OFFICIAL REPORT
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CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
12th Meeting 2018, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

COMMITTEE MEMBERS

*Claire Baker (Mid Scotland and Fife) (Lab)
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 Michael Keating (Centre on Constitutional Change)
Professor Stephen Tierney (University of Edinburgh)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 3 May 2018

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Joan McAlpine): Good morning and welcome to the 12th meeting in 2018 of the Culture, Tourism, Europe and External Relations Committee. I remind members and the public to turn off mobile phones, and any members using electronic devices to access committee papers should ensure that they are turned to silent. We have received apologies from Jackson Carlaw.

Our first item of business is a decision on taking agenda item 3 in private. Do members agree to take that item in private?

Members *indicated agreement.*

Article 50: United Kingdom Common Frameworks

10:02

The Convener: Our second item of business is an evidence session on article 50 and United Kingdom common frameworks. I welcome our panel of witnesses: Professor Michael Keating, professor of politics at the University of Aberdeen and director of the centre on constitutional change, and Professor Stephen Tierney, professor of constitutional theory at the University of Edinburgh. I invite Professor Keating to make an opening statement.

Professor Michael Keating (Centre on Constitutional Change): Thank you, convener. I bring apologies from Nicola McEwen, who is not able to come today, as she has had a slight accident. I think that you received notice of that.

As you know, there is a lot of argument at the moment about the European Union (Withdrawal) Bill and what is going to happen to competences that are currently both devolved to Scotland and Europeanised. We are not going to talk about that. We are going to talk about something upon which there is agreement between Governments, which is that there should be frameworks of some sort to deal with matters that are currently regulated at European level that will come back to UK level after Brexit.

There has been discussion in the joint ministerial committees about this issue. There has been quite a lot of convergence between the two sides on what frameworks might look like, but there are still some big questions to be answered. We have some big questions about how both sides are going about frameworks, what frameworks are, what we mean by frameworks, how they might be negotiated, what they might contain and how they might be implemented or enforced.

The notion of frameworks does not exist in the UK devolution settlement, but it exists in many countries. Framework law is law that sets down general principles, and the devolved or federated governments fill in the details. Such laws exist in Spain and Italy. They used to exist in Germany but were abolished a few years ago, although they still exist in a kind of ghostly form. Framework law is how the EU works. EU policy making is about setting down general principles for most areas, leaving state and substate Governments with the ability to fill in the details.

If we are introducing those principles into the UK, it is really important that we realise that they are a novelty. They imply a change in the

devolution settlement, which has to be thought through very carefully. What we have in the UK is a fairly clear division of competences between the devolved level and the UK level. There are some overlaps, but there is no hierarchy of law. There is no area to which both UK laws and devolved laws apply and UK laws take primacy.

That is the principle of framework law and that is how the European Union works.

There is also work to be done on how European frameworks might be brought into the British devolution settlement, if that is what we are going to do. EU laws are proposed by the European Commission. They are adopted by the Council of the European Union—the Council of Ministers—in various ways by qualified majority voting, and sometimes by unanimity, but they are negotiated intergovernmentally and they require the consent of a sufficient number of member states. They are then directly applicable. They are subject to the principle of subsidiarity and proportionality, which is that things should be done at the lowest level possible and only proportionally. Europe should act only insofar as it is necessary, and not intrude on national or substate competences where it is not necessary. There has been no discussion of that principle in the arguments about frameworks here.

The framework laws of the European Union are enforceable by the Court of Justice of the European Union. They take a legal form. We are told that some of the new frameworks will be legislative, some of them will be concordats and some of them will be memoranda of understanding. We do not really know how they are going to work, except that the UK Government has suggested that certain things should be subject to legislative frameworks and other things should be subject to more informal arrangements.

In our paper we say that there are two forms of frameworks that you could choose between. One is what happens in the EU single market—the term “single market” or “internal market” has been introduced into discussions about the United Kingdom. In the EU single market, normally what are laid down are not detailed provisions but general principles about market competition, which is the most important one, free movement and so on. From those are derived specific rulings of the European Commission and decisions of the Council of Ministers. Very often the European Commission will take up and apply the principles to matters that, if necessary, go to the European Court of Justice. That means that issues come up in all sorts of unexpected ways. My favourite example of that is minimum unit pricing of alcohol, which has just come in after about five years during which it was tangled up in the European and domestic courts. That was a public health issue, but somebody said that it was a single market issue, so it became a single market issue.

The other way is to list individual competences, start from the bottom up and try to go through the statute book and work out on which pieces of legislation there may be overlap between the UK, devolved and European levels. That is the way that the Governments have gone about this process; they have gone for the deep dive and have come up with long lists of competences. The risk is that the list might be too broad or too narrow. Unanticipated things might come up because of single market considerations or foreign trade agreements.

