OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 19 June 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 19 June 2019

CONTENTS

FINANCE AND CONSTITUTION COMMITTEE
15th Meeting 2019, 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:

Professor David Bell (University of Stirling)
Stuart Bews (Aberdeen City Council)
Malcolm Burr (Comhairle nan Eilean Siar)
Professor Michael Dougan (University of Liverpool)
Dr Viviane Gravey (Queen's University Belfast)
Professor Michael Keating (University of Aberdeen)
Gill Lawrie (Angus LEADER Local Action Group)
Roddy MacDonald (Industrial Communities Alliance)
Angus MacLeod (Highlands and Islands European Partnership)
Professor Aileen McHarg (University of Strathclyde)
Lynn Murray (Zero Waste Scotland)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 19 June 2019

[The Convener opened the meeting at 09:30]

Internal Market

The Convener (Bruce Crawford): Good morning, and welcome to the 15th meeting in 2019 of the Finance and Constitution Committee. I remind members and witnesses to set their mobile phones to silent so that they do not disturb the proceedings of the meeting. The first item on our agenda is evidence on the internal market. Our panel members are Professor Aileen McHarg, Professor Michael Keating, Dr Viviane Gravey, and Professor Michael Dougan. I warmly welcome them to the meeting and thank them for providing us with written submissions, which was very helpful, as it means that we do not need to ask for opening statements, because we have something from them already.

The question of the internal market first arose during our inquiry into common frameworks, when the point was made that we had never needed a definition of the United Kingdom internal market, because of our membership of the European Union. In our report on common frameworks, we noted that the UK internal market is not defined in law. Do we need to have it defined in law or, given the existence of common frameworks, trade deals and the like, is an internal market something that may just evolve? What might the impact be of having no clearly defined internal market? For example, would it make it harder or easier for the UK Government and the devolved Governments to challenge each other over the perceived unfair use of economic policies to support local business conditions? I know that there is interest in asking about state aid later.

Professor Aileen McHarg (University of Strathclyde): There are arguments on both sides as to whether we need to define the internal market. It is difficult to define it, and the process of reaching an agreed definition would be quite tricky. There are dangers if it is not defined, however. There are dangers in not having a principled approach or in having different approaches in different contexts that do not necessarily make sense when compared with each other.

The biggest risk is that, if we do not have a clear idea of what the UK internal market is—and of what its limits are, which is probably the key thing—we run the risk of the internal market being defined by default by the UK Government and the UK Parliament. They would get to decide the appropriate balance between central control and local autonomy, as well as when it would be acceptable to depart from free trade principles to promote other values.

There are, undoubtedly, risks to the devolved Governments and devolved Parliaments in having an overly expansive definition of an internal market. However, the devolved institutions are in a vulnerable situation anyway, and having an agreed, principled framework could produce some sort of constraint or at least a set of standards against which to measure the UK Government's actions, which is probably important.

Professor Michael Keating (University of Aberdeen): I would be worried about putting a definition into law, because it is a contested concept that is open to challenge. It is highly politicised and highly charged, and many of the decisions should be taken in some kind of political forum.

The other danger of putting a definition into law is that it may be used as a mechanism for centralisation, particularly if Westminster is the custodian of the definition, as Aileen McHarg said. The experience in the EU is that the courts might expand the definition of what is meant and take it into unanticipated areas. It is more important to have some kind of forum or central place, representing all the Governments, where the notion of the internal market can be continually reviewed and redefined in practice.

Such a mechanism should not be hierarchical; it should involve the UK Government, the devolved Governments and somebody who represents England. There should be scope for some expert advice in there—experts would not take decisions but would provide advice on what the implications for the internal market might be. Matters would be resolved within that intergovernmental format, as far as possible, which would keep them out of the courts.

Dr Viviane Gravey (Queen's University Belfast): The key difference with the European Union internal market is that no single member state of the European Union can change the definition of the EU single market. With the situation as it is in the UK, it would be possible for the UK Government not only to set the definition but for every Government coming after it to simply change that definition. There is an issue with regard to the best way of ensuring that one of the four Governments cannot just change the definition of the single market for everyone, whether that is about going through a legal process to set a clear definition somewhere—which is very complex—or having a much stronger

intergovernmental structure. Given the way in which the UK constitution works, it would be very difficult to hold the UK Parliament and the UK Government to some kind of commitment on not changing the rules in a way that would benefit England the most.

Professor Michael Dougan (University of Liverpool): I agree that there needs to be some sort of definition, for the reasons that Aileen McHarg gave. You would need to provide a degree of coherence for what would otherwise be quite a disparate range of regulatory problems and policies that would potentially be in conflict or in tension with each other.

I also very much agree with Michael Keating's point. If that is not done and you do not have horizontal principles that help to define and articulate the trading relationship between the constituent territories of a state such as the UK, there is a risk that that will happen by default, not just through Westminster but through the courts. One of the main experiences we can take from the EU is that the courts can easily step in and provide the type of horizontal internal market principles that politicians fail to articulate.

The main point that I would add to what has been said is that I find it much more helpful to think of an internal market as a process and a set of institutions rather than a simple definition of a statement of policy. Internal markets are ways of managing trade relationships between territories with regulatory autonomous powers, such as the UK post withdrawal from the EU.

If you think of internal markets as a set of institutional arrangements that constantly address new problems, try to find solutions to trade barriers and try to define and address distortions of competition, you do not, in a way, need to worry so much about the definition of a barrier to trade or a distortion of competition, because you are constantly refreshing your political and institutional understanding of it through your institutional framework. If you think of internal markets more as a process than as an end state, it becomes particularly important to define what the institutional framework should be for managing those problems instead of giving a set solution that will last forever, because we know that internal markets do not really work like that.

The Convener: Thank you for those very helpful opening comments.

Adam Tomkins (Glasgow) (Con): Good morning, everyone. Right at the beginning, I want to address head-on the question of keeping the courts out of it, which Professor Keating mentioned and which Professor Dougan also spoke about in his very helpful remarks. I did not interpret what Professor McHarg said in quite the same way as I think that Professor Dougan did. She said that the danger is that, if we do not define the internal market, the definition will happen by default, and, if it happens by default, it will happen in the courts. Is that right? No?

Professor McHarg: No—I said completely the opposite. The danger is that, if we do not define it, it will happen by default—as Viviane Gravey said—through UK Government and UK Parliament ad hoc decisions that change over time. There would be no way of legally constraining them, but some sort of statement of principle would at least give you a reference point from which to say, "Please justify that decision in accordance with this set of principles," or an institutional framework would allow decisions to be argued out.

Adam Tomkins: That is very helpful. Thank you. Is it either possible or desirable to keep the courts out of it? In the EU, as Professor Dougan says in his written submission to the committee, there are something like 6,500 legal instruments on the EU internal market, yet some of its most important rules were written in judgments, not in legislation at all. Professor Dougan cites the famous example of the cassis de Dijon decision in the late 1970s. In Canada and the United States, a huge amount of the federalism case law is about the commerce clause, economic regulation and their internal markets. Is it even possible to keep the courts out of this? If so, why would you think that that is desirable?

Professor Keating: One reason is the asymmetrical nature of our constitution. If we were to have the courts involved, they would presumably have to be able to strike down English provisions as well as Scottish, Welsh and Irish provisions, and that is simply not going to happen. That would be a federal system, which might be desired but is not going to happen. So, there is an asymmetry there.

The fact that, as you say, the courts have made a lot of the running in the European internal market has been subject to a lot of criticism. Maybe that is precisely because something had to be done to create an internal market, and that is why we had qualified majority voting and a role for the courts—to overcome all the veto points with the 27 countries. Here, it is more a question of preserving an internal market that already exists, so we would not need that degree of initiative and momentum to create an internal market.

I suspect that the number of issues that would arise in the UK would be much lower than the number that arise in the European Union, so it would be manageable through a political process. In keeping with the way in which devolution has been handled, there has been a general consensus that it is fortunate that we have kept a lot of this out of the courts—that matters that are

political have been resolved through the political process rather than through excessive recourse to the courts.

You mentioned Canada. I would add Spain and Italy, where the courts have been overburdened with jurisdictional disputes. In the UK we have, thankfully, managed to avoid a lot of that.

Professor Dougan: I take a slightly different perspective from Michael Keating's on that question. It is true that the EU internal market had to be created and that the courts played a role in it, and it is also true that the UK internal market is already quite well established, but I return to the point that I made before. Internal markets are not about a destination; they are about the constant process of managing relationships between territories. From that point of view, it does not matter whether the EU's internal market had to be created over 40 years or whether the UK's internal market is a particular starting point. From the moment of withdrawal from the EU, the UK's internal market will face identical problems to those of the EU internal market, and they will need some sort of response. The main question is whether that response will be provided primarily by politicians in legislatures, who have consciously set out to think about its design and co-ordination, or whether it will, in effect, be provided by the courts, because nobody else has provided an answer.

It is worth mentioning the cassis de Dijon judgment in a little more detail. The day before that judgment, the rule across Europe was that someone who made a good or provided a service in their own territory could not assume that they could automatically sell or provide it in any other territory without meeting its regulatory standards, so the markets were highly compartmentalised. The day after the judgment, someone who made a good or provided a service in their own territory could sell or provide it anywhere across Europe, and the burden was suddenly on the host country to demonstrate that its rules were needed in the public interest and could be justified. That was not just a minor development; it was a total transformation of the way that the entire European economy functioned, and that change was made in the space of a couple of paragraphs in a single judicial decision.

I suppose that the UK is going to face the same type of challenge. If, a couple of weeks after withdrawal, the Scottish Parliament enacts legislation that is capable of creating a barrier to trade or a distortion of competition for English, Welsh or Northern Irish goods and there is no political, legislative framework for managing that, you can bet that it will not be long before someone goes to the courts and says either, "The Scots have tried to stop me selling my English good in Scotland because it doesn't meet their new regulatory requirement," or, "The Scots are allowing these English goods into Scotland and it's distorting the competition because I have a higher regulatory burden."

