OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 24 October 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 24 October 2018

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FINANCE AND CONSTITUTION COMMITTEE
26th Meeting 2018, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)
*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Angela Constance (Almond Valley) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Emma Harper (South Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lloyd Austin (RSPB Scotland)
Professor Paul Beaumont (Royal Society of Edinburgh)
Michael Clancy (Law Society of Scotland)
Jonathan Hall (NFU Scotland)
Professor Michael Keating (University of Aberdeen)
Professor Colin Reid (University of Dundee)
Anthony Salamone (Scottish Centre on European Relations)
Daphne Vlastari (Scottish Environment LINK)
Iain Wright (University of Glasgow)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 24 October 2018

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning, colleagues, and welcome to the 26th meeting in 2018 of the Finance and Constitution Committee. I ask those who are attending, including all the panel members, to make sure that their mobile phones are put in order so that they do not interfere with proceedings. I would be most grateful for that.

Under agenda item 1, do members agree to take consideration of our draft pre-budget scrutiny report in private at a future meeting?

Members *indicated agreement.*

Common Frameworks

09:30

The Convener: Our next item of business is to take evidence in a round-table format on common frameworks. Today's discussion will build on the evidence that we have already received in response to our call for views, our fact-finding visit to Brussels last month and the comparative research that we commissioned on what happens in other countries with regard to common frameworks.

I will just mention our witnesses' names and institutions, as we will be here forever if I mention all their titles. With us are Professor Michael Keating from the University of Aberdeen, Daphne Vlastari from Scottish Environment LINK, Professor Colin Reid from the University of Dundee, Jonathan Hall from NFU Scotland, Iain Wright from the University of Glasgow, Professor Paul Beaumont from the Royal Society of Edinburgh, Michael Clancy from the Law Society of Scotland, Lloyd Austin from RSPB Scotland and Anthony Salamone from the Scottish Centre on European Relations. I thank everybody for coming along and being prepared to contribute to our deliberations this morning.

As a committee, we find that these sessions can work very well in teasing out the issues and allowing people to contribute as freely as possible. The discussion is certainly intended to be free flowing. When you want to comment, please catch either my eye or the eyes of the clerks, and we will try to get you in as much as we can as part of the discussion.

Today's discussion will be based on four themes and a different member of the committee will lead on each one. I intend to allow about 30 minutes for each theme. As usual, there will be a bit of crossover, so we may stray into other areas. That sometimes happens naturally in free-flowing discussions. Let us see where we get to. I am really looking forward to this.

Willie Coffey MSP will kick off our discussion and he will focus on the principles and policy areas of common frameworks.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Good morning, everybody. I am the member of the Scottish Parliament for Kilmarnock and Irvine Valley. I will start at the very beginning, with basic principles. Professor Keating and others have said that it is as if we are working on the detail before the basic principles have been worked out. I want to test whether others have the same view.

It seems to me that the policy areas that we are discussing in the frameworks are like a pack of cards but we do not know who is dealing them, what the rules are for their distribution or what the discussions will be. I contrast that with the experience that we had in Brussels recently, where we heard from a number of jurisdictions in which there seem to be clear, well-understood agreements about the hierarchy of laws that are governed by the principles of supremacy and so on that Professor Keating has mentioned. Should we start there and put a bit of effort into that area first, before we argue and worry about the detail of how the frameworks will operate?

Professor Michael Keating (University of Aberdeen): Yes—I think that that is right. It seems that there are two processes going on. One is about the broad principles of what the internal market means. At one level it seems straightforward, but once we get down to the detail, the concept of the internal market is extremely complex, and we have nothing like it in the devolution settlement. We did not need it, because Europe looked after that. Then there are the deep dives in individual policy fields that civil servants have been working on. Those two things are supposed to meet, but I am not sure that they ever will.

There is then the problem of the basis for European Union regulation and whether we can download that EU model into the existing devolution settlement. I do not think that we can do that without rethinking it.

Where we end up—which is, I think, your point—is that we are going to have a range of mechanisms for dealing with intergovernmental relations. We have the existing mechanisms for non-EU matters; we have frameworks, some of which will be legislative and some of which will be non-legislative; we have the individual sectoral bills such as the Agriculture Bill, and an environment bill is coming up; we have matters to do with negotiation of international agreements, where the discussions have hardly started; and then we have various ad hoc measures. The whole thing is so complicated that it is difficult to see how anybody could really understand it.

The reason why this is happening, of course, is the timescale. We are trying to address really important constitutional issues in a very limited timescale. We still do not know how long the timescale will be or how long the transition period is going to last. However, even if it is three years, that is not long enough to think through the implications for our constitutional settlement, so we could end up with a terrible muddle.

The Convener: Who would like to chip in? I see that Michael Clancy is desperate to say something. I know that the Law Society has made some comments on the theme. Would you like to give us your reflections, Michael?

Michael Clancy (Law Society of Scotland): I think that you are reading too much into my expression, convener, but you have asked for it now, so I will say a few words.

Let us consider the timescale. I entirely agree with the analysis that it is far too short. I recently submitted something to another committee of the Parliament that gave scenarios for how things would go if we had an October withdrawal agreement reaching over to 29 March next year; if we had a November withdrawal agreement—at the time when I was writing it, everyone was talking about the idea that a European Council meeting would be sketched in for November that would give us that arrangement; if we had a December agreement at the European Council—time has been allocated for that, but it is looming, even though it is only towards the end of October; and lastly what would happen if there was no agreement, say at the last opportunity in October.

I checked our Brexit law countdown clock this morning and it is 154 days until 29 March. If we take out the various holidays and recesses, we do not have an awful lot of parliamentary time here or in London—or indeed in Europe, because we tend to forget that, under article 50, members of the European Parliament have the possibility of voting. I agree with the point that has been made about the timescale. It is short, and decisions that are made in a rush to try to meet a timescale are sometimes not the best decisions. It takes an awful lot of energy, time and thought to get them right.

On the idea that we are putting the detail before the principles, the Cabinet Office identified 111 powers and sent the list to the Scottish Government more than a year and a half ago. When I was doing the survey of those powers, which the Law Society published, it seemed to me that they are complex and detailed areas of the law and a significant amount of specialisation is required to be able to understand them.

The make-up of that list of 111 powers gave me the impression that the Cabinet Office had sent out a general call to Whitehall, saying, “Tell us the intersection areas between the EU and devolved matters,” and it had got back various returns. Some of the returns were duplications and the clustering of them might have come from different departments. We are dealing with a thought process at the very beginning of the whole idea of withdrawal, before the full consequences of that had been identified, even after the referendum.

In the list of 111 powers, we also see the variety of mechanisms that are currently used. In relation to certain agricultural matters, there is a

memorandum of understanding. In other areas, such as pollution prevention and control, there is primary legislation. Across a raft of other things, there is subordinate legislation. That variety of mechanisms makes it difficult for us, in retrospect, to start thinking about how to fit this into the concept of a common framework analysis when what we have done up to now has been anything but common.

We know that the total list contained 153 powers. Some related to Northern Ireland, some related to Wales and there was a core group that applied across the United Kingdom. If we dig into the 111, we can see that, on food and feed law, our current analysis paper stretches to 125 pages, but if we add the Food Standards Scotland digest of food and feed law, the total is something like 500 pages. Who around the table has the expertise to tell me what the analysis of mineral water is all about? That is the level of detail that some of the pieces of law go into.

I have probably taken up too much time already.

The Convener: I am grateful for that contribution because it allows me to bring in Lloyd Austin from RSPB Scotland, which has also commented on the area and has expressed some concern about the Cabinet Office's provisional assessment of the policy areas. Would you like to flesh that out, Lloyd?

Lloyd Austin (RSPB Scotland): I agree with Michael Keating and Michael Clancy about both the timescale and the fact that the devolution arrangements took account of the EU situation or were developed with it in place, so if the EU level of governance is to be removed, there is a need to think about how it will be replaced.

We welcome this discussion about frameworks partly because environmental issues are inherently cross-border issues. Whether we think of airborne pollution or wildlife movements, the environment does not respect political borders, and one of the reasons why we very much support international measures to address environmental issues, be that on a global or a European basis, is because of that cross-border nature.

A number of things that relate to nature and the environment were not recognised in the Cabinet Office paper as requiring cross-border co-operation within the UK. For example, we highlighted invasive non-native species, which need to be addressed in co-operation, at least, if not in a common way. That illustrates that the environment often needs to be approached biogeographically rather than by jurisdiction. By that, I mean that we might want an approach for Northern Ireland and the Republic of Ireland, where species are different from those in Great Britain—England, Scotland and Wales. In environmental areas, we need to approach things in a biogeographic way, which means that we need better intergovernmental mechanisms to address them.