We are a bit critical about the way that the Governments have gone about this. Instead of saying, “What do we mean by the internal market? When might international agreements apply?” and working from there, they started at the other end and looked at individual competences, which is just not the way that the European Union works and it is not the way in which you might think of a single market operating.

Finally, there is the question of how the frameworks are negotiated and whether it is necessary to reserve competences even temporarily or whether it can be done while leaving the competences where they are. That is the current argument between the UK Government and the Scottish Government. In so far as those issues are negotiable, they are being negotiated, and there does seem to be a willingness on both sides here to try to get things done by agreement. How will that be done? Will there be a horizontal negotiation—something like what the Welsh Government has suggested, which is a UK council of ministers to replace the European Council of Ministers, in which devolved Administrations have equal status and in which there is also somebody speaking for England—or will it be a more hierarchical process in which the UK Government introduces frameworks and speaks for both England and the United Kingdom? That is important. Whether the arrangements take a legal form is really a secondary question that we can think about in due course. The main thing is to establish that there will be a negotiation among equals rather than a top-down process.

Finally, in the paper we look at three policy areas as illustrations of the dynamic and the problems.

Those are the basic principles. Stephen Tierney can talk about some of the legal aspects and we can talk about some of the policy areas later, if that is what you want to discuss.

The Convener: Thank you very much for that, and thank you for your paper, which I have read very closely and found very interesting. In your

paper, you mention that the Scottish and Welsh Governments have argued that they make policy within the EU frameworks rather than implementing them. Can you give us more details and perhaps even examples of how they can make policy within the EU frameworks that differs from how other countries implement the frameworks?

Professor Keating: Yes. Generally speaking, in the UK, the flexibility that is allowed to member states is handed down to the devolved level in respect of devolved Governments' competences. The only other place where the process works in that way is Belgium, so it is quite exceptional. In Spain, they have a hierarchy of laws as well. If it is a Scottish responsibility, Scotland will have the responsibility for making the policy.

I have some examples in agriculture of Scotland having made decisions that are quite different from those of England, and the decisions of Wales and Northern Ireland have been quite different again. In fact, within agricultural policy, there is as much variation within the United Kingdom as there is among the EU28 member states. For example, what used to be called modulation is moving from direct support to farmers into rural policy, so there is quite a bit of difference there. Also, in direct payments, Scottish farmers have some production-linked payments; the test for an active farmer is applied more stringently in Scotland; and there is a cap on the amount of support that can be received by any farmer in Scotland. When Michael Gove was the Minister for Environment, Food and Rural Affairs, he said that, after Brexit, we will be able to cap the direct payments to farmers. However, we can already do that, and Scotland, Wales and Northern Ireland do it. Those are quite important variations.

Similarly, it is possible, because of the devolution settlement, to mix and match the various instruments in detail to develop a rural policy for Scotland that is distinctly Scottish. If the frameworks were too constraining—particularly if the frameworks were about individual bits and pieces of policy—Scotland might not be able to assemble all the policy instruments it needs to have a genuine agricultural and rural policy. For that, it does not necessarily have to know where all the competences lie.

The Convener: In your opening statement you said that there is a danger that, by proceeding according to the lists that the UK Government seems to prefer, the coverage of issues is both too wide and too narrow in not providing for anticipated implications of international trade agreements. Are you able to elaborate on that?

Professor Keating: Yes. We do not know what international trade agreements are going to contain. These days, international trade agreements are about much more than trade in the narrow old sense. They often have provisions about levels of permissible support, state aid, environmental standards, labour standards and all kinds of things to make sure that trading conditions are generally fair and appropriate.

When we get into agricultural trade—very few trade agreements include agriculture, but the UK Government says that it wants agriculture to be in the trade deal with the EU and with third countries—there is an awful lot of regulatory alignment involved to ensure that support systems, subsidy systems and regulations enable goods to flow freely. However, we do not really know what those systems and regulations are going to be, because we do not know what the trade agreements are going to be or what things might be put into those. If we say simply that the frameworks will relate to an existing bundle of competences that are shared by the EU, the UK and the devolved Governments, that might not be the right list for future trade agreements, which might have other things in them.

10:15

At the moment, there is a provision to enable UK ministers to instruct Scottish ministers to give effect to international obligations, which might cover that. However, if the UK Government was to use that clause—which it has not used so far—that would mean that it was giving instructions to the devolved Governments. Ultimately, the Sewel convention notwithstanding, the UK Government has the right to overrule the devolved Governments and simply pass its own legislation, but that is not consistent with the spirit of devolution as we have known it.

Richard Lochhead (Moray) (SNP): Can I pick up on your example of agricultural policy? My nine years' experience of being a cabinet secretary and attending European negotiations was that Scotland was often rescued by the European Union when the Scottish Government's policy diverged from UK Government policy. Because the decisions were taken in Brussels, the UK often did not get its way and we were able to make policy that diverged from UK policy on issues such as the privatisation of fish quota and different agricultural regimes.