It would only take a bold set of judges to say, "Cassis de Dijon," and that would be it. The UK internal market would be created, and it would be created not by a legislature but by judges.

09:45

Dr Gravey: We are talking about intergovernmental processes, but, in the cassis de Dijon case, it was a private actor who went to court. The internal market is also about whether citizens and businesses would have the right to go to court and have remedies in a UK system that were similar to what they had in the EU. It is important that the internal market is not just about the four Governments but about everyone who lives in those countries.

Professor McHarg: Michael Dougan said that it would only take a bold court to give the UK a cassis de Dijon case, but it would have to be extremely bold. The current devolution legislation has no obvious way in, because, in the existing devolution settlements, we have only very limited provisions that have any relevance to a general concept of a UK internal market. Northern Ireland has the secretary of state's veto power, which has never been used; if it were to be used, it could be judicially reviewed, but, until then, it cannot be. In the Scotland Act 1998, but not in the other devolution statutes, there are protections for the trade provisions in the Acts of Union, but, in the Imperial Tobacco judgment, the courts told us that they are very limited in their effect. Those provisions are not promising.

More generally, there is interpretation of existing reserved matters, but the approach of the courts so far has been to interpret them relatively narrowly and in line with normal principles of statutory interpretation, not in the light of any overarching idea that they are intended to protect the UK internal market. It would require a great deal of judicial creativity to get us to the same position as we have in the EU, which has a set of treaties that provide a hook on which a court can come in and develop a jurisprudence. I just do not see where the hook is in the domestic legal system unless there is some amendment of the devolution statutes.

In any case, as Michael Keating said, that would constrain the internal market only at a devolved level. We would still have the problem of the internal market at a UK level.

Professor Keating: I agree, and I would add that there are many fewer issues in the devolved

settlements that are likely to raise internal market issues, because most of those matters are reserved. Agriculture and the environment are devolved matters. They are important, but I imagine that they are not as broad as the internal market provisions in the European treaties, which potentially cover a huge range of things.

Dr Gravey: I am sorry, but I disagree. In the history of the cases that have been on-going between the UK and the European Commission and the European Court of Justice over the past 15 or 20 years, the environmental cases have been high ranking and the UK has lost most of them. In other areas, by contrast, the UK has been on the winning side.

In the Welsh-UK relationship around agriculture, in particular, a lot of the cases between the Welsh and UK Governments have been about agricultural subsidies. Issues around the environment and agriculture will come up and may be very important.

Professor Keating: I mentioned agriculture and the environment. Outside those areas, it is difficult to see others.

Dr Gravey: Yes, and those areas will be important.

Professor Dougan: I do not disagree with what Aileen McHarg has said. If we focus on institutions and the devolution settlements, it is very difficult to see the hook on which a court could develop a default system of internal market rules.

That comes back to the important point that was made by Viviane Gravey about the role of individuals. The issue is not about the interpretation of the devolution statutes; it is about an individual finding a way to persuade a court to articulate some sort of internal market principle. I have given the matter a degree of thought, and I believe that an easy route in would be the Human Rights Act 1998. An individual would simply need to say, "I have the freedom of property and the freedom to trade and to run a business, but the Scottish Government and Parliament are inhibiting that freedom by refusing to allow me, as an English trader, to sell my good in Scotland, because it does not meet their local regulatory requirements." That would be enough of a hook for a court that was minded to do so to create a cassis de Dijon approach. It would simply have to say that Scotland had, prima facie, infringed the English trader's right to run a business and make a profit and their freedom of property. The court would have to consider how that could be justified or reasoned through from a legal point of view, and then a cassis de Dijon approach could be taken.

The hooks exist and are waiting to be exploited. The question is whether we should set a line that shows that the issues have been thought about and designed politically, which would mean telling the courts to follow what the legislatures had decided, or whether we should provide no solutions and continue talking about such things for many years, while, in the meantime, individuals and businesses push the courts to provide an answer.

A key point is that there must be an answer to the problem. The day will come—it might be in a few weeks or in a few months—when Scotland exercises its devolved powers in a way that creates a barrier to trade or a distortion of competition for an English manufacturer of goods or service provider. We can bet that, the moment that that happens, the English company will say, "Where is my hook to find an answer to the question?" If legislatures have not provided an answer, the English company will want the courts to do that.

The court's answer might be not to take a cassis de Dijon approach, which would also be a really important decision, as it would mean compartmentalising the UK markets from each other and, in effect, having no right to trade within the UK. The decision to take a cassis de Dijon approach and the decision not to take such an approach would be of equal importance, because one would mean that we would have an expansive UK internal market and the other would mean that we would have a restricted and compartmentalised internal market. Either decision would be equally valid.

The Convener: That was a truly fascinating beginning to the discussion—I say that genuinely. We will bore into the issues a bit more.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): If colleagues do not mind, I will take you back a little step from the dispute resolution discussion. What processes should be in place to enable a body of people, for example, to establish what a UK internal market should look like, so that it is not defined by default or imposed on us by the UK Parliament? Professor Keating's submission refers to a council of the UK that would

"work on similar lines to the Council of the EU."

What systems, measures, institutions or bodies should be brought about to avoid the situations that have been described? Is any progress being made towards that?

Professor Keating: I see no such progress. The internal market changes over time—it has living principles and unexpected things can come up—but there should be a baseline against which we can measure changes and some appreciation of what matters and what does not matter. A really big issue involves the border between public services and the market and the extent to which

public services can be protected from market competition. Another issue involves proportionality—what matters? Does it matter if Scottish sheep farmers get direct production-linked payments, as they do at the moment? If Welsh farmers do not like that, is it worth making a fuss about?

We need to work through such issues and lay down the baseline principles so that when something comes up—as Michael Dougan said, something could come up in a court or anywhere—we can go to the body that represents the four nations plus the UK to find a political resolution, with assistance from people who work through the principles and with advice from business and civil society, before things get to the courts. Putting something into law without properly defining it would invite people to continually make cases, and a lot of that has happened in the European Union. It would be better to start with basic principles and to have a place where they can be applied in individual cases rather than setting up a rigid legal framework in advance.

As for what is being done, sectoral frameworks are being negotiated, discussions are going on about the internal market, sectoral bills for agriculture and the environment are being developed, competition policy is coming on and work is being done on the Trade Bill and trade policy. All those processes seem to be separate, before we have even got to the point of Brexit, without any consistent principles across them. I find that troubling.

Professor McHarg: What worries me about entrusting the matter purely to an intergovernmental process—although such a process is of course crucial because, if we are talking about UK-wide principles, there has to be buy-in from all levels of Government—is that history tells us that such a process risks being very untransparent. The decisions that are made about the internal market principles that are to be applied really matter and will have significant implications for the ability of Parliaments and Governments to make decisions and to pursue their policy objectives, which can have an impact over time.

There is a real danger of a stitch-up that nobody has had any opportunity to comment on. The advantage of a legislative approach is that, at least at some point, the proposals come to a public forum in which there is an obligation to justify decisions that are made and an opportunity to amend. The end point of that and what we get might be problematic, but at least the process would be more transparent, to an extent. I would like whatever process is adopted to be subject to proper consultation and scrutiny and perhaps some form of parliamentary confirmation in the Scottish Parliament, the other devolved legislatures and the UK Parliament. It should not simply involve people saying, "We've had a joint ministerial committee meeting and here's the set of principles we've produced."

Dr Gravey: When we talk about learning from the experience of the European Union and having something like the Council of Ministers, we keep on forgetting that decisions in the EU are not made by the Council of Ministers; they are made jointly by the Council and the European Parliament. We are not talking about the role of Parliaments in future discussions on the internal market.

There are different ways in which Parliaments could have a role. The process could be mostly intergovernmental, but we could have something like what the Danish Parliament does when the Danish Government goes to Brussels. The minister has to go in front of Parliament and ask whether it agrees with the Government's objectives. There has to be support from the legislature, and then the minister has the intergovernmental discussion.

There could be an interparliamentary forum that sits alongside any intergovernmental forum to have that discussion. Alternatively, if there is an intergovernmental political agreement, legislation could then be passed in all four legislatures.

Right now, with the UK-Welsh agreement, we are talking about something that is decided by Governments, with the National Assembly for Wales having 40 days to consent. You may be extremely quick in setting up inquiries and getting input from civil society and all that, but 40 days is a very short period in which to weigh up the pros and cons—it basically means that you trust the Government to have done all that consultation work correctly. That approach would really limit your work as a Parliament. The internal market principles will constrain the action of all four Parliaments in this country.

It is important to think about not just the court and the ministers but where the Parliaments are in all of this.

Professor Dougan: I agree with everything that has been said, but I will add a couple of points.

It is worth recognising that the challenges that we are talking about are not new; they are challenges that countries all over the world have had to tackle before. In a way, in each case, the challenge is about how to find institutions that are independent and impartial of the constituent territories that will be subject to the internal market. That covers legislation, executive action and the courts. We should of course be aware that the courts have a legitimate role in any internal market, because the legislation needs to be

interpreted and enforced. The question is what scope the courts will have.

The challenge is always the same. It is how to create independent and impartial institutions that will help to manage and administer the internal market for the benefit of its constituent territories. In the UK context, there are at least two real challenges to creating that independent and impartial governance system. One is constitutional and one is much more empirical.

10:00

The constitutional problem has been mentioned several times: the parliamentary sovereignty of Westminster and the lack of any distinct English Parliament. That means that, inherently, the legislative aspect of the internal market will never be independent and impartial in a way that would be recognised in the EU, for example. That is a real constitutional challenge that must be grappled with and worked around.