We believe that, in order to respect the devolution settlements, each jurisdiction needs to have the authority and accountability that the devolution arrangements give them, but there needs to be a mechanism to ensure proper co-ordination and consistency to deliver cross-border mechanisms. We can learn from things that exist in the EU, such as intercalibration, which is a technique of setting environmental standards under the water framework directive. Common frameworks can be that way of working, rather than legislation or other non-legislative mechanisms. There are many different forms of common frameworks.

09:45

The Convener: We started with a question from Willie Coffey about whether a set of common principles should be established before we get into the detail. Does RSPB Scotland support that or are you more relaxed about it?

Lloyd Austin: From an environmental point of view, if a set of principles is to exist, we would like recognition of the cross-border nature of the environment to be one of the principles.

The Convener: Okay. Angela Constance is next.

Angela Constance (Almond Valley) (SNP): My question is a slightly broader one. I am conscious that both Michael Clancy and Lloyd Austin laid out a raft of detailed work that needs to be undertaken. An enormous amount of detailed work is required. I suppose I am interested in trying to get my head around how much of a priority the resolution of some of the details in and around common frameworks is actually going to be, given the evidence that we have from the Scottish Centre on European Relations. Picking up on the scenarios that Michael Clancy began to lay out, I note that there is broader negotiation and there are scenarios around a deal or no deal, a hard or soft Brexit and transition periods. It would be good to hear from Anthony Salamone whether there will be capacity to prioritise the work on common frameworks, given the broader political situation.

Anthony Salamone (Scottish Centre on European Relations): Good morning, everyone. Picking up on Angela Constance's question and building on what others have said, I note that the timing is clearly important. As Michael Clancy mentioned, we are in the countdown to a deal or no-deal scenario. Even if we presume that we will have a withdrawal agreement, it will only include a

political declaration on the shape of future relations between the UK and the EU. Even if we have a deal by October, November, December or even January, which is probably the latest moment at which the European Council will be willing and able to endorse a final agreement, we will not know the shape of the UK's future relations, which will obviously have concomitant impacts on the way in which the UK and Scotland can prepare internally.

The UK Government's current proposal is the Chequers proposal, beleaguered as it is. That would see the UK remain, ostensibly, aligned to a number of areas of EU law. That might mean that, in practice, things would not change as much as we might expect. Internal configurations might be required to produce relatively similar outcomes, but otherwise we would wait to see how the negotiations progressed. We may not see the shape of a final settlement between the UK and the EU until months, if not years, after Brexit day in March 2019. The uncertainty that we have may persist for some time, which makes it difficult to prepare anything on that basis within Scotland or indeed the UK.

The answer to the question about capacity will depend on the scale of the change that will be required and, as I said, we do not know what that will be.

If I may, I will make one or two other points, building on what others have said. The European Parliament clearly has a say on the Brexit deal. It has set out clear priorities for what it is looking for, and it may well reject a deal. It is not a given that it will accept a deal. However, its overriding priority has been citizens' rights, and the current withdrawal agreement provides a number of safeguards and provisions in that area, so it may well be that the European Parliament decides to vote through the deal and leaves the UK Parliament to decide what it wants to do.

The Convener: I see that Paul Beaumont wants to contribute.

Professor Paul Beaumont (Royal Society of Edinburgh): It is true that a lot of things will be unknown until we know whether there is a deal or not, what its shape will be and, therefore, how much priority will be given to the issue of common frameworks.

One of the key points relates to the third of your themes, but I need to make it now. In order to identify the principles and policies that should come within common frameworks, we need some institutional development. Who is going to identify what should be in the common frameworks? At the moment, we have a list of specific things and particular bits of legislation. Nobody has sat back and thought, "What is the UK internal market? Conceptually, what should it be?" Nobody is doing the fundamental research that is needed to think through what policies should be in any common frameworks. That points to the need to set up an institutional solution before we decide on the substantive points.

In a way, we cannot not come to the third theme. The RSE's position is that we need an institutional solution. We recommend an independent secretariat because there needs to be someone whose job it is—independent of the players: the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive, if it is functioning—who will commission research, analyse it and see what a future UK internal market needs to look like. Even the UK Government acknowledges that some of the matters will be in reserved areas, such as food, geographical indications and state aid, which it has identified. The UK Government can identify areas with reserved powers, but an independent body might identify quite a few more if it was thinking conceptually about what would be a good internal market.

Even in a time of scarce resources and uncertainty, the first thing that a rational set of Governments in the United Kingdom would do would be to decide to get together even a very small secretariat that would have that task of focusing on what the future internal market in the UK should be. The issues need to be considered whether we are in the EU or not. There is an EU market, but it does not necessarily translate into a UK market. The two things do not have to be identical. We have thought about things in that way up to now because it has been easy and convenient to do so, but it does not have to be like that. How we do business within the United Kingdom could be different from the way that we do business within Europe.

In any future political scenario, things could be different. If Scotland was independent, it might want to be in an internal market with the remainder of the United Kingdom. The conceptual work that such a body would do would not be wasted. It would be useful in whatever scenario develops, so it is worth investing in, even at a time when everybody is stretched.

The Convener: That is helpful. I will accelerate to the topic that Adam Tomkins is going to lead on, which is institutional governance, as that has been mentioned. Before I do that, however, Daphne Vlastari and Jonathan Hall want to make points.

Daphne Vlastari (Scottish Environment LINK): I have one quick point on the issue of principles and process. Scottish Environment LINK would echo Professor Beaumont's point about the need for a transparent process that involves stakeholders.

On the types of principles that ought to guide common frameworks, there was an effort initially, led by the Scottish Government, for the UK Administrations to come together and develop a future policy paper for the environment. It seems that that has been put aside because of other priorities, for example legislative considerations. We would have found that exercise very useful in respect of legislation that is coming through now, such as that relating to the EU environmental principles and solutions to the governance gap. Some of those are joint problems, so we should all be looking at how we can develop solutions to them. Although the solutions might be different in the various jurisdictions, there is definitely an element of coming together to address the problems.

Jonathan Hall (NFU Scotland): The initial question under theme 1 relates to what we understand and mean by the UK internal market. In the agricultural context, we do not play on a level playing field to begin with. There are already four different settlements of the common agricultural policy across the UK, and we do things very differently in Scotland from how they are done in England, Wales and Northern Ireland. Arguably, we play to the same rules—just about. I say "just about" because there are variations between Scotland, and England, Wales and Northern Ireland, in some of the rules associated with policy measures.

Professor Keating and others have rightly raised an important question about the internal market. Although we all aspire to a level playing field, a level playing field does not exist in the first place. My clumsy analogy is that we are on an uneven playing surface but are just about playing to the same rules. It is a bit like putting a rugby league team up against a rugby union team. Some of the rules are pretty much the same. Sorry to those who do not know anything about rugby.

Patrick Harvie (Glasgow) (Green): I am lost already.

The Convener: I will allow the analogy.

Jonathan Hall: Some of the rules are the same, but there are clear differences as well. How would you determine a fair outcome in a game of rugby league versus rugby union? It would be impossible, but nevertheless that is where we are.

My other point leads us into theme 2. We are talking about common frameworks. At NFU Scotland, we have always talked about commonly agreed frameworks. There is this concept of common frameworks and what should be included in them, but to us it has all been about the process by which we derive those common frameworks. The commonly agreed aspect, and the process and governance behind that, are fundamentally important to us as an organisation.

That leads us into things that are happening at Westminster, for example the Agriculture Bill, as well as the issue of which powers might reside with the UK secretary of state and how the devolved Administrations fit into that. There is an important difference between "consult with" and "consent from"—the two things are markedly different in terms of the powers that the secretary of state might hold in the longer term.

The Convener: Before we move on, I ask Michael Keating to reflect on the internal market issue, which he covered in his paper, as did Professor Heald. How definitive is the list of 111 policy areas? As far as I am aware, it is not written down anywhere in legislation, and therefore that 111 might change as we progress. Indeed, the 24 areas that the two Governments are discussing in a lot more depth at this stage may well change as we move on.

Professor Keating: Yes, the list seems to derive from what happens at the moment, but things will change in future. These are shifting policy fields, which is why it feels strange to nail this down to particular pieces of legislation rather than general principles. The UK Government started talking about the single market, realised that that was an inappropriate analogy with the European single market and started talking about the internal market, which has been there since the treaty of union because it provides for free trade.

In a modern economy, maintaining market unification requires a great deal more than that. It is about regulations, product standards, state aids, public procurement—which is a really big one—and what kinds of things are thought to interfere with the market. It requires consideration of the boundary between things that are provided in the market and things that are provided as public services, which is a highly controversial and political issue. That has come up in regard to international trade agreements, where the fear has been expressed that if we have semi-marketised sectors we cannot protect our public services. That fear may or many not be well founded, but it has been expressed.

There is the link to environmental issues. Do we have to have common environmental standards in a single economic market? To some extent, we probably do.

The issue of state aids has come up in relation to agriculture. Jonny Hall mentioned the Agriculture Bill, which allows the Secretary of State for Environment, Food and Rural Affairs effectively to lay down which aids will be

permissible through the mechanism of the World Trade Organization.