How can devolution and the current proposals from the UK Government be compatible with the motivation of the frameworks, which is maintaining the UK internal market? I am extremely concerned that the UK Government will put the kibosh on all Scottish decision making on issues on which it has a different view by saying that it would interfere with the UK single market.

Professor Keating: We do not have a mechanism for resolving that kind of problem—we make that point in our paper—but there are mechanisms for resolving that kind of thing within the EU. In the UK, we have a very weak system of intergovernmental policy making in which the UK Government has the last word. We suggest that that may be unsatisfactory because it does not correspond to the way in which the EU works, for the reasons that you have just mentioned.

There is also a difference in the Governments' understanding of frameworks. The Welsh Government is quite happy with the idea of joint policy making—of UK-wide policies—as long as the policies are negotiated, whereas the Scottish Government has tended to put more emphasis on the scope for making different policies. I do not want to exaggerate that difference, but there is a difference of emphasis. If we go down the road of joint policy making, it will be very important that it is genuinely joint policy making and not simply the UK Government laying down the law. There needs to be something in place to make sure that the frameworks are operated with the consent of the devolved Governments and are not simply imposed.

Claire Baker (Mid Scotland and Fife) (Lab): Are there examples, within the UK as it is currently arranged, of our having made shared policy with the UK Government? In the relationship that Scotland has with EU laws and within the flexibility that we have, is there an example of something that operates just within the UK on which we have reached agreement that may be used as a future model?

Professor Stephen Tierney (University of Edinburgh): One of the big issues is that the structure of the Scotland Act 1998 caters for parallel development of policy, so matters are either reserved or devolved—there is not an awful lot of shared competence.

The way that the law operates is that, when it comes to agreements, there is a big distinction between negotiation and implementation. Typically, the whole area of negotiation has been dealt with under the umbrella of the EU. For example, quite a lot of the policy approach to justice and home affairs has been shared between the UK and the Scottish Governments, which has generally been to opt out of the big Schengen arrangements but to opt in selectively on particular issues such as police co-operation and criminal enforcement co-operation. That is one area in which the negotiation is operated under the umbrella of the EU. The issue will be whether that will continue—whether the frameworks will facilitate that kind of co-operation.

The second issue is implementation, which seems to be something of a sticking point. As Michael Keating alluded, the Scotland Act 1998 provides a power for the UK Government to enforce implementation if there is a sense that the devolved Administrations are not complying with international agreements. That power has not been used, and its use would be politically deeply problematic. The frameworks will have to account for dispute resolution, too, and how such things will be agreed. Some areas are more consensual—justice and home affairs is one—but some of the areas that Michael Keating has touched on could be deeply contentious.

Claire Baker: I was going to ask about dispute resolution. You gave the example of Wales, which has suggested a kind of council of ministers of equal standing from the different Governments. The question of where England would fit into that has not really been answered. Have there been any such proposals by the Scottish Government or the UK Government, or is anybody else putting forward suggestions about how that council might look or about how the intergovernmental relations will look after we leave the EU?

Professor Tierney: Michael Keating might want to answer that question, too. The frameworks issue is part of a bigger debate about intergovernmental relations after Brexit. We are focusing largely on the renegotiation of arrangements with EU partners or third-party states, but a much bigger issue is about intergovernmental relations. Many recommendations have been put forward, over the years, for more formalisation or at least for a clearer structure, more transparency and so on. There has not been much progress on that, largely because everyone is now so focused on the granular issues of Brexit, but the matter clearly must be built into the debate.

Claire Baker: When you describe the different models that other European countries operate under, you use the term "umbrella". That is the term that I was thinking of, which, in simple language, allows me to understand the model. There is a primary government, and underneath it sit regional governments that can make their own policies. However, that model does not sit with our devolution settlement.

The other option, which we are operating on at the moment, would be to divide the competences and have equal partners. Are there other European countries that work on that model, or would we be unique in going forward with that? It seems that the umbrella model is acceptable for other European countries, but it does not appear that it would be a solution that would satisfy the UK.

Professor Keating: Frameworks exist in Spain and in Italy, where the central Government sets broad parameters within which the devolved

governments can make policy. For example, they are allowed to set something like 40 per cent of the educational curriculum and the state government sets 60 per cent—I cannot remember the exact figures. However, that model has become extremely contentious, and it really is very difficult to work with. There is endless litigation on it in the constitutional courts of Italy and Spain. It is not an example that anybody in Spain or Italy would recommend exporting to us.

The German model has traditionally been not to divide competences between the two levels but to have the federal level setting out the broad framework and the Länder effectively implementing policy, although the Länder have not done an awful lot of legislating. That model has been changing a little bit because it was seen as being too complicated.