The empirical challenge is just as important. The simple fact is that the English economy is vast compared with the Scottish, Welsh and Northern Irish economies, which really matters in an internal market. It matters because what England decides to do in regulatory terms could have an incredible empirical effect on the regulatory choices of the other territories. For example, if there were a ruling similar to the cassis de Dijon judgment—that if someone makes their goods lawfully somewhere in the UK, they can sell those goods everywhere in the UK—it would make it highly difficult for Scotland, for example, to have highly divergent regulatory standards from England, because production would just happen in England, the goods would flood into Scotland and there would be nothing that the Scottish Government could do about it.

Those are the two difficult challenges with which we must get to grips: the constitutional challenge of parliamentary sovereignty; and the empirical challenge of the size of England and its economy.

Dr Gravey: The empirical challenge depends on how much divergence there is between the UK and the EU after Brexit. If, because of the backstop or any other logical economical reason, UK regulations remain very similar to EU regulations, there will not be the same pressure. What will matter will be the much bigger EU economy compared with the smaller UK economy.

Professor Dougan: It is the same thing.

Dr Gravey: They are similar things, but at a different level.

The Convener: I want to drill down into that a little more. I will use an example that may or may not become live in the near future. There was a report in the media this morning on minimum pricing and alcohol sales in Scotland being at their lowest level since records began—the drop might not be to do with minimum pricing, but there is some evidence to suggest that it is. Minimum pricing has had the biggest impact on products such as strong ciders. If we do not have some rules written down and the courts have to decide, does it begin to raise the prospect of an English strong cider maker taking the Scottish Government to court because of a process that the Government has introduced that is prohibiting sales of the cider? If that is where we are, that is both challenging and interesting at the same time.

Professor Dougan: That is exactly the kind of situation that we are talking about. The example that I have had in my head—and sometimes I have used it outside my head to illustrate the point—is single-use plastics. I am going to admit immediately that I am not completely au fait with the UK constitution and the devolution settlement and so this is a purely hypothetical example. However, for these purposes, let us accept that it is within the devolved competence of Scotland, there is no common framework on the issue, and there is regulatory autonomy for Scotland so it is capable of diverging from the regulatory standards in the rest of the UK.

Let us say that the Scottish Parliament proposed a ban on single-use plastics in Scotland. There would then be two main choices. One option is for the whole of the UK to have a similar ban—everyone has similar rules, so we do not need to worry about barriers to trade and distortions to competition. However, that requires some degree of co-ordination—either a centralised legislature or co-ordinated legislation between the four legislatures. The other option is there is no centralised intervention, in which case there needs to be some sort of default rule that governs what the ban means for English single-use plastics that want to enter the Scottish market—the rule either says that they cannot or that they can enter. There needs to be a rule and there cannot be a vacuum of law. If there is a cassis-de-Dijon-style rule, which says that any good lawfully produced anywhere in the UK can be sold across the UK, it immediately tells English manufacturers that they have the potential to challenge the Scottish rules, via the courts or another institution, depending on the framework that has been established.

That is a perfect illustration of the type of challenge that we are talking about. It is also, incidentally, why I feel that the debate about common frameworks is relatively narrow in the broad context of the whole UK internal market debate. At the minute, so much of the attention is on the existing European regulations and how we stabilise and fix them at this point in time, at the point of withdrawal or at the end of the transition

period, but the real challenges lie beyond the common frameworks. They relate to the things that are not currently subject to EU rules or that will not be subject to a common framework in the future. Those include minimum alcohol pricing, recycled packaging and new digital services—anything within the competence of the Scottish Parliament that is capable of creating a barrier to trade.

Professor Keating: That is precisely the danger of having a rule that is statutory but very generally framed: people can go to the courts and play with it. It is more important to have some principles to ensure that there is a balance in the boundaries between economic, social, environmental and public health considerations. If there is simply a single market clause, market competition trumps everything. That is a problem that has occurred within the European Union.

It is very difficult to write all those competing considerations into a law and give that to the courts. It is not the job of the judges to make such decisions; they are essentially political decisions, and, as Michael Dougan said, they will come up in all kinds of unexpected ways. We should be prepared, so that when they do, we have principles against which we can judge individual cases.

Professor McHarg: Alcohol minimum pricing is a good example to illustrate the importance of principles. The minimum pricing legislation was challenged in the Scotch Whisky Association case on the grounds of breach of EU free movement law, but it was ultimately held to be proportionate as a measure to protect public health. In that case, the role of the proportionality principle was really important in balancing trade objectives versus social policy objectives.

The problem, which could have been more important than it turned out to be in practice in the Scotch Whisky Association case, was that the devolution dimension was not properly dealt with. One of the judges referred in the proportionality assessment to the elephant in the room: there was a choice between minimum alcohol pricing and raising alcohol duty, but the Scottish Parliament did not have the option of doing the latter because that is a reserved matter. If we were to address that in a purely domestic context, we would need not only the equivalent of the proportionality principle but some sort of internal subsidiarity principle to help us to negotiate the difficult question of divided competence.

The Convener: We have a couple of supplementaries from Angela Constance and Tom Arthur. I am also conscious that Murdo Fraser may have to leave soon to deal with amendments at another committee; I do not know how closely his question relates to this area.

Murdo Fraser (Mid Scotland and Fife) (Con): Time-wise, I am okay for now.

The Convener: In that case, I will take the supplementaries in this area and come back to you.

Angela Constance (Almond Valley) (SNP): In essence, I want to know whether we can recreate an internal market in the UK with a new set of arrangements that is as good as what we have. The submissions to the committee from the panel members say that there is nothing that is comparable to the current EU arrangements anywhere in the world—it is the most comprehensive and integrated internal market. How can we recreate something as good as that, or on a par with it, without downgrading devolution?

Professor McHarg: There is a danger of exaggerating the impact of EU internal market law. It does not completely protect the UK internal market—for instance, it does not give us a right of internal free movement. That is why Scottish universities have to take EU students without charging them fees but can charge English students fees because those students cannot benefit from free movement or non-discrimination rights in the way that EU students can.

EU internal market law does the job well enough for us not to have had to talk about this before, but it does not do the job perfectly. If we were starting from scratch with regard to protecting a UK internal market, we would not simply adopt EU law—we would have to do something different that addressed the conditions of our internal market and the rights of citizens within the UK to move freely. We do not exactly have a right to do that; it is just that we have not tried to stop people doing it, which is a different thing.

Dr Gravey: I go back to what Michael Dougan said. It is much more a question of having institutions and processes whereby there is trust between the parties and they are all working towards a similar goal. What we are seeing now is a process in which everything is happening in parallel and there is no discussion between the different bits. There is discussion on the common framework, discussion on the Agriculture Bill and discussion on the JMC. All those different elements have different interpretations of the powers for the devolved Administrations. That is not a good basis for a discussion because, depending on who you speak to, Scotland is going to get way more powers or it is going to get fewer powers.

The big problem is that, in many ways, Westminster has been running ahead with Brexit and trying to find an answer to all those issues without taking the time to work with the other

parties. Legally, Westminster does not have to work with them, but if we want to have a UK internal market that works well, where it is not necessary to use formal mechanisms a lot of the time and where most of the issues can be dealt with informally, it is necessary to build trust. As we have seen, trust has been eroded. The best way to build trust again is for Westminster and the UK Government to hold back, to not use all the power that they have and to say, "We're going to be partners on this."

Professor Keating: We also need institutions to work when there is no trust and when there are different goals. That is the real test of institutions. We got off to a really bad start with the original version of the European Union (Withdrawal) Bill, in which the answer was to take back powers. There are still aspects of that in the final act—the European Union (Withdrawal) Act 2018. I suspect that that option will never be used, so why leave it there in the first place? Why is the fallback answer, in the event that all else fails, to take powers back to Westminster? The division of competencies might not be perfect, but it was agreed on in the political process on three occasions in three different acts. As the different levels of Government have their own powers, which they own, any negotiation process must take place among equals.

To pick up Aileen McHarg's earlier point, of course we need transparency—the processes must be open to scrutiny by the Parliaments and by the general public.

Professor Dougan: I come back to something that I said earlier, which I think is particularly important in answering Angela Constance's question. We should not think of internal markets as static end points where we have found the solution to a regulatory problem and which we will live with for ever. Internal markets involve the constant managing of relations, facing new challenges and updating the solutions that we thought that we had found five or 10 years ago, but which are no longer appropriate because science and technology and consumer behaviours have changed. We need to think about internal markets in that dynamic, institutional way.

Aileen McHarg is completely correct to say that the EU internal market is not perfect. It is not perfect in the sense that it provides answers to some of those questions that some people do not like—that will always be the case—but it provides answers nonetheless. As an EU lawyer, I find it very frustrating to hear people say that the internal market is not complete and has not been finished. What has happened is that a particular set of answers has been provided to the problems that are faced at the moment. Those answers must evolve and change. Internal markets are never complete—they are never finished.

I come back to what I said before. There is the constitutional challenge of Westminster, and there is the empirical challenge of England. If we wanted to recreate a functioning internal market—it would not be the same as that of the EU, because the context is totally different, although the challenges are the same—we would have to face up to those two facts. How would we constitutionally create a system that recognised the equality of the Governments and the Parliaments and allowed for independent and impartial management of the internal market? Such an institutional framework does not exist now. How would we recognise that the English economy and population overwhelm the economies and populations of the other nations? What would be the best substantive policy choices to manage that? If we sorted those two challenges, we would have a well-functioning internal market, but I recognise that that is quite a big task.

10:15

Tom Arthur (Renfrewshire South) (SNP): Professor Dougan, you have just summarised the point that I will raise with you. I appreciate that the question that I will ask is difficult but, for the committee's benefit, will you say what would be an answer to the questions of parliamentary sovereignty and the empirical reality that Scotland has a population of 5 million and England has a population of 55 million? I appreciate that we are dealing with hypotheticals that are laced with political difficulties—some might even categorise them as impossibilities—but will you sketch out what an answer would look like in practice?

