations.

**Willie Coffey:** Ultimately the UK will go to the table with a set of requests or, if you like, demands for X, Y and Z. How can that possibly be reconciled with, for example, the Scottish Government's position on migration? You cannot seriously present a UK position on migration; it will be a Conservative Party position. How can both positions be represented fairly to Europe?

**Dr Kenealy:** I do not want to start speculating on the future, because we do not know what the UK Government's demands or negotiating line might be. I presume that there will be an opportunity to discuss and debate, but in political discussion and negotiations through the intergovernmental system, there will, sometimes, be winners and losers. That might be a very simple answer, but I guess that that is politics.

Problems arise when views diverge. Everything that we know about the JMC and the broader intergovernmental relations machinery shows that they work least effectively when there is a divergence of interests. There is a power asymmetry; the UK Government is the more powerful of the two actors, and if interests collide, it is more likely than not that one actor's interests will supersede the other's.

I said that I did not want to speculate, but here I go: with regard to restrictions on migration, what we are likely to get are quite limited targeted changes to access to benefits systems. There will be no blanket ban, restriction or cap on who can come here from Europe. As a lot of us have said either explicitly or implicitly, such a proposal would just not fly; it is just too contrary to the EU's founding principles. The measures will be much more targeted at what people can claim and how long they have to be here before they can claim it, which takes us back to the issue of how the Smith proposals will evolve. Smith could evolve in a way that would allow the Scottish Parliament to do things differently. As I said at the beginning, I do not think it could do that with its current language, but that could change.

**Professor Keating:** This issue arises all the time in relation to European issues through the joint ministerial committee and the delegation to the Council of Ministers, where the UK Government has the last word. The difference here is that we are talking about not just devolved but non-devolved matters. After all, although many



aspects of migration are not devolved, they are of particular interest to Scotland, and it is important for Scotland to be represented in relation not just to devolved matters but to things that, even if they are reserved, have a particular impact on it.

**Willie Coffey:** I have a wee question on the possibility of treaty change. It has been suggested in the discussion that if the proposed changes are not substantial enough, they will not require treaty change. However, if the changes are substantial enough to require treaty change, some member states will have to put the question to their citizens in referenda; indeed, Ireland's European minister has confirmed that Ireland would have to have a referendum, which means that the people of Ireland might be asked to vote on a treaty change that benefits the UK but which possibly disadvantages them. Can you see the people of Ireland supporting that?

**Professor Keating:** The Irish always vote twice—they are given a second chance.

There are two types of treaty change. I do not think that the first, which would give the UK more opt-outs, will happen. The UK Government's initial tone was all about opting out of more things, but you cannot opt out of things that are already part of the *acquis communautaire*; that sort of thing cannot go into a new treaty change. Never before have countries been allowed to opt out.

As a result, it will be more about doing things that affect the whole of the EU, and those things will have to be done in a way that can be sold to the other member states. The Government seems to have realised that now; it cannot just ask for special treatment for the UK, because the EU will not give us that. It has to contribute to Europe as a whole and show that whatever it is doing has benefits for the other member states, too. Whether that is possible, I do not know.

**Willie Coffey:** Dr Dan, do you have a view on that?

**Dr Kenealy:** I agree with that. As Mike Keating has said, Ireland could always have a second vote on the matter.

On possible welfare changes and access, a lot of this issue is incredibly definitional. The issue is that the European courts, using the language in the treaties and directives that govern this area of EU law, can be very flexible in how they interpret, for instance, a "jobseeker". The relevant EU directive states that someone is a jobseeker if they are in the country, they are looking for work and they have a "genuine chance" of employment. What does that mean? It is a very loose phrase, and the courts have chosen to interpret it quite expansively over the years. Similarly, you cannot deny EU jobseekers access to benefits linked to labour market participation; however, you can

deny them social assistance, and then you can argue and have discussions with European partners about what constitutes social assistance and benefits linked to labour market participation.