The devolution settlement that we have tends to provide fairly clear distinctions between the competences of the two levels, although it is not completely clear—there are always overlaps, of course. Inevitably, we are going move a little bit away from that model, because of the question of the UK internal market replacing the EU single market and because many things that are currently subject to EU law—a lot of things to do with agricultural regulation, environmental law and so on—will become subject to international treaties; they will move into that category. When we do so, we will really need to think about the implications of that and about which of the models we are going to go for.

We are not making any recommendations, but we should at least be thinking about where we are heading. As Stephen Tierney said, the process has been overwhelmed by the urgency of Brexit, and the danger is that we may just stumble into a solution that changes our constitutional understandings without having given it proper thought. At least we now have the transition period and the UK Government's promise that the re-reservation of competences will be subject to a sunset clause period of two years plus five years—in effect, up to seven years. That might give us time to think about these things.

If the competences are going to be reserved temporarily before they come back again, it will be important to think more carefully about exactly how that fits into our devolution settlement, taking into account the lessons from Spain, Italy and Germany, where they have had to change things because they found that their own system had not worked terribly well.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning. The issue of intergovernmental relations has been raised on numerous occasions in this Parliament, particularly in the previous session of Parliament. Look at how unequal the JMC process is: it has never met outside London. When ministers and cabinet secretaries attend, it is usually very heavily weighted by UK Government ministers, and we have heard from Michael Russell that the notification letters that we get here regularly provide no agenda. Surely, there must be a fundamental element of respect in any framework that is devised.

Professor Keating, you said a moment ago that we could just stumble upon some solution in the future. I think that that would be extremely worrying and concerning for many people in this country.

Professor Tierney: Michael Keating talked about the framework of IGR in general, but the one legal point that I would like to come back to, which frames the debate to some extent, is that the competences of the Scottish Parliament and the other devolved arrangements are not being removed. That gives the devolved Administrations quite a lot of weight when it comes to the implementation of policy. Because those competences are still firmly embedded in the devolution acts, there is scope for the devolved legislatures to continue to implement policy in different ways provided that it falls in devolved areas.

It is very much in the interests of the UK Government to arrive at processes of IGR that are agreed by the devolved Administrations. We often think of devolved Administrations here as quite powerless and frustrated by how things are working. However, in this new environment, when so many powers are coming back in areas that, de facto, are going to have to be shared and the subject of frameworks, the capacity of the devolved Parliaments to make law in those areas is quite significant. It is fundamentally in the interests of the UK Government to start to take more seriously a process towards greater formalisation and transparency as well as a firmer commitment to agreement in the IGR process than currently prevails. The devolved Parliaments now have quite a lot of weight to make it clear that that is a firm expectation.

Professor Keating: That is right. The problem with intergovernmental relations here has not been so much about notions of respect or trust, because those are abstract ideas that have to be built from somewhere. The problem is that there is a lack of institutional underpinning and a lack of clarification about what happens in the last resort. The last resort is always that the UK Government can get its way, and our knowing that changes the whole dynamic of negotiation. The UK Government can go into negotiations knowing that there will be a political cost to pay—it may cause a political row—but, ultimately, it can get its own way. I do not

know of any other system of intergovernmental relations in the world in which that is so comprehensively true.

In a federal system, the federated units have their own competences that belong to them, and they simply cannot be overridden. If the federal government wants to negotiate, it has to get agreement. In such systems, that provides an incentive to co-operation; it does not necessarily produce deadlock. Knowing that you have to have an agreement, you work very hard at getting that agreement, and that goes throughout the entire system.

Another problem has been not so much that the UK Government wants to engage in a power grab of devolved competences—I really do not think it is interested in that—as that the UK Government tends to neglect the devolved level, partly because it is legislating for England and the UK at the same time and partly because the departments in Whitehall have sometimes lost their connections with the devolved level altogether. They do not understand the issues and they constantly have to be reminded.

10:30

Those are two critical factors that, once again, are connected, because it was not always necessary to get the consent of the devolved level on things that may overlap the two levels. The UK level would have to put more investment into thinking about what is happening in the devolved territories—what their distinct concerns are—and anticipate such conflicts so that they would not occur. I am not in favour of proliferating intergovernmental committees all over the place. That is not the answer. The answer is to identify clearly where the competences lie and then have a procedure whereby, if there is a deadlock, you can get an agreement.

Stuart McMillan: On procedure, it has been suggested that the majority of environmental frameworks are likely to be non-legislative. What are your thoughts about that? How will there be any parliamentary scrutiny and what will be the role of Parliaments if the frameworks are to be non-legislative?