Professor Dougan: This is where the EU example is useful because, in the EU, Germany has a population of 85 million, whereas Malta has a population of 500,000, so the EU is familiar with vast discrepancies of population and economy. The Council of the EU plays an important role because, although population size is relevant to many decisions in the Council, it is also irrelevant to some things. On fundamental treaty change and designing the rules of the system, all member states have an equal voice and none can outvote the others. In particularly sensitive policy areas, such as taxation, all member states are equal and none can outvote the others.

We can imagine a system in which all four UK Governments and legislatures were treated on an equal basis for the fundamentals of how the internal market is managed but in which population size was relevant to other decisions. However, that would require a total rethinking of the UK constitutional framework.

That is the challenge that we are talking about—it is where the gap between the aspiration for independent and impartial governance structures meets the reality of parliamentary sovereignty in Westminster and the lack of a distinct English Parliament. We could say that we needed to work around those two things, which would mean that the approach was much more about building collaborative fora in which the Parliaments agreed that they were to be treated as equal and the Governments agreed that each would have an equal voice—even though, constitutionally, that is not true. Alternatively, we would have to fundamentally reimagine the UK constitution. Perhaps there would be a moment of genuine national crisis in which fundamentally rethinking the UK constitution was possible; that is what would be involved.

Tom Arthur: Can I ask a short supplementary question?

The Convener: I need to be fair to the other people who want to answer your original question.

Dr Gravey: I appreciate that we are talking about bringing in the cassis de Dijon principle and the Luxembourg compromise; that is fascinating for me, as I studied EU law and politics. We must think of the Commission, too. It has one commissioner for each member state and it proposes policy that is in the common interest of the whole EU. The tension in the UK is that it has no body that could propose common frameworks for the whole UK's interest, because the whole UK's interest is assumed to be represented by the UK Government and not by representatives of England, Wales, Scotland and Northern Ireland. That is another missing point.

Professor Keating: The business of parliamentary sovereignty will never be resolved, but we can get around it. My interpretation is that I am sceptical of parliamentary sovereignty, but I accept that it exists as a principle. It does not mean that Westminster must always have supremacy over everything. In a federal understanding of the UK constitution, the legislative consent convention could be seen as part of the constitution. That would not resolve all the problems, but it would change the bargaining dynamics, so that Westminster could not always overcome the objections of devolved legislatures as the last resort.

Professor McHarg: Although federalism, whether legally or conventionally entrenched, is a theoretical answer, we have to bear in mind that no federation has such an imbalance between its federal units. Germany is very much larger than Malta, and California is much larger than Maryland, but in neither case does one part account for 84 per cent of the population of the whole. That changes the balance of the argument around when it is acceptable to have equal status in decision making versus population-based decision making. There is a genuine question about democratic fairness in allowing 84 per cent of the population to be outvoted by 16 per cent.

The Convener: I am conscious that Angela Constance and Tom Arthur have more questions. I will come back to them later, if they still want to ask them. I need to let others come in.

Murdo Fraser: To an extent, the questions from Angela Constance and Tom Arthur went into the territory that I am interested in pursuing. I am particularly interested in the parallels between the EU single market and its institutions, and the UK internal market.

Michael Keating makes a comment in his submission about the contrasts between the two different models. The EU single market has been created by treaty—it is about sovereign countries coming together to create something new. The UK internal market is quite different because it is something that already existed. Parts of it have been devolved through powers being passed down by the centre. In that context, how much can we really learn from the creation of the EU single market, and how much of it is transferable to the UK situation?

Professor Keating: I argue that it is difficult to simply download the EU internal market system into the UK devolution settlement because we just do not have the institutions and, as you say, the history is very different. We can learn something from it about what an internal market means, its flexibility and the fact that it can extend in unexpected directions. We can learn about the advantages and disadvantages of having a strong role for the courts that is much stronger than the role of the courts in the UK internal devolution settlement. In fact, the courts mostly interfere in the UK's internal devolution settlement through European law rather than other kinds of law.

The principle of subsidiarity and proportionality is important. It is difficult to put that into law but it is a working principle that is quite important. People have tried to put it into EU law but it is a slippery idea, although it is built into the process. There is also the idea of horizontal co-operation and that there is no element of hierarchy. There is a hierarchy of laws, but there is no hierarchy in decision making through the European Council.

We cannot reproduce something that looks exactly like the Council of the European Union; that would be futile. However, we can learn from the principle and notion that policy is jointly made.

We can also learn from some of the downsides of the European system, such as the problems with transparency and accountability, the excessive judicialisation of some things and the

role of private actors intervening in the process, which might have advantages and disadvantages. That is what I am interested in learning.

However, we cannot simply transfer the system. That is why, right at the beginning of the meeting, I was critical of using the terms "internal market" and "single market", which have a European context, as if they would be the same thing in the UK.

We have all said at one point or another that the internal market is a flexible, living concept. There is no such thing as a perfect internal market; it is just a principle that needs to be interpreted in different circumstances, and we might need our own interpretation of it. Indeed, the different parts of the UK might have their own interpretations of it. We have seen all that in the European experience, and we can learn from it.

Dr Gravey: Different parts of the UK risk having different interpretations of the single market because there is a good chance that Northern Ireland will have a much closer relationship with the EU single market than the rest of the UK.

The UK Government has promised unilaterally that, if Northern Ireland has to change its rules and adapt to new EU rules, the Government will ensure that Great Britain follows. That issue could come into play under the next Conservative Government. Through the Northern Irish backstop, the UK could end up following quite a wide range of EU rules and, basically, staying in the EU single market.

The Convener: If that becomes the reality, a lot of this discussion will not be necessary, because, in effect, we will follow what the rest of the European Union does anyway.

Dr Gravey: If we think of Brexit as being about taking back control, it would be nice not to end up having the UK single market defined by the EU. It would be nice to do some home-grown work on the matter. It is likely that UK actors will not have access to the same kind of EU remedies, so domestic rules and ways of dealing with issues will be needed, even if the UK is under the EU's influence.

The Convener: Does anyone else want to respond to Murdo Fraser's question?

Professor Dougan: I will follow up on the question of whether this will all be a theoretical discussion in the end. Even if the Northern Irish backdrop were to come into effect, if Northern Ireland were to remain dynamically aligned with evolving EU legislation and if the UK Government and Parliament were to decide that the rest of the UK would do the same, that would cover only a relatively small part of the overall single market and certainly a small part of the economy.

The only way in which the discussion could become genuinely more theoretical is if we were to follow, for example, a Norway-style European Economic Area agreement. If that were to happen, this discussion could more or less melt away, because not much would change in practice—the UK would do what the EU said it should do but would not have a voice at the table. That is, in effect, the Norway option. The level of economic ambition that the UK Government and the EU have agreed to in the political declaration, as it stands, falls far short of the ambition under the European Economic Area model. That will become a live issue that will need to be dealt with, so we should keep that in perspective.

Murdo Fraser: I will move on slightly and pick up on the points that were made earlier on the resolution of disputes. Ideally, we would want to find a political and/or governmental solution. However, if we were not to find such a solution quickly, do you foresee a large number of court cases coming—I presume—to the Supreme Court on the operation of the UK internal market post-Brexit?

Professor McHarg: We might draw an analogy with devolution jurisprudence generally. It took a long time to build up a significant body of case law, and it took a particularly long time for any cases to arise on the division between reserved and devolved competences. Most cases were about human rights. Why was that? Nobody is very clear, but part of the answer is that there are effective internal checks that prevent the devolved legislatures from straying significantly beyond the scope of their powers. Sometimes, there are no incentives for people to challenge decisions that might—arguably—be unlawful, so it is in no one's interest to challenge them.

The difference in relation to the internal market is that it will be in people's interest to challenge decisions, because we will be talking about powerful organisations, with significant amounts of money at stake. Some—but probably not all—of the potential disputes could be headed off. Enough precedents have been set on resorting to courts to solve matters that we might reasonably expect to come up.

10:30

Professor Dougan: I agree completely with Aileen McHarg. Another factor that makes quite a big difference and which I have hinted at in my written evidence is that, for 45 years, pretty much every lawyer in the UK has been trained in how the EU internal market works—find me a lawyer who does not know about the cassis de Dijon judgment or who does not understand how the system works. The process is entirely familiar to lawyers and to the people who would have the

incentive to make their careers out of bringing such cases. All the principles are there, like a toolbox waiting to be picked up. When we add that to the economic, commercial and financial incentives for businesses that feel that the UK internal market is not working the way that they would like it to, we have a combination of factors that could quite rapidly make the situation a potent source of litigation.

Dr Gravey: I preface this by saying that I am not a lawyer, but my impression is that the Welsh experience is quite different, because of the different devolution settlement. Because there has sometimes been a lack of clarity on where the powers lie, there have been many more cases between the UK and Welsh Governments. I believe that a lack of clarity on the division of power would lead to many more cases.

Emma Harper (South Scotland) (SNP): I have questions about further centralisation. Dr Gravey's written submission states:

> "In devolved policy areas with direct trade implications such as agriculture, ongoing legislative developments in Westminster appear to point towards greater centralisation".

We have talked a bit about agriculture and environmental issues. The submission points out that

> "Clause 28 in the Agriculture Bill ... gives central government powers previously held by the devolved administrations".

We have different farming practices in Scotland, and 85 per cent of our land is less favoured area, so we need to do things differently with our beef and sheep. How would further centralisation impact on farmers in Scotland? What are the threats if taking back control means that agriculture is not devolved?