If the definitions in those areas were tightened up and then applied equally across all member states, all of those states could be seen as benefiting a little bit, because they would be paying out a little bit less in welfare. On the other hand, the workers who move around Europe might lose a little bit, because they would be able to take less in welfare. You could do it in a way that, as Mike Keating has suggested, would give everybody a little bit of something so that they could claim that it was a success.

We have heard from the Germans and the Dutch of a desire to try to tighten that area up, given the expansive court rulings in the area over the years that have stretched the definition of "jobseeker" to what, to be honest, I would consider breaking point. We could try to tighten things up in a way that applied to everybody to ensure that we did not get into the situation that you have described in your question.

**David Frost:** I am not going to comment on the Irish-specific case with regard to treaty change, but on the question whether we need it, I would be astonished if the renegotiation ended with an agreement by all member states to a particular set of treaty changes that went to ratification. For political reasons, that is not going to happen.

At the same time, though, it feels as though the PM is going to need a bit more than a promise to change a few directives in detail down the line if this is to pass the credibility and referendum test. I suspect that we are going to end up with a typical EU fudge, where the European Council commits to certain principles, makes a solemn declaration and agrees that, at the next opportunity, those principles will go into the treaties but, in the meantime, we are all committed to them. I think that the Council will try to deal with it that way. It will all feel major and solemn and there will be a commitment to change the structure down the line but, at the same time, nobody will be required to run the risk of a referendum in the short run. Clearly I am speculating, but I would not be surprised if it came out like that.

**Willie Coffey:** Thanks.

**The Convener:** We are now really running up against our timescales. I will take a question from Anne McTaggart and then a couple of supplementaries.

**Anne McTaggart (Glasgow) (Lab):** Thanks, convener—I will be quick. I apologise for staying within the area of speculation, but can you underline some of the implications for Scotland of a no vote?

**The Convener:** That is a big “what if”.

**David Frost:** It is. I think that being outside the single market—in other words, being outside the single trade policy—would be fundamentally disadvantageous to any bit of Europe. We gain from being part of a big market and not being part of it would have a significant impact on the prosperity of everyone in Scotland and the rest of the UK. That is why I do not think that we should come out of it. Quite apart from the fundamentals, we have to think about all the transitional costs arising from reorganising things, the change in foreign investors’ expectations and the different perceptions of the country. Those are the economic risks of leaving.

**Professor Keating:** If the UK were to withdraw from the EU, it would have to establish another trading relationship with it; indeed, it would have to put a regime in place just to continue trading. It would be in a weak negotiating position with the EU, whereas the EU would be in a very strong position. If the UK wanted full market access, it would, like Norway, probably have to accept the rules of the single market without having a say in the making of the rules. That could put it in a very difficult position.

An alternative strategy would be to diversify trade and open up beyond Europe. I am therefore not saying that the UK could not survive outside Europe—it certainly could—but it would have to negotiate its own position within the global trading order. It would not be a case of the UK coming out of the EU and life continuing; something would have to be put in the EU’s place.

11:15

**Dr Kenealy:** I agree. The economic consequences could be quite significant. This is speculation, but a lot would, as both of my colleagues have said, hinge on the relationship that we managed to re-establish with the European Union. I do not think that anybody is suggesting that we would want to be completely, totally and entirely cut loose. Swiss-type multiple bilateral treaties are highly improbable; Europe has done that once and does not particularly want to do it again.

As Mike Keating has said, if we ended up in a situation like Norway’s, we would have to accept a lot of regulations and provisions without having any say in them. Those provisions would include the free movement of labour, and if that is the big issue that we end up fighting about, a Norwegian-type relationship with the EU is not a way to resolve it. We would end up almost worse off.

**The Convener:** Jamie McGrigor and Adam Ingram have quick supplementary questions.

**Jamie McGrigor:** I will be as quick as I can be. Professor Keating briefly mentioned the *acquis communautaire* and David Frost mentioned a “fudge”. Those are two interesting things to do with Europe.