Professor Tierney: In one of my other roles, I serve as legal adviser to the House of Lords Constitution Committee, and the detailed report that was published on IGR would merit close attention again as it included a lot of detailed, practical recommendations on how things could be improved. One of the big areas that that report looks at is parliamentary scrutiny. It is clear that that is an underworked area, but one that is going to be important.

One of the huge issues to do with the new frameworks is going to be parliamentary scrutiny of the process of negotiation, particularly where that involves other countries. At the moment, the Scottish Parliament and the UK Parliament have a role because of established mechanisms for European treaty scrutiny, but that will no longer apply. The Scottish Parliament will have to think carefully about how it builds in scrutiny of negotiations with regard to frameworks, particularly when they involve other states.

There will also be an important role for Parliament to scrutinise the implementation. The issue will be not simply the need for parliamentary scrutiny of the intergovernmental discussions, but whether the Parliament has the resources to properly scrutinise so many new agreements, particularly as they might result in secondary legislation. The Parliament really needs to think about how it is going to resource that, what committees it might need and whether it will be appropriate to have a dedicated committee to look specifically at the frameworks.

Stuart McMillan: We are having discussions in the Delegated Powers and Law Reform Committee regarding the secondary legislation. You will be aware that over 300 pieces of secondary legislation are anticipated, notwithstanding any future primary legislation. However, the frameworks are a different beast.

Professor Tierney: They are. As you say, this is probably a non-legislative issue, and that is why, when it comes to framing new IGR arrangements, transparency will be a crucial element in relation to the agenda setting and how much information is released. Parliament can scrutinise only what it knows about.

Professor Keating: I agree with what Stephen Tierney has said. That is vitally important. The issue has been around for a long time, but the more frameworks we have, the more acute the issue is going to become.

Mairi Gougeon (Angus North and Mearns) (SNP): Before I ask my substantive question, I want to ask a supplementary to Stuart McMillan's question, which Michael Keating responded to, about what seems like a lack of understanding in Whitehall departments of devolution and how it operates. I feel that we are almost in a catch-22 situation with that. If that understanding is not there at present, I do not see what is going to fundamentally change or how we will make those Government departments understand and take cognisance of the issues here, especially if, as you say, there is always the fallback position that they can essentially do what they like anyway, unlike in the situations in other countries. How can we possibly hope to change that situation and that

understanding so that we can have meaningful progress in these areas?

Professor Keating: From 1976 until 1979, I taught a course on devolution for Whitehall civil servants, because we thought that it was going to happen. It was so important that all the incoming high-fliers had to go through it. That did not happen 20 years later, in the 1990s. It is important that that sensitivity is embedded in the training of civil servants.

Also, there is a high turnover of officials in Whitehall. Officials establish relationships with the devolved Administrations and get to know people. The relationships tend to be good at the ground level, but then somebody else moves in. That needs to be built more clearly into the system. Similarly, ministers in Whitehall are often insensitive in the sense that they are unaware of the devolved implications of things. They have got to learn more about that.

It is difficult, of course, because we have such an asymmetrical system, with 85 per cent of the population and 85 per cent of the MPs being in England. However, I think that that is beginning to change, partly because of what is happening in England. It now has city mayors, and there is the question of London. There are territorial politicians of some weight, and those things really do matter.

Nothing can be done about the situation institutionally. It will take a change of mentality or a change of understanding. Every time one of the crises arises over the EU withdrawal bill or something like that, it sensitises people in London again to the importance of the issue. However, it is always going to be difficult and it will always have to be worked on.

Professor Tierney: There are some practical suggestions. One is to focus on the civil servants, and there have been suggestions about making improvements to training. The UK Government has at least notionally begun processes to have better devolution training for civil servants.

An option would be greater transfer between the different Administrations, but that would hit practical hurdles such as housing costs in London.

Another way to do it is to impose obligations on Government, because that focuses civil servants. For example, if new concordats are to be prepared in relation to the frameworks, one suggestion would be to require their frequent renewal and revision, because this is going to be such a fluid area. For example, we could say that any new concordats must be reviewed annually. That would require civil servants to keep on top of what was happening and how well the concordats were working.

Another thing that could be built into new agreements would be an obligation on the part of the Prime Minister and possibly First Ministers to report to Parliament formally in every session or after each JMC meeting in relation to the frameworks, with a full account of what had taken place and what progress had been made since the previous one. Not only would it be good for Parliament to hear direct from Government in that respect, it would force civil servants to be on top of the issues.

Those are some of the things that people should be thinking about as we move to try to formalise some of the framework scrutiny.

Professor Keating: I would add one thing to that, which is interparliamentary co-operation. There is a lot of talk about the idea that the devolved and the Westminster Parliaments should be able to interrelate to each other. There have been all sorts of suggestions about joint investigations. I was at the Public Administration and Constitutional Affairs Committee meeting on Monday in the city chambers, and people said, "Wouldn't it be nice if we could meet in the Scottish Parliament?" Everybody said, "Yes". It surprised people that that does not happen more often. That would also improve the scrutiny function and sensitise Westminster MPs to what is going on at the devolved level.