10:00

Maintaining market unification has all kinds of ramifications. It would be simpler to sit down and think about what the single market amounts to in general. That is the way that the EU does it. It does not have a list of 125 competences as a principle and then, as Paul Beaumont said—I am part of the same committee of the RSE, so I share parentage of this proposal—have somebody somewhere who can actually do the homework on these very complicated issues.

Ultimately, many of these are matters of political judgment, but we at least need to have a common base. Rather than complicating or delaying matters, that would simplify them, because we could go to the 111 competences, or whatever it is, and measure them against some kind of common standard. It would also deal with the problem that I raised earlier. Four or five different intergovernmental mechanisms are dealing with this, and a common standard would allow for a similar process against which to measure things.

I understand that there is an intergovernmental discussion at the moment, led by the Treasury, about what the single market means, but that seems to be going on in parallel to the discussion about individual competences. It would be better to give priority to the latter, and then we would know where we are heading and what the basic principles are.

The Convener: That leads us quite nicely into the section on governance, enforcement and common frameworks, which Adam Tomkins was going to lead on.

Adam Tomkins (Glasgow) (Con): Before I launch into governance and enforcement, can I ask a question about what Professor Keating has just said?

The Convener: Of course you can.

Adam Tomkins: What strikes me about Paul Beaumont and Michael Keating's argument is that it might be seeking something that is not available; I wonder whether it is available anywhere. Anybody who knows anything about comparative federalism knows the history of the American constitution with regard to the changing nature of the commerce clause, which is the provision of the US constitution that deals with precisely this question: to what extent is economic regulation required at the national level and to what extent can it safely be left to the states? The answer to that question, both legally and politically, has changed massively over the course of the 200 years of the US constitution, without the principle that is articulated in the relevant provision of the constitution having changed at all.

We have a very clear principle, but the sands underneath that principle have shifted massively from time to time. Has the RSE or anybody else looked at whether there are any international comparators that we can learn from, other than just learning that, while it might be nice to have a really clear, principled understanding of what the UK's internal market is and what it requires, it is not actually possible? From my understanding of comparative federalism, whether you look to the US, Canada or Australia—the three leading common law jurisdictions of federalism in the English-speaking world—the only lesson that you can draw from this is that what you are asking for is impossible.

Professor Beaumont: Adam Tomkins makes a good point—I would not want to deny that. The existing comparative evidence shows that what we are talking about is very difficult; any further comparative research would show that, too. I was not saying that there is a magic bullet out there. What I am saying is that we need flexibility.

We should not be aiming for a level playing field. That is nonsense. There is not a level playing field in Europe. The single market is not based on a level playing field—that is a myth. Much of the single market is based on a principle of minimum harmonisation. The single market was achieved only when we shifted away from maximum harmonisation to minimum harmonisation.

This is precisely the sort of issue that needs to be dealt with by somebody. Which of these competences need maximum harmonisation and why? Which of these competences only need minimum harmonisation and why? I cannot answer that question. I do not have expertise across all of those areas. I need somebody to do the work—we all need somebody to do the work. I am not talking about the conceptual work of where the balance should be between the federal Government and the states, because that is an illusion. Instead, the question, in every area where we think that there is an internal market issue, is how much harmonisation we need to make the market work and how much we do not need. We can debate that—that is where we need a political element—but we also need the underlying analysis of the technical area to see what the reasons are why we might have minimum or maximum harmonisation. We can then have a political debate about which is the right outcome. That outcome will change over time.

It is about creating a structure where we can have the proper political debate about where power should lie between the central Government and—to use a bad word—regional Governments. There is no magic bullet—we are not claiming that

there is. We are saying that, rather than just relying on people, purely on a sectoral basis, jumping in deep, we need institutions at least to try to tease out what the real issues are. We are not denying that there is a need to jump in deep, but somebody also needs to take the more conceptual approach and think about what the issues are.

Adam Tomkins: That is a helpful set of clarifications—thank you. It is particularly important that we understand that the ask here is for something that will necessarily have to be flexible. We are not seeking to ossify or fossilise a particular here-and-now conception of what needs to be reserved for all time, what needs to be devolved for all time, and what needs to be shared—and how—for all time. As the market changes, and as our reaction to the market changes, there will have to be a degree of flexibility, which means that we are looking for very high-level principles. A lot of the work that can be done, which is very politically contentious, can be done under the umbrella of those principles.

Professor Beaumont, you keep saying that somebody needs to do this work. I want to get into the question of the kind of institutional architecture that we are thinking about here. Are we talking about the courts? Are we talking about committees of civil servants that may meet behind closed doors in the safe spaces that Governments say that they need to negotiate with each other? Are we talking about something a bit more transparent and open that might even involve parliamentarians, or are we talking about quangos, non-governmental organisations and experts in some shape or form, whether that is think tanks, organisations such as the RSE or Government agencies?

Three questions in particular stem from the written evidence that we have received. First, do we need formally to adopt some kind of qualified majority voting in order to understand and analyse these problems? Secondly, to what extent do we think that common frameworks will require to be judicially enforced, whether by the UK Supreme Court or by other courts and tribunals? Thirdly, to what extent can we, as parliamentarians, expect any meaningful input into the policing of these essentially intergovernmental bits of machinery? There is a lot there, but I would be very interested in your views about the kind of institutional architecture that we think that we are looking for.

The Convener: I will come to Paul Beaumont in a moment, because I know that the RSE has done some work on this, but before I do so, I will try to pull out some other contributions. Did you want to come in here, Michael?

Michael Clancy: Thank you, convener. Mr Tomkins has asked a very interesting set of questions, and it will be great if we can get the answers to them before 11.30.

However, I think it important that we acknowledge how difficult these things are. As we saw in the Maastricht treaty process, the route from a form of unanimity to qualified majority voting is long and hard. It is not easy; indeed, as the subsequent changes to that treaty and the evolution of qualified majority voting showed, it is quite difficult. I know one party leader in Scotland who, when I mentioned that three-letter acronym QMV, said, “Over my dead body.” We have to appreciate that, although that is probably where one would land in a theoretical sense, politically it might not be possible to achieve it in the world in which we live.

As for the kind of people who should be around the table, since the referendum we have consistently spoken of this as a whole-of-governance—not whole-of-Government—project. You have heard me talk in this committee about getting the Governments together—and by that, I mean bringing all levels of government together with those in academia, the professional bodies and civil society who have expertise. Those components are important in getting the right answer—or at least an answer with which everyone can live. After all, if common frameworks are to mean anything and have the permanence that Adam Tomkins has mentioned, they have to be rooted in general acceptance, not some kind of formalistic political acceptance that breaks down over time as political priorities change. I think, therefore, that there is a role for parliamentarians to play here, and I think that Administrations and Governments should not exclusively be the authors of these arrangements.

That brings with it an element of transparency, a lack of which has characterised the joint ministerial committee process. There has been more transparency in Scotland and much less in Westminster until latterly, with David Lidington taking to the despatch box. We have to get to a point where there is much more transparency in these arrangements. I know that that is difficult for the Administrations to deal with, because things can be said in a room where there are no other people there that cannot be said in a room where other people are present, but those other people are key to finding the answer here. That is why I think that there is a role for parliamentarians. Accountability demands—and scrutiny requires—that parliamentarians play that role; if that does not happen, we might end up with common frameworks that do not function properly.

As for the question whether decisions should be judicially enforced, you might think this strange coming from a lawyer, but I am not entirely sure

that judicial intervention is the best way. However, it has to be there as a backstop.

Adam Tomkins: Let us not use that word. [*Laughter*.]

Michael Clancy: That was a popular cultural reference, convener.

The Convener: You are right. This morning, I heard two different conversations in which someone used the term "backstop". I have never heard anybody using it before—it is amazing how it has got into our language.

Michael Clancy: I want to see where it comes from originally and what the translation is, but there we are.

It is right to use the courts as a final arbiter, but under the MOU of October 2013, the JMC has the capability to put in place a complaints process, which would then take us to a group of civil servants. You can therefore see that the RSE is following a respectable trail. The question, though, is: is it correct for civil servants to end up determining arrangements that were made by politicians? Even if the most independent of appointment processes for civil servants were in place, are we essentially talking about having a royal commission of civil servants to ensure their appointment? Much more detail will be needed to enable us to sign up to the idea at this moment.

The Convener: I know that Colin Reid mentioned in his submission the issue of the role of Parliaments that Michael Clancy has just introduced. Would you like to reflect on some of that at this stage, Professor Reid?

Professor Colin Reid (University of Dundee): As far as Parliaments are concerned, one of the big criticisms that has been made over the years about the handling of EU negotiations is that the Government minister goes from London or whatever capital, does a deal behind closed doors and then presents that deal as a fait accompli, with the Parliaments having very little input into the negotiating position and the acceptability of the final output. It has been a political process.