Dr Gravey: In my written evidence, I referred to the work of colleagues in the Brexit and environment network. I am happy to provide supplementary written evidence to go into more detail on that. Clause 28 of the Agriculture Bill is on the World Trade Organization Agreement on Agriculture. Basically, the clause is about the UK Government looking at the instruments that are used by the different Administrations, deciding in which box they will fit and potentially then limiting the ability of those Administrations to use more or less market-distorting instruments. Until now, that has been done at EU level, and there is actually quite a lot of flexibility. There is a fear about that, which has been pointed out. The Welsh Assembly has done a lot of work on the Agriculture Bill and on that specific bit of it, so you could look at that.

That is a key concern. The obvious place where there is a tension between trade and agriculture is the issue of genetically modified organisms. England is the only part of the UK that has not availed itself of the ability to opt out of GMOs under current EU law. A lot of American companies and the US trade department have clearly stated that they hate the EU policy on GMOs, and of course a UK market would be very interesting in that respect. Exactly as Michael Dougan said, with the push towards a trade agreement with the US, we could end up with English producers that grow GMOs having direct access to the Scottish market, or perhaps the English ones would not, but American ones would. Through a trade deal, American GMO producers could have access to the Scottish market, which would have a knock-on effect on farmers.

Many of the discussions on common frameworks and so on are about having some kind of central Government control over devolved Administrations. The UK Government has missed a trick in that regard because, for me, the way to make that politically palatable is to give devolved Governments a seat at the trade negotiation table, or at least at the trade negotiation preparation table. We know from the EU example that not all 28 member states negotiate the trade deals. The European Commission negotiates the deals, but what to negotiate for is agreed by all 28 countries.

An easy way to reassure the devolved Administrations would be to say, "Of course we will pursue a trade policy that works for the whole of the UK. We will make sure that it does so by involving the Governments in preparing all position papers and having them discussed in Parliaments." If they did not do that, we could end up with situations with lots of opposition and fears, as happened with the transatlantic trade and investment partnership negotiation.

Professor Keating: There is an important difference between the strategies of the Welsh and Scottish Governments with regard to the intergovernmental system. The Welsh Government is quite happy to have joint frameworks and, indeed, joint policies, as long as the devolved Administration has a say, whereas the Scottish Government puts more emphasis on doing its own thing.

That is a philosophical difference, but it conditions an awful lot of those strategies. For that reason, plus the dispute over the withdrawal act, the Welsh Government has bought in to some of the sectoral bills, such as the Agriculture Bill, but the Scottish Government has not. That is problematic because it means that there is not a UK-wide system. The Northern Ireland Administration is not able to do anything because it is not working at the moment, so there is just an English and Welsh process with a bit stuck in about the WTO rules, which says in effect that the

UK can control direct payments, as Viviane Gravey said.

In agriculture, there is a lot of scope and pressure for policy divergence. Surprisingly, Wales is pretty much lined up with England on the issue of phasing out direct support for farmers, whereas Scotland wants to keep direct support. Having subsidies in one part of the UK and not the others raises all kinds of internal market considerations. That situation already exists, but it may become greater.

There is also the question of the balance of considerations in agriculture: in England, it is about the market and the environment; but in Scotland and Wales it is about social considerations, maintaining the population in fragile communities and geographical balance. The circumstances are quite different and we can see a lot of pressure for divergence there.

The other big problem in agriculture is, of course, money. We do not know what will happen to the money, although we know that there will be less of it. It will not be Barnettised; there will be an agriculture formula, but direct support will come down in England, so that will drive down support here. I can see a lot of controversy about agriculture. The economic sector may be small but it is important socially and environmentally and is very politically salient.

The Convener: We will move on to state aid, and James Kelly will kick us off.

James Kelly (Glasgow) (Lab): Thank you, convener. State aid rules and their interpretation by the different Governments in the United Kingdom could become an area of inconsistency. What conflict issues may arise and how might they be resolved?

Dr Gravey: The panellists had a discussion about this before we came into the committee meeting. In the US, Amazon is trying to establish its second headquarters and cities are in fierce competition and increasing the amount of public money that they are spending and public rules that they are willing to bend to help to secure Amazon to come to them. We could end up with the four nations competing to make sure that the big plant is in their jurisdiction and not in another. That would be a big waste of public money, and whichever nation has the bigger purse will get it anyway.

There is a clear risk that looser competition rules—moving away from EU state aid rules—would lead to public money being spent, because businesses would put the four nations in competition with one another. That would be very problematic.

Professor McHarg: I agree. It is inevitable that we will end up with some kind of UK state aid framework. The ability to spend public money is an important policy tool for the devolved Administrations, which the Scottish Government in particular has used extensively to extend its policy competence beyond the strict limits of the Scotland Act 1998. There are sensitive issues to be addressed there. There is also the underlying question of where state aid currently lies in relation to the reserved/devolved boundary. I think that we will end up with some kind of UK framework, but I expect there to be significant disputes and tensions.

Professor Dougan: This is probably one of the areas where we do not have to worry quite so much. I think that, in any trade agreement with the EU, it will insist that the UK has a state aid regime that is roughly comparable to the one that exists today. The main issue will probably be less the substantive rules, which I do not think will diverge much from the existing EU substantive rules; the real question will be—I return to the thing that we keep talking about—which institution will interpret and enforce those rules and how independent it will be of any of the four Governments or legislatures that make up the UK's governance system.

My concern would be about not the substance of the state aid rules but the institutional question of who administers them within the UK and how independent and impartial that body will be.

Professor Keating: I agree with my colleagues on that. It then links in to what competition policy we will have in the UK and how that will be regulated. For example, we need to consider the role of the Competition and Markets Authority and how that will link in to other regulatory agencies that we might have, to deal with other things.

Dr Gravey: Under the backstop, EU competition policy and EU state aid rules would still apply in Northern Ireland. We could end up with an interesting situation there.

The Convener: I call Alexander Burnett.

Alexander Burnett (Aberdeenshire West) (Con): The questions that I was going to ask have already been covered, thank you, convener.

Adam Tomkins: I would like to drill down a little bit further. I do not know whether this is too difficult a question either politically or legally, but there is a live dispute, as I understand it, between the United Kingdom Government and the Scottish Government about where state aid fits in relation to the division between devolved and reserved competence in the Scotland Act 1998 and perhaps other devolution statutes. What are your views on that?

Professor McHarg: My view is that it is devolved. The reason is that the UK never had its own state aid regime, so it has never been part of domestic competition law. The wording—

Adam Tomkins: It has never been part of domestic competition law.

Professor McHarg: It has never been part of domestic competition law. The wording that is used in the Scotland Act 1998 has a technical meaning within competition law that would not, as far as I am aware, extend to include state aid. If we go by the standard approach to interpretation of the devolution statutes, I do not think that a court would interpret them as including state aid.

The Convener: Does anyone else want to comment on that? It seems not.

Adam Tomkins: Does the same apply to competition policy? That is reserved, is it not?

Professor McHarg: Competition policy is reserved. I cannot remember off the top of my head what the definition is, but the wording that is used has a technical meaning within competition law that does not encompass state aid. State aid control is a different element of competition law.

Professor Keating: State aids were definitely reserved in the Scotland Act 1978, but they were not reserved in the second one—the Scotland Act 1998. Somebody must have known what they were doing. I noticed right away that there was a difference, which is entirely consistent with the difference between the two statutes. The 1998 act was much more generous, defining the reserved powers and not the devolved powers, and it was passed within the European context. In my writings, I have pointed out that difference between the two acts, because it seems to me to be significant.

Adam Tomkins: Michael Dougan might be right to say that this will never arise in practice because, in any future trading relationship that we have with the European Union after Brexit, the European Union will insist as a condition of entering into that agreement that UK state aid policy is broadly similar to or perhaps exactly the same as—his expression was "dynamically aligned with"—the EU rules on state aid.

However, if we assume for the purposes of argument that it does arise as a real issue and, without conceding anything, that Professor McHarg is right that state aid is devolved and competition policy is reserved, how will that work, given what you have said about the close practical interaction between competition policy and regulation and state aid?

10:45

Professor McHarg: It would mean that any UK framework would require devolved consent, but whether devolved consent would be insisted on in the new constitutional disposition post the withdrawal act is a different issue.

Even if Michael Keating is right—I think he is—about the fact that we will not have much choice with regard to the content of the rules, the decision about who will enforce matters will be a really important one. We can anticipate that there might be differences of views between the devolved and the UK Administrations. Therefore, the question of where competence lies and whether the Sewel convention is engaged is extremely important.

Adam Tomkins: The Sewel convention applies to legislation but not to regulatory authorities, so if the Competition and Markets Authority is the regulator that is charged with the primary responsibility for enforcing whatever UK competition and state aid policy looks like post-Brexit, because the CMA was created by an act of the UK Parliament and is accountable to the UK Parliament or to UK ministers, Sewel will not come into play, will it?

Professor McHarg: That depends on how the CMA acquires the enforcement powers. If it does so via statutory instruments under the withdrawal act, Sewel will not be engaged, although there are equivalent non-statutory consent principles that have been agreed, which are being applied to withdrawal act statutory instruments. However, if the CMA acquires the enforcement powers through primary legislation, Sewel would be engaged.

Professor Keating: That raises a broader question about how regulatory authorities in general will tie in with the devolution settlement. There has been very little information about that from the Government.

The Convener: Patrick, before I go back to Tom Arthur and Angela Constance, is there anything that you want to touch on?

Patrick Harvie (Glasgow) (Green): I was going to touch on issues around democratic accountability, which several of the witnesses have spoken about. I want to focus on the idea of a legislative model and the problems of being unable to constrain the UK Government, and its existence as the UK Government and the Government on what we would call devolved issues for England. We have not really talked about the idea of an intergovernmental model and how accountability would work in it. We have seen what a mess a Government can get into if it makes an agreement with another Government or Government body and cannot get that through its own Parliament.