Mairi Gougeon: Yes. I remain concerned about some of the bigger things that you have talked about. A change of mentality is needed, but that is not a quick thing to create. It would take quite a long time to embed.

I will move on. The part of your research briefing about funding and agriculture is really interesting. You state:

> "Only 17 per cent of land in England is in 'areas of natural constraint' (formerly 'less favoured'), compared with 70 per cent in Northern Ireland, 81 per cent in Wales and 85 per cent in Scotland ... It is estimated that between 50 and 60 per cent of farm income in the UK as a whole comes from CAP payments. In Northern Ireland, Wales and Scotland it is 87, 80 and 75 per cent respectively".

Will you elaborate on how important that is to Scotland and how you see the funding arrangements working post-Brexit? If they went along according to the Barnett formula, how would we see that impact in Scotland? I have not seen any further details, as far as I am aware, on the UK-wide shared prosperity fund. If you know about any further detail that has been published on that, it would be worth while for us to hear about it.

Professor Keating: We do not know very much about what is going to happen there. The UK Government issued a discussion paper on agriculture for England, which proposes that direct payments for farmers will be phased out altogether. There would be huge implications if

that was applied in Scotland, because of the figures that you have just cited. It would be much more serious in Scotland, Wales and Northern Ireland than it would be in England.

We do not know whether, under a framework, Scotland will be permitted to keep those direct payments. That would be a very contentious issue. It might be argued that it would be unfair to farmers in England if Scottish farmers got those direct payments, or we might say that it does not really matter and it is not that important. We just do not know. The DEFRA white paper very carefully avoids making UK-wide commitments because that is for another stage, but we know where it is heading and it was not very surprising that that white paper said that we are heading in that direction. There are implications for funding regimes in the different parts of the UK.

As for how payments are going to be funded, at present, the direct payments to farmers are funded by the European Union and the rural development payments are jointly funded by the Scottish Government, in this case, and the European Union. Following Brexit, that money will come back to the UK. We are a net contributor so the money will come back again. How will that be distributed? One possibility is that it could be incorporated in the frameworks. If we have an agricultural framework, there will be a funding mechanism to match that, so the framework would be enforced, almost, by funding. I suspect that that is not going to happen. I do not think that DEFRA is interested in doing that.

Another possibility is to do what is done at the moment, de facto, which would give each of the nations the share that it got last time round. That is what was done last time with the agricultural funding. It was squared with the European regulations, and then you can do what you like with it.

A slightly different version of that is to Barnettise it. That means that it would go not into the agricultural funding but into the block funding, so rural policy would have to compete with education, health and all the other things. Farmers would not be happy about that, because it might be difficult to maintain their share in that kind of competition, but it would also mean that their base share under Barnett was pretty much guaranteed, because it is only the margin. Every time there is a funding round, the margin shifts according to population, so you keep your base funding. That would be a pretty good deal for Scotland and Wales. Many people think that Barnett means that we only get 8.5 per cent, but it does not. It means that we would keep the existing funding. As agricultural spending falls in England, which it will, Scottish spending would also fall. However, that is probably the best deal that Scotland could get, because at least there would not be drastic changes.

We know very little about the shared prosperity fund, but it may be operated on the same basis as the existing cohesion funds from the European Union. It may be selectively distributed according to a formula that has some need indicators within it, there may be a little bit of political fiddling around with that, and then matching funding may go along with that. The UK would say, “You can get this much if you follow these guidelines and if you match funding”.

That would be something of a centralising measure, as the cohesion funds are, because Scotland would then have to follow those guidelines and put its own money there as well. It is a little bit like the city deals that were rolled out to the devolved nations a couple of years ago, which require the Scottish Government, local government and other bodies to put in match funding. That might be considered to be distorting of our priorities, because the UK Government would be saying, “You’ll get more money if you put your own money in.” It would also be incredibly complicated, as the cohesion programmes are. We might ask whether it was not a cumbersome, complicated and expensive way to spend rather small amounts of money. If we thought that that was the case, an alternative would be to put those funds into the Barnett formula as well. That would be another way of doing it.

10:45

The idea of a UK prosperity fund is the former model. The UK Government might want to take that approach because it likes to be seen to be spending money in the devolved territories and to get credit for it. That is a lot of what city deals are about—the UK Government raising its profile here—so there might be political incentives to do that. However, the more of these initiatives we get, the more complicated it becomes and the more the administrative costs increase. It might be simpler to put all the money into the block grant and let the devolved Governments go about it in the way that they like. Nevertheless, it seems that, with the prosperity fund at least, that is not going to happen.