We ended up with that, because of the way in which the EU works. People aspire to have something better, more open and more accountable, but it is really difficult to balance that. After all, difficult compromises will inevitably have to be made, not all of which might be palatable, and individual trade-offs will have wins and losses. It is not possible to have complete accountability with mutual transparency, because every decision would have to go back for approval by every different Parliament. That is a recipe for going nowhere. If there were, at the very least, an announcement of what was going to be discussed, the possibility of discussing possible policy positions that were going to be embarked on and fuller reporting afterwards of what had happened, that might go some way to solving what has been identified as a big gap.

The Convener: I think that Iain Wright has made some comments on this area, too.

10:15

Iain Wright (University of Glasgow): As my background is in utility regulation and in working in cross-border markets and dealing with cross-border business on the island of Ireland, I am quite used to spending a lot of time looking at EU directives and trying to understand their implications for running a business. It is very important that we avoid diversity in standards being used as barriers to trade or competition, because one thing about an internal market is that you have to be able to run a business in it. You have to understand why you should make the investment and what the risks and potential rewards are. It is very important that we look at not just the theoretical mechanics of how this is done, but the effect on economic players.

Two things identified in the House of Commons Public Administration and Constitutional Affairs Committee report were trust and the lack of a deep and widespread understanding of devolution issues, and that is the reason why I would support the creation of a single body that can build up expertise and become the go-to organisation for advice on process for individual departments wanting to produce frameworks. Transparency is extremely important. By that, I am suggesting not that everything be said in an open forum, but that the process allows for consultation so that people can point out where issues are different in different places. Different people have different experiences and can bring a broader diversity of understanding to what should be in frameworks. I do not think that transparency of process necessarily means that everything has to be done in public.

Governance is important, because people who are trying to work in a market need to understand the root of legislation—or whatever it is—from the policy idea right through to an act, a directive and so on. It is really about people understanding what has been done and how it has been done and being given the opportunity to provide meaningful feedback.

As for the issue of MOUs versus legislation et cetera, I am not a lawyer, so I have no opinion on that. However, from my own experience, I can tell you that the single electricity market on the island of Ireland was set up on the back of an intergovernmental, non-legally binding MOU, so I know that it is possible for that mechanism to

deliver. On the other hand, the intention to deliver an all-island gas market crashed and burned, because there seemed to be no top-down driver to make it happen. It is very important that there is a framework to make sure that outcomes are delivered.

The Convener: I call Patrick Harvie, although we might have moved on a bit from the issue that he wanted to ask about.

Patrick Harvie: I think that my comment is still relevant, convener.

I appreciate the suggestions and ideas that have been made, but it is important to remember that what we are engineering is not just a rational system. There will always be the potential for a situation in which there is a strong rational reason to have a common co-ordinated UK-wide approach but at the same time sufficiently strong political disagreement about the direction of policy for multiple jurisdictions within the UK to think that divergence is more important than the advantages of a shared approach.

On the architecture of institutions, the comparison that I would like to make is with the UK Committee on Climate Change, which is an advisory body, not a regulator. It has no enforcement powers. The two jurisdictions—Scotland and the UK—each passed climate change legislation; the UK legislation, which came first, set up and defined the CCC's advisory role, and the Scottish legislation gave ministers the power either to designate a body for its advisory function or to create a separate Scottish one. That second power has never been used, even after nearly a decade of the CCC's performing its function in relation to both the Scottish context and the UK context, where UK ministers have not only UK-wide responsibilities but devolved powers with regard to England and Wales or to England alone.

That could have been a real mess, particularly because of the policy differences on some of this, but I would make the case that the voluntary nature of that relationship is what has created the advantage and the potential for a relationship in which the CCC has had an incentive to take Scotland seriously and to take account of political or policy differences and the Scottish Government, with the agreement of the Scottish Parliament, has been content to keep the CCC as the UK-wide advisory body as well as the Scottish advisory body. There are, of course, differences between that sort of body and a regulator or a body with enforcement powers in relation to Government, but I just wanted to highlight the general idea that the voluntary or non-binding nature of an arrangement could result in a stronger rather than a looser outcome.

The Convener: I know that Lloyd Austin wanted to come in. Again, I hope that the discussion has not moved on too far.

I will also come back to Paul Beaumont, because Adam Tomkins addressed a lot of his questions specifically to him. Professor Beaumont will have heard a lot of contributions by then, so it might be nice if we came back to him at the end of this particular discussion.

Lloyd Austin: I will come back to the Committee on Climate Change in a moment; first I will make some general points about governance. I strongly support the view that this is about governance, not Governments. It is about Governments as part of wider governance, if that is not too much of a tongue-twister. I think that there is a generally acknowledged need for better intergovernmental relations.

Until the last couple of years, environmental organisations had not had much experience of intergovernmental relations, so we asked the Institute for Government to produce a report about that in relation to environmental matters. The report is referenced in our written evidence and I commend it. It is about the various failings, as we see it, in relation to how the JMCs work and includes proposals for how that might be better. I agree with Iain Wright, I think it was, who highlighted the need for process. As part of that process, we as stakeholders—and probably business as well—think that transparency and proper stakeholder engagement in these matters is a key part of governance.

In terms of the various frameworks, it is about intergovernmental process and about interparliamentary process scrutinising the intergovernmental process. Governments have officials or agencies working for them, but it should not be beyond the wit of man to create some kind of institutional arrangement to support the intergovernmental organisation, such as a form of secretariat that is responsible not to any one of the individual Governments, but to the collective—a secretariat of the joint ministerial/joint governmental process. That has happened under previous Anglo-Irish agreements, so there are ways of doing it. The key thing that such a secretariat could do from the point of view of stakeholders is ensure that process, transparency, stakeholder engagement and in-depth analysis are available to the Governments that are making the decisions.

At the moment the Governments meet and the communiqués simply say that they met and they discussed X, Y and Z. The support and the information that is provided for those discussions appears to be lacking and those affected, whether businesses or NGOs or citizens, have no idea how they can influence or even feed in views. The key

thing is that that applies whatever happens constitutionally. Whether we are talking about Brexit or an independent Scotland or different models of devolution, the principles of better intergovernmental governance apply irrespective of long-term political constitutional decisions.

I agree with Patrick Harvie's analysis that the Committee for Climate Change has worked well in relation to climate change advice. A key area of governance that environmental bodies are concerned about goes beyond advice: it is about implementation, regulation and enforcement mechanisms. I know that the Scottish Government has committed to consult on that before the end of the year. The Westminster Government, in relation to England and reserved matters, has had a consultation and is deliberating how to act, but the possibility of agreeing to operate in other areas, as well as advice, through institutions that share support—that may be a better way of putting it—enables a greater transparency and understanding among stakeholders. I commend the CCC as a model and suggest exploring whether that model can be applied in different areas.

Professor Beaumont: A long time ago, Adam Tomkins asked a lot of questions. I am not sure that I will remember to answer them all, but I will try to deal with what I can. The RSE position relates to the development of policy and the development of the common frameworks. That is where we have reached an agreed position and I can speak to that. I will then speak more personally to some of your other questions.

In terms of the development of policy, the RSE is suggesting an independent secretariat made up of experienced civil servants from Northern Ireland, Wales, Scotland and the UK. They would be appointed to speak for the UK in the abstract—not the UK Government—and they would bring to the table that range of expertise that is perhaps lacking at the moment. Nobody has brought that expertise together. That is point one.

The secretariat would probably be pretty small at first—let us not exaggerate its significance—and what with public expenditure priorities and all the rest of it, it will probably be a relatively small body. It should have some budget, with the costs shared across the UK Governments in an appropriate way—that is not for me to decide, but each of the players should contribute to the budget. Once the secretariat has a budget, it should have independence in relation to how that is used, but it would be free to commission research—it would go through the usual procurement process to get hopefully the best people to produce good research. The secretariat would have to decide the priorities for that research: some of it would be conceptual, some of it would be very technical detailed stuff.

Transparency is key. How do you have transparency? The key thing for the secretariat is to publish all the research that comes in and all the papers that it is producing on the broader issues. In my experience of negotiating in both the international and the European spheres, a degree of privacy is needed. You need areas where everything is not in the public domain. It is just sensible that you can have free and frank discussion at a certain level before you go into the public domain. Transparency should not be confused with everything being done in the public domain. That leads to bad rather than good decision making.

Transparency is about making public as much as you can so that you have an informed debate, but some of those debates need to be in private. Then you have transparency so that people can feed in. That is where Lloyd Austin is correct. The way you get good governance is if the people who really know about the subject that is being discussed have inputted all the relevant data. If you do not ask them, you do not get it. The advantage of an independent secretariat is that, hopefully, they will see their role as the European Commission does when it does its job well.

10:30

It does not always do so, but when it does its job well it seeks out all the relevant expert input before it makes its proposal. Again, you would see an independent secretariat that would, at the early stages, be getting all the data before it made its proposal as to how to deal with some specific aspect of a common framework. That is learning from the best of the EU, rather than just mimicking it.