We are in a situation in which it is almost inevitable that we will have separate political jurisdictions with different political balances. There is an expectation that Governments will resolve how to make such decisions, but there is no mechanism for achieving parliamentary engagement on that. Can the witnesses point to any mechanism that would be functional in achieving accountability in the appropriate places on matters that are devolved here but not elsewhere?

Professor Keating: Going back to what I said about how the general principles could be laid down and where that would be done, I do not think that it would necessarily be done in a closed-door meeting of ministers. There would have to be other kinds of input. I mentioned that specialists in particular areas, such as lawyers or economists, could be involved, but stakeholders and the general public would also have to be involved. That would have to be a political decision; indeed, decisions on the boundaries between the market, the environment, social policy and so on are very political decisions. I see no reason whatever for having that sewn up between Governments. There could be an open and accountable process, given that we are talking about highly politicised issues.

As for working out the details of the process, it would be up to the various Parliaments to make sure that Governments reported to them regularly—before as well as after meetings, and before as well as after making commitments—so that Parliaments got the opportunity to contribute their understanding of what the internal market meant.

Patrick Harvie: But as there is no body other than the UK Parliament, which is also the Parliament for England on devolved matters, that can hold a UK-wide common decision-making arrangement accountable, where is the opportunity for citizens as voters to know who they are holding accountable for decisions that are imposed through the common frameworks to implement an internal market?

Dr Gravey: That is a key issue right now with regard to the Agriculture Bill and the environment, because stakeholders do not know who they are supposed to go and talk to. It would be problematic if that were to continue.

The Council of Ministers might be the least transparent of the European institutions—the European Parliament is much more transparent, and even the European Commission is more transparent—but it is so much more transparent than the JMC. For example, we know when the council's meetings will be held; decisions on when those meetings will be held are taken not just by one of the countries involved; some of it can be watched online; and texts come out of it, not just one-page paragraphs. All those things could be improved as far as the JMC was concerned. As Michael Keating has said, getting Parliament to talk to ministers before and after the meetings would be a good way of going about this.

There are other ways of doing this, and people should think creatively about them. There could, for example, be a political agreement on broad principles, similar to a European Union directive, or there could be an agreement on the endgame, with the Parliaments arriving at that objective in different ways. Westminster could legislate for England, and the other Parliaments could legislate for the rest of the UK, as long as they were all working towards the same agreed political aim. UK-wide legislation would not always be needed, but that would require—

Patrick Harvie: But if the political balance in those different jurisdictions varied, it might be democratically impossible to get the same outcome from the different legislatures.

Dr Gravey: There is very little voting in the Council of Ministers of the European Union. Most of the decision making is done consensually, because the ministers around the table know that they will have to go back to their countries and explain what happened. It is much harder to bind a country to common rules if it has often been in the minority. Instead of rushing things through, we need good will and time to build consensus on the common frameworks. It is because we are rushing through a lot of this that we are not able to find a consensual position.

Professor Dougan: Building on what Viviane Gravey has said, I think that, if we accept that the Westminster problem is not—short of a constitutional revolution—going to go anywhere, what we are really talking about is creating a buffer between constitutional theory and how the system works in practice, and about how to make things more collaborative and have a system of equals.

That said, there are different things that we can learn from the EU experience with regard to increasing the scope for democratic accountability and legitimacy. There is, for example, the system of mandates that Dr Gravey mentioned. In certain member states, their Government representative has to have a parliamentary mandate in order to agree to something in advance, whichever collective body is making those decisions. The EU also has the yellow card system—it could easily be an orange or red card—whereby national Parliaments are able to flag up serious issues or objections, which have to be taken into account by whichever centralised decision body is involved.

Something that Viviane Gravey said is important and worth elaborating on. There is no inherent

reason why an internal market needs to be highly centralised. It is completely agnostic about the methods used to manage the market—it is the methods that count, not the end result. There are various sectors in which the EU adopts purely outline principles, which the member states implement in whatever way they see fit in their own territories. There is only minimum harmonisation; everyone agrees a level-playing-field standard, but each territory is completely free to go beyond that if it so wishes. There are also systems of derogations, in which there can be special exemptions from the rules. Those are all up for negotiation.

I am wary of equating an internal market with centralisation, because it is only one way—and not necessarily a very good way—of having a such a market. You can certainly have a well-functioning internal market that is based on a much more decentralised and co-operative model.

Professor McHarg: I should point out that, despite the disagreements over the European Union (Withdrawal) Act 2018, discussions about common frameworks are proceeding rather well and consensually, without any need to resort to the statutory mechanisms. It might be that we have not got to the bits at which consensus will break down; nevertheless, consensus is taking us a long way, even in this rather fraught political situation. Issues of political divergence do not have to become sticking points—it is quite possible for people to accept the legitimacy of divergence in the creation of the common frameworks.

Patrick Harvie: That brings me to my final point. Professor McHarg sounds more optimistic than I had been expecting, to be honest. We are all grateful for your work and for advising us and giving us briefings on the issues, but I feel as if we have been going round the houses on this quite a lot. It is clear that significant constitutional innovation is required, but I see no evidence that the UK is ready for it—and this is three months after the original leaving date. Surely, then, it is completely implausible that significant constitutional innovation will cut through these problems by October.

The Convener: I can see a lot of people agreeing with Patrick Harvie.

Professor Dougan: If only people had thought of these things beforehand. [*Laughter*.]

Patrick Harvie: If only.

Dr Gravey: Quite a few Tory MPs are talking about abolishing the House of Lords. There is an appetite for constitutional revolution.

The Convener: And the whole concept of the sovereignty of the Westminster Parliament has been subject to real challenge in the process.

Angela Constance, do you want to come back in?

Angela Constance: Just briefly. Does the panel think that, whatever we do about the internal market, constitutional change is inevitable?

Professor Keating: Well, an awful lot of it is taking place—the question is whether we can understand it and anticipate what the real issues will be. We have spent the best part of two hours talking about the internal market, but we do not really know what is likely to come up. As Aileen McHarg has said, a lot of discussions about detailed issues have been put aside; that is going to be a problem, because, as Michael Dougan has pointed out, all kinds of things can come up in that regard.

The danger lies not in our making up the constitution as we go along—we all do that; indeed, that is how constitutions are always made—but in our not knowing where we are going and making decisions that will affect future decisions and get us into dysfunctional things. We had what I thought was an unfortunate process after the Scottish referendum, with the Smith commission and its being given between St Andrew's day and Burns night to come up with a new settlement. That was far too short a time, and the deadline was totally artificial. Now we face deadlines that are not artificial; they are real, and the danger is that we will stumble into things that will cause problems for the future.

Occasionally, we need to sit back and think about the implications of all of this. We will never have a grand-bang constitutional reform in the United Kingdom—that is just not the way it works—but we can stumble into dysfunctional things if we are not careful.

The Convener: Again, I see a lot of people agreeing with that. I should put that on the record.

Dr Gravey: As a French person, I suggest that you have a—well, I will not say that you should have a revolution. [*Laughter*.] However, there is something healthy about changing the constitution every few decades. We just like doing that.

Professor Dougan: We are probably living in the middle of constitutional upheaval that will lead to something more fundamental.

My main worry is that all this is being done in a state of heightened crisis management and not necessarily in the types of circumstances in which we would want such important decisions, with such long-lasting consequences, to be made. We know that bad decisions that are made in a crisis can have a very long-term impact and

fundamentally shape how issues are dealt with and governed long after the crisis itself has passed by. My main concern is the legacy that we will end up living with once this complete mess has passed us by—if it ever does. Sometimes it feels as if it will not.

The Convener: I guess that a fair bit of irrevocable decision making is going on at the moment.

That was a fascinating, informative and enjoyable session and I thank the witnesses for coming along and contributing. Your evidence will help us significantly, and I am very grateful.

I suspend the meeting for a few moments to allow a changeover of witnesses.

10:59

Meeting suspended.

11:10

On resuming—

Structural Fund Priorities (Post-Brexit Funding)

The Convener: The second item on our agenda is evidence being given in round-table format on the funding of EU structural funds priorities in Scotland post-Brexit. I welcome our witnesses. A few committee members—Murdo Fraser, Adam Tomkins and Patrick Harvie—have had to go to other committees that are considering legislation this morning. The round-table format is intended to allow for as free-flowing a discussion as we can manage. The session is informal, so witnesses should, please, feel free to join in. If you want to contribute, let me or Jim Johnston, our clerk, know and we will try to get you in as soon as possible.

The discussion will be based around three different themes—a different member will lead on the different elements. We will discuss allocation of funding, process and administration, and outcomes. I ask Emma Harper to kick off the discussion on allocation of funding. The committee has already held a similar session, and we have been around the country—to Paisley, Dunfermline and Inverness—to talk to people who are very interested in EU structural funds. Some of what you tell us will therefore not be new to us, but much of it will be, so we look forward to the discussion. Over to you, Emma.

Emma Harper: I am interested in how allocation of funding will work. Earlier in the meeting, Michael Keating said that the funding will not be Barnettised. How will future funding be allocated, and what level of funding should Scotland receive?

The Convener: That is your starter for 10. Who wants to kick off?

Roddy MacDonald (Industrial Communities Alliance): That is a good question. The actual quantum is important. I do not believe that we should have a penny less. That is where I would start.

The Convener: Do you mean for the whole UK? Do you want to break down what that means for Scotland?

Roddy MacDonald: For Scotland, that would mean getting the same as we got from the previous funds. It is very important that we get exactly the same.

Professor David Bell (University of Stirling): The UK Government has indicated that the shared prosperity fund will be about the same size as the existing EU structural funds. My paper shows that that is still a relatively small proportion of total

Government spending—indeed, it is relatively small in comparison with the amount that Scotland spends on its own account on economic development and skills development.