Ross Greer (West Scotland) (Green): The nature of the frameworks has been mentioned a number of times now. Michael Keating mentioned in his opening remarks that some frameworks will take a legislative format and some will not. I am still somewhat unclear as to the rationale of the UK Government in relation to deciding what requires a legislative framework and what does not. What is your understanding of its rationale in relation to how it is categorising those frameworks?

Professor Tierney: It is not entirely clear to me either, and I do not think that anything is settled on that. It will have to be worked through and a real, practical issue is parliamentary time. There is a huge backlog of legislation at Westminster. A lot of bills will have to go through. Bills that we have not yet envisaged will have to be introduced in relation to the withdrawal and implementation agreement. There will be things that have not been foreseen. A lot of it will come down to practical matters of parliamentary time, and my expectation is that a lot of this will be done by secondary legislation—possibly a lot more than is presently envisaged.

Ross Greer: The issue of consent has been the political highlight of this saga and it is where there have been the most significant clashes. As has been highlighted, there is clear precedent elsewhere of different levels of government being able to overrule each other depending on the constitutional framework of different nations. Is there a precedent elsewhere in Europe for the kind of language that is now proposed for the UK's European Union (Withdrawal) Bill in terms of the outright rejection of consent being considered as a "consent decision"? I understand that there is precedent elsewhere of different levels of government or parliament being able to overrule each other. Is there precedent for that kind of language being embedded in legislation?

Professor Keating: The Sewel convention has worked pretty well so far because it has not been invoked very often and there is a degree of ambiguity about what would happen if legislative consent was not given. That is a way of squaring the circle of parliamentary supremacy with recognising devolution. It was the best they could do at the time. The convention was bedding in and then it was put into legislation in the Scotland Act 2016 and the Wales Act 2017. Perhaps Stephen Tierney can comment on the legal aspect. It seems odd to write a convention into legislation and then say that, in effect, it is not legislative any more. It is a strange way of using the law; either something is legal or it is not legal. However, you can understand the political logic of it—the UK Government and Parliament are making a statement. Before the Sewel convention really had time to bed in, we got Brexit, which put more weight on that convention than it was ever intended to bear.

With this latest amendment to the withdrawal bill, the UK Government has retreated a long way. It has accepted the principle of legislative consent, even for statutory instruments, so it has not violated the existing understanding; it has just exposed a weakness in the existing understanding that was already there. The clause that you are referring to, where it says that A, B and C all amount to consent, was just drawing attention to that weakness in what was probably a very unhelpful way. All that ambiguity has disappeared because, for the first time, the UK Government has explicitly said that a decision not to give legislative consent will still allow it to go ahead. From a political point of view, there was an element of clarifying and laying things down that were previously political understandings and had worked as political understandings. Stephen Tierney may have some comments on the legal aspect.

Professor Tierney: It is a curious thing. It brings up the whole idea of what a convention is. Essentially, we have law on the one hand, which is binding, and political practice, which is nothing more than political practice, on the other; a convention exists in the middle, in a sort of grey area.

In the Miller case, with regard to triggering article 50, the Supreme Court said that the Sewel convention is simply a political principle. I do not think that that is correct; it is a bit more than that. It is a practice that is repeatedly observed and it is observed because people consider it to be binding. If the withdrawal bill goes through without consent and if we then find regulations repeatedly being made without consent—regulations do not technically come under the Sewel convention but there is a general commitment to consent—we would have to ask whether there is still a Sewel convention. A convention is something that is considered to be binding and which is repeatedly observed. If we find that it is no longer considered to be binding and is not repeatedly observed, the issue will be: can we still talk about a Sewel convention?

The Convener: On the issue of the environment, you state in your paper that

"Relatively few environmental areas were considered to require legislative frameworks"

but those areas

"included waste packaging and product regulations, and implementation of the EU Emissions Trading Scheme. It is not yet clear whether the UK intends to leave the ETS, nor what would replace it."

To take the waste packaging and product regulations—just to get this down to practical things that people actually care about and which affect them—Scotland brought in the plastic bag charge several years ahead of the rest of the UK, I believe, and we are currently looking at issues in relation to running bottle deposit schemes. If we decide to go in a different direction in that area, as we have done in the past, could we be constrained from doing that because of the framework?

Professor Tierney: That would depend on how detailed the framework was, but it would only be the framework that was binding, in a sense. In other words, the Scottish Government and

Scottish Parliament would only feel themselves constrained if they accepted the terms of an informal framework. The competence of the Parliament remains. This is a point that I tried to make earlier—these devolved powers are still there and until the Scotland Act 1998 is changed, it is still within the competence of the Scottish Parliament to continue to legislate in areas that are devolved areas.

Professor Keating: You have picked out an area that is Nicola McEwen's part of the paper, so we probably cannot go into the details of that. Stephen Tierney has exposed the question of what non-legislative frameworks really mean and how binding they are.