That takes me beyond what the RSE has agreed, to the other issues that Adam Tomkins asked about.

Should you have qualified majority voting or consensus? I have worked with both within the EU, and I have worked with consensus in an international environment. My personal preference is for consensus. I will be quite frank about that. Even in the EU, things initially had to be agreed on the basis of consensus. For the reasons that Michael Clancy mentioned and in my opinion—I am speaking personally—within the UK, a framework should initially be based on consensus. Therefore, if you do not have political consensus, you do not have a common framework. You go back to whatever the legislative position is under the current constitutional settlement, which of course runs a risk. I realise that if the UK Government and Parliament behave badly they can upset that settlement by driving legislation through without consent, on the basis that it is just a convention.

Of course, and again speaking personally, that would be a disaster from the point of view of the long-term UK constitutional settlement. One would hope—and indeed, speaking personally, pray—that the UK Government would not get into the habit of breaking the convention, that that would be only a very rare thing and that normally the provision would stick. If it did not stick, then the whole thing would not really work in the long run. That would undermine the whole system. If you have a sensible use of the current constitutional settlement, common frameworks can be developed purely on the basis of consensus and you rely on the normal operative rules if there is no consensus, but that should not be seen as an excuse for the UK Government to dominate the agenda because it has the trump card. If the UK Government gets into that frame of mind, it will undermine the whole system.

Do we need courts? That is a good question. Again, all the examples are that if co-operative federalism—if we want to use that dangerous word that the Germans use—is to work, it works, as the name implies, on the basis of co-operation rather than on the basis of legal frameworks, where you fight it out in the courts. I say again that if this is to move forward in a way that will be good for the UK as a whole, it should be on the basis of consensus and people making things work, like the Northern Ireland electricity network: making it work because there is a common interest in making it work, not because some court tells you that you have to do it. Courts are not the best people to determine these questions, in my opinion. I am a parliamentary sovereignty guy at heart and I think politicians need to be making the decisions, not courts.

What role for Parliaments? That is the last part of this question. Yes, there does have to be a role for the Parliaments. Parliaments should be the ones that try to make sure that the independent secretariat does its job properly, that it is not captured by any particular interest or interests, any particular lobby groups, that it does maintain an overall perspective on the difficult political questions where you are balancing different interests. The environment lobby, for example, is one very strong lobby group—it is very well represented in this meeting, by the way; that is interesting, is it not? The environment lobby group has its act together. There are other interest groups out there that do not have their acts together so well. Politicians need to be careful to listen to not just the strongest lobby voice. I have nothing against the environment, by the way, but there are balancing factors in a single market. Where are the business voices? Honestly, where are the business voices, and what about the Convention of Scottish Local Authorities? COSLA has excellent evidence, but where is it today?

It is the job of the politicians, in the end, to ensure that in making final decisions, the different vested interests are properly balanced. That is why it is not the secretariat that makes the decisions. The secretariat creates the framework. Some of our members have been involved in the JMC and the problem with the JMC is that it does not automatically meet; it does not have clear agendas; it does not have clear outcomes. If you have the system that we are suggesting, the advantage is that the secretariat makes sure that there are regular meetings of the ministers. The secretariat makes sure that those meetings are not just a talking shop, but are dealing with something concrete. There should be outcomes from those meetings. That is a whole different ball game from what the JMC is and has been.

The Convener: Paul, thank you very much. You raised issues about who is and is not here. I assure you that a variety of people were asked.

Professor Beaumont: I was not implying—

The Convener: No, but just so that it is on the record, a variety of people from a number of sectors were asked, but for various reasons could not be here.

Neil Bibby (West Scotland) (Lab): This follows on from Adam Tomkins's question. We have obviously heard a lot about the need for a new, independent secretariat and for greater transparency and scrutiny. Members will be aware that proposals on that have been set out by the Welsh Government as part of its proposal for a UK council of ministers. I know that we have touched on some of the issues and on qualified majority voting, but I would welcome any further contributions touching specifically on the Welsh Government's proposal for a UK council of ministers. As we have discussed, timescales are tight and there is a proposal here from the Welsh Government that is worthy of discussion and debate.

The Convener: I will ask Professor Michael Keating to pick up on that point in his contribution at this stage. Then we will need to move on to some other areas.

Professor Keating: I will first pick up a point that Adam Tomkins mentioned earlier about the single market or the internal market not being a fixed principle. Of course it is not; it is a living principle and it changes over time. The European market changes all the time. That is why we need to have a mechanism. The market changed with the welfare state and it will change with international agreements and so on. That is one reason not to write in these 111 competences—or whatever it is these days—as the solution. The solution has to be something that is open to social change.

I am one of the few people around the various tables at which I sit who likes the Welsh Government's proposal, because at least it provides some kind of ultimate tie-breaker—I was going to say backstop—where there is conflict. On most of these issues, I think that we will get consensus; on some issues, we will not get consensus. Issues such as public procurement can become quite contentious. As a last resort therefore, it would be useful to have a system in which the UK Government cannot always play the trump card, and that would have a feedback effect. Knowing that it cannot get its own way all the time and that it cannot play that trump card, the UK Government would be obliged to engage seriously in discussion, so we probably would not have to vote. In the EU, the Council of the European Union does not vote on most issues because the countries know that the voting option is there, and that provides an incentive to agree. I think that we have to bring in the question of power. That is really what I am saying here: it is a power game, ultimately.

The other thing that we have discussed in various places, including in the RSE, is where England comes in. If there is a UK council of ministers, there must be an English minister representing England, as well as a UK minister. This applies to a lot of things that we are saying. Will England be bound to common frameworks, given that the English Government and the UK Government are the same thing? That is important. It is important not just for England but for Scotland and the whole of the UK that there should be a separate English presence so we know who the partners in this negotiation are. We have to do that without resolving the question of English government, because we are not going to resolve it. That is a bigger separate issue that is not going be resolved tomorrow, but within the frameworks argument we need to think about England.

The Convener: Thank you. I will move shortly to James Kelly, because we move quite neatly from what Michael Keating said into issues to do with negotiation.

You mentioned the issue of power, and that is quite an important aspect of what we are discussing, but so is culture. In the most recent visit that members of the committee made to the EU to talk to Canadians, Norwegians, Germans and Swiss, I was struck by how, every time we discussed conflict resolution, they were shocked at us because they look at it the other way round—at how you can find solutions rather than at what dispute mechanisms need to be in place to resolve issues. There was quite an interesting cultural difference between how we are approaching it in the UK and how they do it. We seemed to be putting the question of how we resolve conflict first, before sitting down and talking about it, when the conflict might not exist in the first place. That was an interesting learning point for me. It is all about clever negotiations.

We will hand over to you, James Kelly, for the next section.

James Kelly (Glasgow) (Lab): That is a very pertinent introduction to this section, convener. I think that everybody understands that we need a clear process for negotiation, agreement and implementation of common frameworks if this is to work properly. A lot of the issues here have already been discussed in the previous section. I was interested to hear Paul Beaumont talk about the different forums for resolution: consensus, qualified majority voting or the courts. The convener brought it all to the fore when he talked about our visit to Brussels. The key to all this is about relationships between the UK Government and the devolved Governments. When we spoke to people from other countries, we found that there is a different culture there. There is a culture of everyone sitting down to discuss the issues and trying to seek solutions. Even when there were big disagreements, they understood that they needed to try to resolve the issues and come up with solutions. It is not unreasonable to say that we do not have that culture currently in the UK. In some instances, we do not have a starting position of trying to find a joint solution.

My question is about how we change the way we organise the relationships and the way we have relationships between the UK Government and the devolved Governments, so that we can achieve the objective of having common frameworks and a clear process for negotiation, agreement and implementation. How do we change that culture?

The Convener: How do we reset the relationship? I think that that is what the question is.

Iain Wright: From experience, my view would be that, if you have an effective process, you can avoid issues of trust and conflict arising—you can head it off at the pass, if you like. For example, the intergovernmental MOU setting up the single electricity market in Ireland defined how the market would work, but it also said that the governance body would have three people from one regulator, three people from another regulator and a representative from someplace else entirely, and that has worked very well. You need to look at the design of the process to see what areas conflict might arise in and then try to find a mechanical solution to avoid it.

People sometimes have suspicions of one another when they feel that the scope of what is being asked for is starting to creep; when it looks

as if there is more power or more regulation or something else being brought in and imposed, people feel uncomfortable about that. It is very important to define the scope of what is being discussed and what can be discussed. When you look at a European directive, for example, it always starts off with something like, "This is based on the Treaty of the Functioning of the European Union, article whatever." That comes up front. It says, "Here is the authority that we have for doing this." The overarching agreement or framework, whatever structure it has, should have something that defines the scope very clearly so that everybody understands that some things will be ultra vires and other things will be part of what has already been agreed.