Let us consider the fishing industry, for example. The whole fishing industry in the North Sea is based on a derogation from the *acquis*. The *acquis* refers to equal access to a common resource, but that does not happen at all. Nobody has changed the treaty to do that; instead, there have been derogations for nation states.

It seems that the Prime Minister is moving away from demanding changes in social policy and is going more for safeguarding national interests in the non-eurozone countries against things being imposed by the eurozone countries, for example, and for giving greater powers to national Parliaments. He seems to be going more for a lighter-style Europe, without the great heaving hoof of authority coming down the whole time from Brussels. To achieve that, I presume that derogations, which have been used before, could be used again in other spheres outside the fishing industry.

**Professor Keating:** Yes. The fishing policy took a long time to negotiate—it took decades. The Spanish had a strong interest, but apart from that, the Scottish and UK fishing industries were competing with non-EU countries, so it is not clear that that could always be taken as a precedent, but you are right. There could also be greater application of the principle of subsidiarity.

**Jamie McGrigor:** That is another thing. There is the Hague preference, for example, and subsidiarity, which John Major was a great proponent of.

**Professor Keating:** Indeed. There have been attempts to apply subsidiarity by saying that the EU could regulate with a light touch, that there could be greater scope for variations and that the competition policy does not have to be as rigorous and rigid as it is in situations where there is not really a problem. The same applies to cohesion policy, which still spends a lot of money—mainly in central and eastern Europe. That does not have to be run so closely from Brussels; it could be decentralised. I see quite a lot of scope for that and for agreement across Europe that Brussels could do things in a much more decentralised way.

**Adam Ingram:** Was the First Minister’s contribution earlier this week very much in line with that approach? She is looking for more flexibility for member states to deal with issues—I think that she mentioned public health, for example—as well as for regulation to be made a bit more proportionate and for subsidiarity to be introduced. I am thinking of fisheries, for example.

Is that the way to go to engage with our partners in Europe across the board? Would such renegotiations move away from the confrontational aspects and get to the substance of what needs to change in Europe and what reforms are required?

**David Frost:** I have not come across a mainstream UK politician who is not calling for membership plus reform. That brings me back to where I started—it all depends what we mean by reform and how we intend to get there. What the First Minister said yesterday is very much in the main stream of that, although I should acknowledge, in my official capacity, that we are the plaintiff in the case that she alluded to. Therefore, I probably should not comment further on that.

The First Minister said at one point that the Scottish Government would not have had a referendum on EU membership but, now that there is going to be one, that is what the debate is about. There might be other ways of pursuing reform but, now that there is going to be a renegotiation, the question is how we get the best out of that and ensure that it is conducted in the most constructive way possible. That is probably the question that needs to be addressed.

**Dr Kenealy:** I come back briefly to Jamie McGrigor's question on derogations. He mentioned strengthening national Parliaments. To go beyond the current yellow and orange cards system, it is necessary to do one of two things. It is necessary for the Commission to say, "Whenever a third of national Parliaments object to a proposal, we promise to take it off the table." That would strengthen the existing provision. Treaty change would not be required; in effect, it would be necessary just to get the Commission to agree to a different way of working.

However, if there was a desire to hardwire in a red card procedure, whereby a sufficient number of national Parliaments could stop a proposal dead, such that it could go no further, it would be necessary to change a protocol at the back of the Treaty on the Functioning of the European Union, which deals with that issue. I see no other way of dealing with that national Parliament issue. It would not be a case of the UK seeking a derogation; it would involve seeking a material change to the way in which the EU works.

**Jamie McGrigor:** It might not be the UK that wanted to do that; it might be another member state.

**Dr Kenealy:** It might be, but strengthening the way in which national Parliaments can co-ordinate to block legislation is not a case of seeking to opt out of something; it involves seeking to strengthen and reform an existing institutional mechanism.