I will look first at the UK level. Allocation of the shared prosperity fund will be done similarly to how allocation currently happens. Essentially, it will be done through a needs-based assessment, rather than through the Barnett formula. Based on a needs assessment, Scotland would mostly come out with about its population share. Based on a list of indicators, such as gross domestic product per head or unemployment, Scotland tends not to be that far away from the UK average. That would mean that funding per head in Scotland—I show this in one of the figures in my submission—would be pretty close to the UK average.

One would have to manipulate quite dramatically the way in which need was assessed in order to find ways of giving Scotland a higher proportion than its population share. That would be the case as long as a measure such as GDP per head or unemployment—a standard economic statistic—was used as a basis for the needs assessment.

11:15

Malcolm Burr (Comhairle nan Eilean Siar): The quantum should absolutely not be less. It is also important to bear in mind the principles of EU funding, such as the level playing field and the cohesion elements. We certainly hope that those would be retained, because they have been immensely beneficial.

Distribution should, of course, be based on need. How need is defined will be the subject of argument, but need has always been the basis of EU cohesion policy, against the principles. Local government very much hopes that acceptable measurements of need can be devised that will enable the quantum to be distributed equitably.

Angus MacLeod (Highlands and Islands European Partnership): I agree with most of what Malcolm Burr said. Distribution should be based on need. It is important to remember that the Highlands and Islands is a transition region. The Conference of Peripheral Maritime Regions of Europe has produced a theoretical projection that says that, if we were still to be in the EU, we would still be a transition region.

On the measurements that we should use, GDP has been mentioned, but it is a bit of a blunt instrument. We would be looking for measurement of things such as peripherality and rurality. The Islands (Scotland) Bill talks about island proofing. All the islands are inside the partnership's radius, so we would look for something like that to deal with the Highlands and Islands.

Stuart Bews (Aberdeen City Council): I will add to Roddy MacDonald's point. The Scottish cities feel quite strongly that the value of the funds should not be reduced. The second point is that the funding should all be money that is not currently available. We know that there are funds available to us at UK and Scotland levels, and we do not want those funds to be absorbed into a UK shared prosperity fund, because that would mean an overall reduction in the funds that are available.

Malcolm Burr and Angus MacLeod talked about need. When we talk about the need for funding, we need to consider the purpose and intention of the funds. For example, we want to encourage innovation, so we need to ensure that the criteria that we employ to determine how we allocate funding take into consideration such factors, rather than just looking at need in the sense that areas that are classed as transition areas should therefore automatically receive that funding.

Angus MacLeod mentioned rural areas; I represent cities. I wholly agree with him that rural areas need to be given consideration, but urban areas also need that. Some of the Scottish cities have been able to work together to identify ways in which they can act as drivers for economic growth. We believe that that creates opportunity. While the shared prosperity fund might have more of the social aspect that we currently see in the European social fund to support areas of need, we also want funding to support areas of growth in a way that is more closely aligned to the European regional development fund programme. We want to ensure that neither aspect is lost in the new programme.

Lynn Murray (Zero Waste Scotland): I agree that distribution should be based on need, but how we determine need is another question. Perhaps the national performance framework, for example, could be used to assess need in some way.

Zero Waste Scotland has had European money to accelerate resource efficiency and the circular economy. With that money, we have been able to create a fund and a business service for the circular economy, with business models that are very innovative, not just in Scotland but in the world. They are change leaders, in that respect. Because of the innovative nature of those organisations, change has been slow, but the work is gaining traction. We would want money to continue that work so that we are able to further accelerate the circular economy.

Roddy MacDonald: The quantum is a red line for the ICA—Scotland should not get a penny less than it currently gets, adjusted for inflation. Also, multi-annual funding periods are important for consistency and confidence, and to allow the money to bed in, in the communities that we all serve.

Another critical question for our members is when the fund would become operational. It must be fully operational and has to hit the ground running from January 2021, in order to ensure that there is no hiatus in regeneration activity in Scotland.

Gill Lawrie (Angus LEADER Local Action Group): I certainly agree with just about everything that has been said. Roddy MacDonald's point about multi-annual funding is hugely important. From the LEADER point of view, most of the rural businesses that we have supported are microbusinesses—small and medium-sized enterprises are our biggest level. They need to know that the support that is out there for them is more than year-by-year. That point is what I most want to press.

The Convener: I have caught quite a few eyes; I will come back to Emma Harper once we have got round everybody.

Malcolm Burr: I emphasise that the funding is truly transformational, so the security of multiyear planning, which permits proper strategic planning, is essential. Other public sector funding has varied and there is not so much capacity to match fund projects, particularly in local government, so the security of multiyear funding has allowed a bit of strategic planning in an era when the Scottish Government and local government have been on one-year budgets. We hope that all that will change for the next financial year.

The projects are not just transformational, but are part of the fabric of delivery of services to people—in particular, services in development of employability and skills.

Professor Bell: I remind everyone that when Theresa May introduced the SPF, her statement was about reducing regional or spatial inequalities. Those have grown in the UK and are bigger than they are in any other European country. Success in her terms will be judged by whether the level of inequalities—measured by, say, income per head—is narrowed by use of the funds.

It seems to me that the size of the funds would not in any way make a significant difference to spatial inequalities, although it is important that, if they funds do have significant effects, they are demonstrable. A significant part of the budget has to be set aside for evaluation so that any genuine additionality from spending public money can be shown.

The Convener: Where do you think the focus would need to be in order to achieve the aims that were set out by the Prime Minister?

Professor Bell: We are talking as if Scotland would be able to determine the formula whereby the different levels of need would be assessed in Scotland. That is not entirely clear; it is possible that the UK Government will take the view that the assessment is down to it, as the EU made decisions on transition regions and so on. That is a very important consideration.

Scotland could do that better, if it were allowed to make the decisions on its own behalf. My paper tries to illustrate the kinds of trade-offs that must be made. You have to decide whether you are going to go into some areas much more heavily—because, for example, they are areas of high deprivation or there is population loss—and trade that off against more mild interventions across a wider area. A lot of trade-offs have to be addressed. It is a multidimensional problem.

The Convener: So, the quantum might be the same but how it is distributed could change significantly.

Professor Bell: Absolutely.

The Convener: I see that Angela Constance wants to come in. I will come back to Emma Harper later.

Angela Constance: Having heard what people have said about ensuring that the quantum is not diminished, I wonder what your views are on the level at which decisions should be made about particular aspects of the funding and whether it should be distributed at a United Kingdom, Scottish or more local level.

When we talk about multi-annual funding, we mean periods of three, seven, 10 or 15 years and so on. The Economy, Energy and Fair Work Committee is scrutinising the Scottish National Investment Bank Bill, and it is hearing from a lot of people about the importance of being patient with investments and having the courage to look to the longer term. What are your views on that?

Finally, how likely is it that the new scheme will be fully operational by January 2021?

The Convener: There were a heck of a lot of questions in there.

Angela Constance: I just thought that I would shove them all in.

The Convener: You did a good job.

Gill Lawrie: Again, I have to stress that I am speaking from my experience of the LEADER fund, but I think that we have to be careful with regard to the issues that you have raised. We cannot simply measure things on the basis of income per head. After all, life in rural areas is about more than earning money—it is much more about the quality of life.

The other point is that LEADER funding was based on variable scoring developed by the James Hutton Institute, which considered issues

such as an area's population level, remoteness and so on; in other words, a greater emphasis was placed on life in rural communities. I believe that a strong element of the funding should come down to the LEADER local action group system, which is all about local people making decisions on local projects.

Lynn Murray: Angela Constance has asked a lot of questions, but I will answer the one about the length of time for funding. The current ERDF programme runs from 2014 to 2020 but, in reality, we are looking at extending that to 2023. That is a good period of time, because any new fund takes time to get established. The hope is that we can learn from the experience of previous funding and incorporate that into any new fund that comes up.

The multi-annual aspect is helpful. There has to be a focus on partnerships, because the funding is transformational. That would be better than having individual lead partners looking to individual companies. We need to think about how the public and private sectors can collaborate to come up with transformational projects. A timescale of around eight or 10 years is good, because it means that, when you go out to talk to partners, you can be certain about your funding, which, strategically, is helpful for everyone.

Malcolm Burr: The best means of distribution involves a mix of approaches. There is certainly a place for Scotland-wide programmes, but I have to say that our experience over 30 years is probably that the most effective programmes have been delivered either regionally or locally. There is, unquestionably, a place for national programmes, but I would suggest that there is a place for the regional, particularly in the context of transport and infrastructure. There is also a place for the local—indeed, the Islands (Scotland) Act 2018 now requires any criteria to be island proofed. Culture and heritage, too, benefit from local intervention.

11:30

We have an opportunity to make a fresh start. Community planning is a lot more developed, and the local outcome improvement plans that we now have should recognise the Scottish Government's national priorities as well as local priorities. There is a better base for local structures, in addition to the regional and national dimensions.

Stuart Bews: On Angela Constance's final question about the level of confidence in the fund being operational from 2021, I would say that there is, quite clearly, very little confidence that that will happen. The current programme, which was not a dramatic change from the previous programme, encountered delays. Given the scale of the change that there might be with a fresh new fund, I genuinely cannot see how it can happen prior to 2021. As has been said, that will create a big problem, because there will be a hiatus between funds and activity will cease, unless funding is made available to continue it.

On the question of levels of accountability and decision making, having seen the impact that the LEADER fund can make at a community level, I think that it is essential to have the flexibility to make decisions at that level. It is less about taking a view that decisions must be made at a certain level and more about determining what we want the fund to deliver and what the most appropriate level will be for the decision making.

In the current programme, a lot of the decision making or accountability has shifted to the lead partner. Some lead partners have taken on almost the role of mini-managing authority, which is a huge burden in addition to supporting delivery and dealing with the compliance aspects.

It is all about finding the right level. Before we came into the committee room, we were talking about the impact at community level. The funds do have an impact at that level, but they are currently so complex that community groups really struggle to get involved. Part of the decision-making process has to be about making the process more accessible for communities where the funding can have an impact.