Professor Reid: In order to reset how negotiations and discussions go, the point that Michael Keating made about the presence of a separate English voice on these issues is hugely important. I know from dealing with colleagues in various English bodies that they are perfectly willing to think about devolution and they are very happy to have people talking about how things are different in Scotland or Wales, but it is just not part of their consciousness in the same way that it is for people up here. Having UK Government bodies that represent the whole of the UK, Great Britain, England and Wales or England on different matters, often very finely divided within particular subject areas, makes things very difficult. If it were much clearer that in the discussions you had to talk about the four nations coming together, that would help things a lot.

10:45

The bigger problems are obviously macro-political issues. There are always going to be disagreements about those. Raising awareness that we are talking about reaching agreements for all four parts of the UK would be important and having a separate English voice is crucial to that.

The Convener: How do we go about creating that separate voice?

Professor Reid: I think that that is possibly beyond the powers of this committee.

The Convener: Yes, but let us generate some ideas of how it might come to flower.

Professor Reid: It is very hard. It may be about trying to persuade the UK Government of the advantages of separating out its role of having an overarching role as the UK from that of dealing with the details. It would involve extra money and a certain amount of duplication. I cannot see any great appetite for it at present but, in the ideal world, in terms of resetting the way negotiations happen, it is a crucial element.

The Convener: I was rather cruel to you there, Colin, I know that.

Professor Reid: Yes.

Michael Clancy: The answer is English votes for English laws. If one went back to the standing orders of the House of Commons when EVEL was set up, you would find that the words "devolution" and "devolved powers" occur frequently. I remember when the debates on that were going on because I participated in them to a certain extent, in an evidence session before a committee of the House of Lords, I think.

The whole point is that EVEL applies where the law would be a devolved law under the devolved systems of Northern Ireland, Scotland or Wales. We have to remind ourselves that there is already a structure that takes into account laws applicable to England as a component of the UK but in its own right. That is where I would guide people to look. If we get to that point of understanding, then it would be the House of Commons, consisting only of its English MPs, which would then nominate someone to participate for the English voice.

Angela Constance: Building on that, I wondered whether there was some learning—the panel may have views on this specifically—about how the British-Irish Council works. Obviously, the English voice is absent there, but there are arrangements there in which all the devolved Administrations participate, the UK Government is obviously present as well and there is a structure and format around that with bilaterals feeding into the plenary sessions.

Professor Beaumont: James Kelly asked how we overcome the lack of trust, which is clearly a fundamental question. The first thing is to create the independent secretariat that then becomes, hopefully, the container of trust, in the sense that it is a body that should command the confidence of each of the relevant players. It should command the confidence of the UK Government, the Scottish Government, the Welsh Government and the Northern Irish Executive, if it is functioning. They should all then have some confidence that that group of civil servants with different backgrounds is honestly preparing the ground for work.

If you take a bottom-up approach rather than a top-down approach, from my experience—again, in Europe and in the world—you start with the people who actually know what they are doing. They do all the hard graft and politicians get involved only when there are a few problems left. That is the way the EU works. It is also the way international negotiations work. I have done both. What happens is that the people who actually have the expertise slave away for a very long

time—months or years—on technical details. They have trust in each other because they are all experts and they get to know each other and work together. They gradually build the consensus and then need some political leverage, usually at the very end, to tease out the few remaining issues that are more political. If there can be an agreement, there is an agreement; if there cannot be, there is not. That is the point—you build it from the bottom. You do not start with the politicians sitting around saying, "This is an intractable and difficult problem. How are we going to solve it?" Sorry, but they do not have the expertise, nor necessarily the political will, to do that at the start.

The answer is to be much more systematic and instrumental and to start from the technical, with a foundational context for that technical work so you know what you are trying to achieve in a broader context. Once you have laid those foundations through your secretariat and through some kind of agreement that the politicians can reach about the vires—Iain Wright is right; there needs to be agreement about what the overall scope of this endeavour is—then it is about trusting that properly prepared work that has gone through consultation with stakeholders.

When the EU works well—I have seen this—the UK is very good, because generally it comes to negotiations with a carefully prepared position that is based on extensive consultation that has gone through a lot of stakeholder input. That is not true of all Governments in the EU, which often come just with civil servants' personal agendas or the political agenda and not with a carefully teased-out and carefully crafted position that reflects strong stakeholder input.

If we want to learn how to do it well, we need to do it on the basis of each of the entities having its stakeholders advising it on what is needed for them. In the agricultural field, Scotland needs to be heavily advised by Scottish stakeholders giving the Scottish position, so that the Scottish voice is properly taken account of in reaching some kind of common framework.

The Convener: I will tee up Daphne Vlastari for later, because I want to come on to stakeholder engagement and I know that SE LINK has said something about that. However, before we get there, we have a question from Willie Coffey.

Willie Coffey: A good example that is in place at the moment is the British-Irish Parliamentary Assembly—forgive me for giving it a plug. I bet that most of the witnesses have probably never heard of it, but it is a great assembly of parliamentarians from the UK, Dáil Éireann, devolved Administrations and Crown dependencies and it works really well. It was set up in 1990, principally to assist the peace process, and the point is for those parliamentarians to meet collectively. There are extremely diverse views in the assembly, but the good that comes from it is that everyone gets the opportunity to share. Believe it or not, we actually agreed unanimously on a motion on Brexit over the weekend. Therefore, it can be done if people can get together in some kind of common forum to achieve such purposes. Maybe that is a model for the future that we could have a look at.

Jonathan Hall: I will pick up on and express support for Paul Beaumont's points. Whether through an independent secretariat or some sort of council of ministers, we have an opportunity. One of the biggest problems that we have in trying to break the culture and trust issue that we have talked about is that, in the past, particularly in big decision-making processes around the CAP, the UK as the member state has had the one and only seat round the table at the Council of Ministers. The DEFRA secretary of state has always led on those issues, which has caused tension and has been an issue, particularly for Scotland. The discussions might have been about less-favoured area support or coupled support, which are clearly of major interest to Scottish agriculture but not particularly of interest for English agriculture. I am sure that the same has happened in other spheres, such as fishing policy.

That was in the context of the UK being a member state of the EU. We now have the context of the devolved Administrations being part of a United Kingdom and we are considering how an internal market operates and what common frameworks are required. My personal point of view is that it is important to have separation between the UK Government and the four devolved Administrations, including an English one, with them providing some sort of council of ministers and the UK Government in effect having the role of the Commission. Obviously, that role is political, because it is elected and it is a Government, but that might be where Paul Beaumont's suggestion of an independent secretariat comes in to provide all the solid groundwork and engagement.

There has always been a frustration about a lack of proper input from stakeholders from devolved regions. If we get the approach right, it could give us a stronger voice in such negotiations and mean that we get the right outcome. It is absolutely right to raise the question of why we start from the point of conflict resolution. Why do we not first find the common interests and goals and then some issues might fall out of that? I agree that we need to turn that on its head a bit.

The Convener: I am aware that there is no council of ministers or secretariat yet so, before we finish this section, I am anxious for us to talk about how we are involving stakeholders currently

in the development of common frameworks. I ask Daphne Vlastari to deal with that.

Daphne Vlastari: I want to highlight that this is not about reinventing the wheel. Scottish Environment LINK members would completely agree with the points that Paul Beaumont made. However, we should compare that great process to what is happening currently in the UK. We know that there are JMC discussions about the principles that should underpin common frameworks, such as a principle on common resources. In parallel, civil servants who are experts in their fields are doing the deep dives. However, we have not seen the outcomes of those processes. It would be helpful if at this point we could see those outcomes and be able to comment and deliberate on them on a truly UK-wide basis. That would potentially help to resolve some of the impasses and clarify a lot of the areas of potential concern. That is why we have been calling for true engagement on the topic from all the UK Governments.

Internally within the environmental NGO community, we are replicating those UK-wide discussions about frameworks and how to bring EU legislation back into domestic law, and we have found solutions. We have found principles about working together and what would make sense as environmental aims. From our point of view, perhaps we need a better intergovernmental process for the UK, but that does not mean that there is no route forward in the interim.

Lloyd Austin: I endorse everything that Daphne Vlastari said, but I want to comment on Angela Constance's and Willie Coffey's points about the British-Irish Council and the British-Irish Parliamentary Assembly, because they are important. The reason why environmentalists are interested in common frameworks boils down to the environment being the kind of cross-border issue that I referred to at the beginning. Different parts of the UK abut different parts of other jurisdictions. The Republic of Ireland is one of those, but equally there is the Isle of Man and the Channel Islands, and all of them are involved in those processes. Some common frameworks will need to involve a mixture of all jurisdictions or some jurisdictions. From an Irish point of view, there are many reasons for Northern Ireland and the Republic of Ireland to work together on environmental issues as well as things such as energy markets. Fishermen in the south-west of Scotland will obviously have an interest in working with the Isle of Man as well as Northern Ireland, so it is important to include the Isle of Man in the discussions.