I would not have thought in a practical sense that that particular example would be a problem. It did not occur to us that the frameworks would go into that level of detail but, insofar as they do, once again we are back to the question of what a framework is and how enforceable it is.

The Convener: Michael Keating mentioned in his opening remarks that the federal system in Germany had some frameworks and that it stopped using them—basically, they went into abeyance. Could you say more about why that happened?

Professor Keating: There was a reform of the federal system that was trying to disentangle competences to some degree so as to get greater transparency and accountability into the system, to get rid of this very complicated, time-consuming and expensive way of joint policymaking and to decentralise more power down to the Länder level. That is always very difficult in Germany because you do that and then things go back to this intergovernmental, complicated system. That was the logic behind the reform.

The reform did not result in any dramatic changes to the constitution but they did get rid of the joint task frameworks and most of the framework laws—I am just trying to recall the detail of it. However, in practice, a lot of joint policy making is still going on.

In education policy, for example, instead of having a jointly made federal education policy, with the Länder participating and the Bundesrat—which is the second chamber of parliament representing the Länder—being involved, they got rid of that but then the Länder ministers just got together and, among themselves, engaged in a lot of horizontal co-operation.

Therefore, there is still joint policymaking but without the federal government involved, it is less hierarchical, and it is more horizontal than vertical. Germany moved from one model to another. We could learn from that because the model whereby the Länder can get together and co-operate is an interesting one and it might be a way of dealing with frameworks without the element of hierarchy that people are a little bit suspicious about in this case.

The Convener: Thank you very much for coming to give evidence today—sorry, I thought that we were finished, but Rachael Hamilton wants to come in.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): How much flexibility will there have to be on policy making to meet some of the requirements or expectations of, for example, the Food and Drink Federation Scotland and NFU Scotland? They want regulatory consistency within the common frameworks, on things such as food labelling, animal welfare and traceability, and pesticides regulation. Will the Governments put those needs first or will they stick to their guns and keep their own unique policies within the devolved Administrations?

Professor Keating: I have talked to a lot of people in the area of agriculture and I find general agreement among Governments and the farmers—everybody—that they do not want regulatory divergence within the United Kingdom, nor do they want international divergence to a great degree, and they do not want divergence generally from the European regulations.

They talk about individual regulations that they do not like but the principle of consistency is clearly in their interests because then they can trade more widely. If there is divergence, it is certainly not going to be for its own sake and I think that a lot of this will almost look after itself. If the farmers are saying, "We do not want separate regulations," and if Governments are saying, "We do not want separate regulations," where is regulatory divergence going to come from?

This would suggest that there is a willingness to have some kind of harmonisation. It is just a question of what mechanisms we use to make sure that that really happens and to make sure that things do not fall out of the picture because nobody thought of them. We do not want to end up with anomalies that nobody really intended in the first place.

Professor Tierney: My final comment would be that we are talking to some extent about frameworks as though we are almost anticipating Brexit in quite a hard form—as though this will take place in a vacuum between the UK and the devolved Administrations.

If we look at things such as the UK Trade Bill, which anticipates the immediate re-engagement of the UK into third-party agreements, for example, and if we consider Michael Keating's last comment, we also need to envisage a scenario

where there will be a continued convergence of policy in a lot of these areas post-Brexit.

On that basis, even the scope for divergence within the UK will be strictly circumscribed by the fact that in many ways, the UK could still be tied very closely—even if it is in an informal sense—to European standards. We should not take our eye off the idea that continued European convergence, including the UK, may well still be a scenario after Brexit.

Professor Keating: The argument that we would go for radical regulatory divergence was part of the Brexit argument. The idea that we would just deregulate seems to have largely disappeared, because of a realisation that regulations have broad support and also that whatever deals we make with the EU or other countries will have that element of regulatory convergence embedded in them.

Rachael Hamilton: How long do you envisage the timeframe will be for developing the common frameworks and agreeing on them? Do you see a situation where those common frameworks will not be agreed upon?

Professor Tierney: The withdrawal bill anticipates quite a lengthy period. Something else that we need to factor in is that there will almost certainly be a transition period now, from Brexit until the end of 2020 or 2021. That in itself will give a lot of breathing space but the withdrawal bill seems to be anticipating an even longer period. Let us not forget that the powers are sunsetted, so things will have to be done within a certain period of time, but I imagine that it will be a four to five-year period.

Professor Keating: The other factor is that frameworks would have to be updated continually because of changing conditions—changing technology and changing risks from trade agreements—so some mechanism would have to be put in to make sure that the frameworks stay up to date.

The Convener: I thank both our witnesses for coming to give evidence today. We will now go into private session.

10:59

Meeting continued in private until 11:25.

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