That would mean changing how the mechanism works, and that is written into the treaties.

I have a brief final point to make. The principles of conferred powers, subsidiarity and proportionality are hardwired into the articles at the front of the Treaty on European Union—articles 4 and 5 and so on—so the idea of the clunking fist of Brussels is not borne out. Since 2005, under the regulatory fitness or REFIT programme—I always forget what the acronym stands for—the EU has repealed more than 600 regulations. A new system is in place for carrying out much more systemic checking of regulations before they are introduced, so the idea of Brussels having a clunking regulatory fist is sometimes a little oversold.

A lot of the process that we are talking about might involve looking at the principles in the treaties on subsidiarity and proportionality and making them mean something to how Brussels does its day-to-day business. That does not require treaty reform, as has been mentioned; it just requires that people take subsidiarity and proportionality more seriously when they do the day-to-day business of EU policy making. Treaty reform is not necessary, because the principles are there already.

**The Convener:** We are absolutely up against the clock. I have one very quick final question. We have strayed into a lot of speculation—we have had a lot what ifs, as well as some realism, idealism and visionary thinking. One thing that we know about is the franchise in the referendum. The Scottish Government and many members of the Scottish Parliament have called for the franchise to be extended to 16 and 17-year-olds and everyone who chooses the UK as their home. A call has been made for those who had the right to vote in the indy referendum to have the same right in the referendum on EU membership. Can I have some quick thoughts on that, please?

**Dr Kenealy:** I will balance idealism with realism. On a personal level, my partner, who works at the university, is German. Although he has been here for six or seven years, he will not be able to vote in the referendum. He is an encyclopaedia of knowledge on the EU and is passionate about it. I consider it wrong that he will not be able to vote, but that is my idealistic response.

My realistic response is that, ultimately, the franchise is a matter for the UK Government. It will be dealt with in the European Union Referendum Bill. As the Conservatives have a majority, it is a matter for them. A hard-core bit of realism is that, although other European countries might think that we should extend the franchise, the last thing that those who are tilting towards the no side might want is to be told by other European states who gets to vote in the referendum. Therefore,

although I do not agree with the UK Government's position on idealistic grounds and grounds of principle, I will let the issue run its course and let the UK Government decide.

**The Convener:** There is a democratically elected member of the Scottish Parliament who will not be allowed to vote in the referendum, either.

**Dr Kenealy:** Indeed.

**Professor Keating:** The franchise for the Scottish referendum was based on the franchise for the Scottish Parliament elections, which was based on the existing franchise for local government elections. It was not as though the Scottish Government decided to do it that way; it was almost a default. Similarly, I think that the default for the EU referendum will be the UK Parliament franchise.

There is a question about opening up the vote to 16-year-olds. I think that that is an idea whose time has come and that it will come generally. I do not know whether it should be introduced just for the EU referendum, but there is certainly a case for thinking about using the EU referendum as an opportunity to extend the franchise to 16-year-olds.

**The Convener:** We are extending the franchise for elections in Scotland, so perhaps the UK Government should follow suit.

**David Frost:** I do not feel qualified to express a view, to be honest. It is a political and constitutional question. I can see arguments in both directions. It feels as though the argument is not quite closed yet; the bill is going through Parliament and there will be further discussion.

**The Convener:** That is excellent. Thank you very much. We have had an extremely interesting exchange, and I do not think that it will end here. Those who have worked with the committee know that we keep an eye on everything that happens in relation to Europe. This is one such issue, which committee members have a keen interest in.

We are keen to hear from you as the situation unfolds. If you have other opinions or ideas, please feed them back to the committee. Similarly, we would be keen to hear from any of your colleagues or other interested parties out there who have an opinion on the matter. Thank you very much for appearing before the committee.

11:26

*Meeting continued in private until 11:36.*

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e-format first available  
ISBN 978-1-78568-736-5

Revised e-format available  
ISBN 978-1-78568-750-1