I completely endorse Paul Beaumont's point about the secretariat working from the bottom up. All those different relationships could be identified and mapped out by a secretariat and then offered up to the political masters. Although we would want to include all of what I would call the English-speaking jurisdictions of the British Isles, we also need to carry on working with other EU and non-EU jurisdictions around those, whether through building relationships with the EU through whatever agreement we reach, as Anthony Salamone described earlier, but equally with Norway and Iceland, perhaps through the Nordic Council.

11:00

Such interjurisdictional arrangements, whether they be common frameworks or something else, are important in all dimensions. We need to think about some things being simply for the four jurisdictions of what is the UK at the moment, but equally we need to think about the reason why we have the arrangements. From an environmental perspective, we think that we need cross-border arrangements because the environment is cross-border. Energy is a similar issue, and there are other such areas. That leads to different groupings of jurisdictions needing different solutions. A secretariat could map out those challenges.

Michael Clancy: When Jonathan Hall was speaking, I was thinking about the concordat on co-ordination of European policy matters. It is true that there is a lot of UK ministerial involvement in that, but the concordat tries to create a mechanism where the devolved Administrations can put their points into the pot and an agreed position can be reached. Certainly, in justice and home affairs councils, Scottish ministers have sat representing the UK view, and the same applies to European law officer meetings. That is a basis on which to build. I am not in a position to say that the Law Society would approve the RSE proposal because we have not considered it in those terms, but I can say that, if we have no agreement on 29 March 2019, we will have to have some form of common frameworks in place at that date.

In thinking about creating that structure—I hesitate to use the word "byzantine", because I do not believe that Byzantine empires did everything badly—we have the comfort of thinking that we might have a withdrawal agreement that will give us until 31 December 2020 to do it, which is a much more realistic proposition. However, we have to bear in mind that the issue is now and that prudence dictates that we are prepared for 29 March, not that we rely on the comfort of a hoped-for withdrawal agreement. That takes us back to the idea of a joint committee under the withdrawal agreement along with the specialised committees and the mechanism that Jonathan Hall identified under the concordat, which could easily be transported over to apply in the context of the

structures that the withdrawal agreement anticipates.

Bearing in mind what Anthony Salamone was talking about in terms of a political agreement for the future relationship, which one would hope will be part of the result of the negotiations that will go on, there will then be governing body and a joint committee. We can see how those correspond to the Commission and the Council of Ministers. Those issues are never going to go away. Bearing in mind that Governments are the primary actors here, they have to come up with something that we can all be consulted on and which I hope we can approve.

The Convener: I hope that the discussion that we are having today can stimulate activity in Governments to create forward movement. Certainly, it was a very sobering moment when you reminded us that we might need to have arrangements in place from March next year.

We will move on to the final topic, which is about funding arrangements for common frameworks. Emma Harper MSP will start the discussion on that.

Emma Harper (South Scotland) (SNP): It has been really helpful listening to everybody's contributions so far. I am interested in funding arrangements for future common frameworks. Our briefing papers note that the Brexit and environment academics all observed that guaranteed funding at an appropriate level would be necessary to ensure the long-term effectiveness of any governance arrangements. I am interested in the impact that Brexit will have with regard to the further complexities that it will bring to the devolved financing system, partly as a result of the differences in per capita funding across the UK's four nations, to achieve the same policy results.

The academics highlight that one outcome to guard against is giving financial levers to the UK Government, which would then result in micromanagement of the devolved finances, negating the strength of the 1999 fiscal settlement. Given the differences that the economies and the funding arrangements across the UK have—Jonny Hall described the four different CAP policies that are currently in place—I am interested to hear about how the frameworks could be fairly funded and what mechanisms should be used to ensure that the financial levers that each Administration currently has can be preserved.

The Convener: Quite a few comments have been made by some of the academics involved in this, as well as the RSPB, Scottish Environment LINK and so on.

Professor Reid: Our comments were primarily about the funding arrangements for the secretariat, whatever the institutional structures are, rather than the substantive funding arrangements that would flow in relation to agriculture and other areas of support. If you are going to have any institutional structure that is meant to oversee compliance with common frameworks to provide the back-up to ensure that common frameworks are properly researched and properly backed up beforehand, that structure needs funding. There is then a whole separate set of issues on the substantive matter.

The Convener: On substantive matters, Jonny Hall might want to pick up on specific issues. Obviously, the RSPB and Scottish Environment LINK will also want to make some comments. Anybody else who wants to should also feel free.

Jonathan Hall: Almost regardless of the Brexit process that we find ourselves in, there has always been a debate and discussion about how agricultural funding via the CAP comes into the UK and how that should be allocated across the devolved Administrations. That was brought to the fore in 2013-14, when the UK was awarded what was called the convergence uplift, predominantly because of Scotland's extensive areas of rough grazing, therefore bringing the UK's average payment below the 90 per cent threshold, which then allowed the UK to receive further funding from the CAP. That is pretty complicated stuff, but at the time, in 2013, the UK Government took the decision to basically allocate that uplift in funding to the UK on the same historical basis that funds were allocated, so that Scotland got only 16 per cent of the uplift even though Scotland was by and large responsible for 100 per cent of the uplift. Therefore the argument was made that all of the uplift should have come to Scotland. That ignited a debate about the basis for allocation of funding.

That particular process goes on, with Michael Gove, Secretary of State for DEFRA, announcing very recently that eventually—finally—a review of CAP funding would take place. It has been promised for a number of years, and that is now going to happen, but the terms of reference of that review were not what we were promised in the first place. It would be very limited. It will take us to 2022, or the lifetime of the Parliament, and will not do much to really address issues of how funding might be allocated beyond 2022. In fact, it will do little or nothing.

There are a couple of important points on this matter, which are live issues right now. One relates to the Agriculture Bill, which was introduced in Westminster in September and is going through the committee process now. Part 7 of that bill relates to the UK's commitments to WTO obligations. As part of that, it effectively gives the UK secretary of state—because the UK is the signatory to the WTO agreement—the

power to essentially limit the amount of spending on different types of agricultural support measures. In theory, that would limit the ability of the Scottish Government or another devolved Administration to spend what it saw fit in terms of the policy objectives that it sought to achieve. That is causing great concern for us and for the Scottish Government. We are seeking to have that addressed as the Agriculture Bill goes through Parliament, because there is an issue about the UK secretary of the state having a significant power over devolved Administrations. The Welsh and the Northern Irish are, rightly, equally concerned about that.

On Emma Harper's point about population size and so on, an interesting point was made in the past week or so by Michael Gove and was then reiterated by David Mundell, as Secretary of State for Scotland, that agricultural support would not be Barnettised. There was a statement a week or so ago to the effect that, as we receive about 16 per cent of the current CAP allocation in Scotland, the rough equation is that—as this committee has discussed before—there would be a reduction in funding if the allocation were based on population share alone.

The problem is that that statement or that commitment from Michael Gove cannot hold water beyond 2022 or the lifetime of this Parliament, whichever might come sooner—and who knows?—and therefore in many ways it is just a restatement of what the UK Government has already said, which is that funding will be committed until 2022. For the agricultural industry in Scotland, England, Wales and Northern Ireland, the uncertainty around future funding levels in terms of the quantum and the allocation of that across the UK remains a really important issue. The issue is not just the direct support into agriculture; it clearly interacts with agri-environment measures and other spending that is important in the delivery of public goods as well.

Daphne Vlastari: I echo some of the points that Jonny Hall made about public goods. Emma Harper mentioned the issue of fair funding in terms of the environment. We have some studies about the private funding that is available in Scotland for environmental issues, and what we have found is that fewer investors see Scotland as a destination for doing projects for the environment. Essentially, there are a lot fewer funding opportunities in Scotland compared with the rest of the UK. If you couple that with the fact that we rely on dedicated EU funds for environmental projects, particularly for live funding, the future of that specific stream is very important for conservation in Scotland.

At the moment, Scotland benefits as it utilises 21 per cent of the UK-allocated funds, so, again, if you were looking to Barnettise that or if there was another mechanism of distribution, that would probably have some consequences for Scotland. What we would like is perhaps a formula or some sort of mechanism that takes into account how much more of the relevant environment Scotland has. If you look at biodiversity and the important habitats that Scotland has, you can see that we have quite a big proportion of the UK total. I think that you could carry on that line of thinking when we talk about the future of the farm payments. Again, there would be a great scope for Scottish farmers to benefit from a system that would reward them on the basis of the public good, including environmental good, that they could deliver, which would be of great value to Scotland. Of course, we know from the public survey that we conducted that that would be favoured by a majority of Scots.

One other funding stream that we have not really touched upon and which there has not been as much discussion about in Scotland, is the shared prosperity fund, which the UK Government intends to be, in a sense, the new structural fund. Again, perhaps just to highlight how Scottish stakeholders are involved in those UK-wide discussions, while that has been an issue that we have raised again and again, we have only just found out that next week there will be some stakeholder meetings in Edinburgh and Glasgow. That is fairly short notice. It does not allow for a lot of time for consultation, so it just speaks to the better co-ordination that is needed on UK-wide issues.

11:15

Lloyd Austin: Jonny Hall and Daphne Vlastari have said a lot of what I was going to say, so I will just add one thing and then draw out what I think is a principle that the committee might want to discuss.

Environmental funding is incredibly important. We think of the environment—Scotland's landscape and wildlife—as something that is just given to us, but it needs investment. Farmers and crofters who benefit from agri-environment schemes deliver quite a lot of our environmental good. The environment is in fact one of the internationally agreed Aichi targets under the convention for the conservation of biodiversity. The most recent report from Scottish Natural Heritage, the Scottish Government's conservation agency, on how we are doing on meeting those targets indicated that we were doing quite well on 19 of the 20 targets but that on the 20th target, which is funding for the environment, we are moving away. It is very important that that is addressed.

In terms of the overall principle, there is a bit of a dilemma here for politicians to consider because

many of the areas that EU funding has supported over the years, whether it be hill farmers in the uplands, as Jonny Hall described, or environmental bodies delivering projects for wildlife, are not distributed around the UK in the same pattern as human beings, for obvious reasons. That means that the funding has not been distributed in the same way as other political funding streams. For instance, as Jonny Hall says, Scotland has a disproportionate level of CAP funding, and, as Daphne Vlastari says, we have had a disproportionate level of LIFE funding over the past decades.

This Parliament, the Welsh and Northern Irish politicians and the UK Government have to consider how these funding streams are going to be replaced. Is the funding going to be distributed according to the outcomes and the issues that they are trying to address, or are matters going to be left to the autonomy of each jurisdiction, with every stream of money being put into a central pot that has a single formula that divides the money up? That has not been decided, and that is a result of the issue that I think that Michael Keating raised earlier, which is that the devolution settlement was developed at a time when the EU was in place and there was no question of that changing. Therefore, all of these EU funds were distributed according to EU rules that were, in fact, focused on the outcomes, with the CAP funding going to where the farmers are and the LIFE funding going to where the environment is. If we take away that outcome-focused approach, we need to reinvent that wheel within the UK or else lots of areas of importance, including agriculture and the environment, will suffer.

Murdo Fraser (Mid Scotland and Fife) (Con): I want to pick up on a point that Jonny Hall made about agriculture funding that touches on wider issues, which was that there is no certainty about where the funding streams in question might go post-2022. That is a consequence of the fact that, under our constitutional arrangements, no Parliament can bind its successor. We do not know who will be in government post-2022; there might well be a change.

Is it being suggested that common framework funding should somehow be detached from the political cycle? How would that work in practice? Surely we are talking about political choices. Surely it should be up to the voters to decide who goes into government in 2022, based on a manifesto that sets out funding. Is NFU Scotland proposing that such funding should somehow be separated from politics? I am just curious.

The Convener: I will let Jonathan Hall answer that, after which I will to come to Iain Wright, because I think that he made a comment about the impact of further complexity on devolved finances as a result of where we are going. Have I got that right?

Iain Wright: Yes, although, strictly, it was David Heald's—

The Convener: When I saw the terminology of the comment, I wondered whether it was by you or David Heald. If you wish to comment, please feel free, but we will hear from Jonathan Hall in the meantime.

Jonathan Hall: In response to Murdo Fraser's question, agriculture is a long-term game, as is managing the environment. Unfortunately, politics is a much shorter game—it can be very short for some people. [*Laughter.*] What farmers, crofters, land managers and others in Scotland are desperate for is a degree of certainty about what is going to happen next. One of the things that the CAP has afforded us is a very consistent seven-year cycle in terms of funding and policy. There is the multi-annual financial framework, which is the funding settlement for the CAP and other elements of EU spend. That is agreed through the European process. The next round of that will kick off in 2020, and it will chime with a CAP that will run from 2021 through to 2027. Having that window in which there is a much higher degree of certainty, regardless of other political changes that occur, is really quite important.

How each Government utilises the funds is another question. The choices about how those funds might be spent in Scotland, other parts of the UK or other member states will be down to those Administrations. That is where Lloyd Austin and I will agree and then suddenly disagree about what the emphasis might be on when it comes to funding in Scotland. However, it is a fact that, because of the multi-annual process that the EU lays down, that mechanism provides a higher degree of certainty.

In some ways, as an agricultural organisation, we would like to see something like that replicated so that it would be possible for a longer-term commitment to continue, by and large, despite there being a change of Government. Under such a system, the Government might shift the emphasis on how the money should be spent, but the broad agricultural and rural development framework would be a given for a longer period than the length of a parliamentary session. Parliamentary sessions can be very short, which can result in constant chopping and changing of policy and, therefore, of where money is distributed and what it is spent on. That is a very unsettling process when we are talking about long-term investment in agricultural businesses and long-term investment in the environment, which Lloyd Austin referred to.

That might be a bit of a fudge, but if we are to deliver the outcomes that we want from public investment in farming, forestry, environmental management and all the rest of it, such longer-term certainty is an absolute requirement, because it is not a short-term game; it sometimes spans generations.

The Convener: I think that the whole of Brexit involves a fudge, but never mind.

Michael Keating has some comments to make on the subject.

Professor Keating: There are huge amounts of uncertainty about the funding business. One thing that we are pretty sure of is that agricultural spending in England will fall and that that will have an effect on anything that links Scottish spending to English spending, whether it is Barnett or whatever. Scotland has pretty much decided that it wants to keep direct support for farmers, whereas England and Wales have decided they do not want to. That will cost money—there is a huge implication there. The Welsh Government and civil servants acting on behalf of Northern Ireland have bought into the UK Agriculture Bill, which provides a framework. Scotland has not, so we do not know what will happen to that or to Scottish funding. More recent indications suggest that there will probably be more latitude in agriculture for the distinct Administrations to do differently than we might have thought a few months ago, but we really do not know.

To go back to the internal market, that could cut across agriculture. Although the Agriculture Bill is separate, any single market principle could cut across that, which would have implications for what Scotland could do. In addition, as Jonny Hall mentioned, there is a little clause that we both spotted in the Agriculture Bill that gives the secretary of state extraordinary powers to determine—using the World Trade Organization mechanism—what funding will be available in Scotland. Therefore, there are huge amounts of uncertainty.

The shared prosperity fund seems to come out of the structural funds; it probably also comes out of pillar 2 of the agricultural funds, which is also to do with territorial spending. For 43 years—that is, since 1975—I have been trying to work out how the structural funds and their predecessors work and whether the money is additional. This Parliament has done at least two inquiries on the issue and the answer is that we just do not know. We just do not know whether that money is additional to what would come anyway or how it links with the block allocation funding formula. As we do not know what we are getting at the moment, it is very difficult to know what we will get in the future, but it has been suggested that there will be a shared prosperity fund. That raises issues about the shares of that, how it will be distributed and whether it will reflect the previous spending on structural funds plus pillar 2 of the agricultural policy. We do not know.

There is then the question of how that will be managed. It seems likely that it will be used in the way in which the existing EU funds or city deals are used, whereby matching funds are levered from devolved Governments and local government. There will be intergovernmental programmes. Some people think that it is a wasteful way of using public money to have yet another set of intergovernmental mechanisms on top of what we already have—city deals and all the rest of it. I know that some people in the UK Government are very doubtful about that. However, politically, it is extremely attractive to the UK Government to demonstrate that it is spending money in Scotland, Wales and Northern Ireland and that it has a presence there, and to lever some funding from the devolved Governments for common UK priorities. That might be an instrument for getting common policies in various fields. That is all that we know at the moment. There are substantial amounts of money involved.

The Convener: I will come to Iain Wright. In your submission, you or David Heald make the comment that

"giving financial levers to the UK Government ... could result in ... micromanagement of devolved finances, thus negating one of the strengths of the 1999 fiscal settlement."

Did you make that comment, or was it David Heald?

Iain Wright: That particular comment was by David Heald. I know that his concern was the interaction between Barnett and whatever comes out of funding common frameworks.

I want to make two other short points, the first of which relates to the MAFF. We have been looking at that and wondering whether there might be some way to adopt a similar kind of process, notwithstanding the fact that the UK has never—as far as I know—been involved in multi-annual budgeting. On the other hand, there is the payment of the divorce bill, should that ever happen. I understand that there is a mechanism whereby certain elements of expenditure are not included in the budget because they just go through. Somebody with expertise in that area might like to comment.

The Convener: Thank you, folks. That naturally brings us to the end of a quite remarkable discussion, which I think has been extremely useful. I thank our witnesses for their contributions, which will undoubtedly help to inform our report when we come to write it. Given Michael Clancy's warning about timescales, we

might need to do that more quickly than I originally thought.

Michael Clancy: I live in hope, convener.

The Convener: It has been a very useful, educational and informative discussion, so I sincerely thank everyone who has attended.

I suspend the meeting to allow the witnesses to leave. The next bit of the meeting will be held in private.

11:28

Meeting continued in public until 11:41.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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