The Convener: We will discuss the issue of process and administration in a moment.

Angus MacLeod: On the multi-annual financial framework, we support having a seven-year period, as it would provide stability and enable long-term strategic planning.

As for how far the decisions should be devolved, we would certainly look for them to be devolved to the Scottish Parliament, with further devolution to the Highlands and Islands. Some of our most successful use of European money has involved a Highlands and Islands body; that is lacking in the current programme, which probably has not served us as well as other European programmes have done. We have a lot of expertise and, as stakeholders, look to have some involvement in how the money is used. I am not precious about the name, but I think that there has been some discussion about something along the lines of a joint regional board. That is what we are looking for.

The Convener: I come back to Emma Harper, who began this conversation.

Emma Harper: LEADER funding is really important. At last week's meeting of the cross-party group on rural policy, we had presentations on what would happen if we lost expertise in making applications. There are people who are very knowledgeable in that regard. LEADER

funding has been fabulous for rural areas and contributes £20 million to my area of Dumfries and Galloway. Are you concerned about the transition and a lack of expertise as we move forward?

Gill Lawrie: I completely understand where you are coming from, but I am not sure that I can give you an answer, simply because I do not work at that level.

Losing the expertise of those members of staff who worked through the complicated LEADER process, which Stuart Bews mentioned, has been an absolute nightmare, and it has certainly put people off applying. We have lost a core of staff members who, since the early 1990s, have understood and grown up with countless LEADER programmes. It is a system of funding that has produced some really worthwhile projects and staff skills.

The Convener: People have talked about 2021, and we need some assurance about what will happen after that. Whether it is LEADER or other programmes in Scotland, there must be some earlier point at which, if we are not clear about the future, there will be an impact on people involved in these organisations. When will the alarm bells start ringing for your organisations? When will you have to say to people, "I am sorry, but we are going to have to issue a 95-day notice"? That is what I am trying to get at. How soon will decisions have to be made before there is an impact on human beings who work in the sector?

Gill Lawrie: The alarm bells are already ringing. We have staff who are looking to their future and where they will go after the LEADER programme finishes in December 2020. At the moment, there is nothing that we can offer our local projects, groups and communities that will fully replace the LEADER process, so the alarm bells are going off right now.

Lynn Murray: I agree with that.

Perhaps I can highlight as an example our experience of the current European regional development fund programme. Because this was a new fund that Zero Waste Scotland had access to—we had never had European funding before—it took us a couple of years to get used to it. Indeed, it was also new to the Scottish Government and the managing authority. I know that we will go on to discuss administration, but it is important to mention in this context that the systems were still being developed, and the rules were changing. There had been a previous European programme in which staff had been timesheet based, but with the move to 100 per cent allocation, we had to move things around organisationally to ensure that staff working on the ERDF programme were working on it 100 per cent and that that was reflected in our structures.

On Emma Harper's question about the impact on us, we have staff who work 100 per cent on the European programme, so we want certainty. There is no certainty about what will happen, and the sooner we get that, the better.

Malcolm Burr: We will begin those discussions in this financial year with a view to making unpalatable decisions in the next. That is simply because councils and other partners cannot fill the gaps in a way that might have been possible in years gone by. It is therefore our duty to do this.

The problem is the lack of clarity following the lack of consultation on future and post-Brexit funds. If we knew what the criteria were, we could plan and work towards them in harmony with the Scottish Government and others, and we could work to keep people and give continuity to employees and those who are retained by other organisations. That is the problem here.

The Convener: It makes me wonder about the scale and number of people around Scotland who will be affected. I do not expect anybody to answer that question just now, but we need to get a grip on that issue and understand it.

Professor Bell: There is a principle here that I have not really thought about before. I am sympathetic to the idea of a multi-year fund, but I think that the approach taken in EU funding, in which a budget will be provided from, for example, 2014 to 2020, is so alien to the Treasury that it will struggle to cope with that sort of idea.

At the moment, we have a two-yearly spending review. That is the way that public spending is allocated in the UK. If we want to go outside that framework, a special case will have to be made. I would support it, but it is a function of what will happen post-Brexit with the move from one funding model back to a UK funding model.

The Convener: That is an important point. Thank you, David.

Neil Bibby (West Scotland) (Lab): On the allocation of funds in Scotland, how should we put the funds that we are talking about today alongside all the other funds that local communities and local authorities get? The local government budget is £10 billion, but local authorities have different opinions on who gets a better deal out of that budget and other funds. Some areas that struggle with population growth feel that they are punished by the local government formula and, conversely, some areas benefit.

I am not suggesting that we have a debate about the local government formula or that we change it. I just wonder what cognisance we should take of the other funds that local authorities

and local communities are getting, given that we want to tackle poverty and regional inequalities.

The Convener: Malcolm, you are in the lion's den with that one.

Malcolm Burr: First, it is a fiendishly difficult job to find a funding formula for the whole of Scotland. However—and I think that this would apply across local government—we cannot simply apply mechanistic formulae such as the Scottish index of multiple deprivation. Good though that is, it does not work for all parts of Scotland. None of these things is perfect, but we need to consider a combination of things including gross value added, gross domestic product, income per head, population issues, remote and rural factors and island proofing.

It is not going to be easy, but the principles of EU cohesion funding should not be lost in the calculation. It is about having equivalence and a level playing field, and about diminishing structural disadvantage—those should always be the main criteria. It is absolutely relevant to look at factors that other funding formulae do not look at, because it is new, additional funding that is there to give equivalence, not to bolster existing funding mechanisms.

The Convener: There is a conundrum here, though, is there not? I am told that, in some areas, we are now in crisis because of the timescales. How are we going to do all the work to create all those new formulas and put all the new ideas into effect in the timescale available in order to ensure that, if the funds are going to continue, things are seamless as they can be? Trying to reinvent something at this stage is going to be a bit of a challenge. Could the national performance framework come in here by providing an overall focus for what the funds should be about? Should that be the driving force for how we allocate the money?

David, I look to you to help unpick some of that before we move on to the topic of process and administration. I know that it is a big question to resolve in such a short space of time.

Professor Bell: I agree with Neil Bibby's point. There are so many funds out there such as the cities initiatives and a variety of other things. What worries me about it all is this: money is being spent with the best will in the world, but how does it fit and mesh with the national performance framework and the things that the Scottish Government sees as being important overall? I am very sympathetic to the idea of distribution happening at as low a level as possible, which might well be the community level.

If we start with a number of indicators, we end up with huge arguments about how we should weight them. How much weight should we put on, say, GVA per head? If you go down that road, which you certainly can, the geography becomes important. Glasgow does not turn out too badly in that respect, but, clearly, it has areas that are severely deprived. How you determine geographical issues is also important.

11:45

Aside from income growth, I had thought about deprivation and, indeed, population decline, which I am not entirely sure we are thinking entirely clearly about how to deal with. There was an item on "Good Morning Scotland" about Caithness and the rapid decline in population that it is facing, with the result that public services are collapsing and so on. The importance that I place on the issue is just a personal view, but it seems to me that the population adjustments that are taking place should be somewhere in the mix when we are deciding what to do.

The Convener: All that suggests that the situation is very complicated.

Professor Bell: That is right.

The Convener: That has been a good opening discussion. We will now move on to the issues of process and administration.

James Kelly: Earlier, Stuart Bews and Lynn Murray spoke about the complexity of the current process. In particular, Stewart Bews touched on how that could constrain the ability of some groups to access the funds. One of the themes that we picked up on in the workshops that we held around the country is the complexity of the process. We are talking about public money, and the public have a right to know that that money is being allocated and spent correctly, which means that we must have a proper compliance check to ensure that that is happening. However, one of the pieces of feedback that we picked up suggests that the process is overly complex and onerous and that, in some cases, people are spending too much time administering the process as opposed to dealing with the groups that they are supposed to be helping. There is clearly an issue there.

With regard to the shared prosperity fund, how could that process be shaped so that it is streamlined and efficient while ensuring that we have in place the correct compliance and monitoring, so that the public are getting value for money and the money is being spent properly?

The Convener: Thank you for introducing the subject so well, James. That is exactly what we need to hear about. I see that Stuart Bews is eager to comment.

Stuart Bews: I mentioned this issue earlier, so you will not be surprised that I want to contribute to the discussion.

The disappointment with the programme is that there are limited funds available within it. When you access those funds, you want them to have an impact in your locality and to benefit those individuals who require support. However, we are finding more and more that the compliance requirements are disproportionate to the support that we are trying to provide. Particularly in Aberdeen, we are trying to support individuals who are quite hard to reach. There is not an abundance of people who require support, but the needs of those who do are complex.

In order to satisfy the audit and compliance requirements, we spend a huge amount of time determining whether a person is eligible to receive support. The physical data that we have to hold in relation to that is onerous. Because of general data protection regulation requirements, the conditions regarding how we can hold that data are also onerous. Further, as you can imagine, at the point at which we are supporting the individual, there is yet more documentation that we need to hold. When it comes to the process of submitting a claim, all of that information has to be made available to an auditor, who will then determine whether we hold sufficient evidence and so on. We go through pre-verification checks, and all of our procurement documentation is checked as well.

I am not saying that we are afraid of accountability—absolutely not. To some extent, we appreciate the fact that this is public money and that we should be held to account for it. However, there needs to be proportionality. If the focus is more on accountability and compliance than on delivering support for individuals who require it, something has gone wrong and the balance must be addressed.

The Convener: That is helpful.

Lynn Murray: I agree that there definitely has to be proportionality. Our fund is geared mainly to SMEs and, from the start, the managing authority said, "Take risks on the project but not on the record keeping." It took a bit of time for us to understand the requirements and to make sure that the evidence and records reflected them, as everybody has said.

We wanted our strategic intervention to provide support to community groups, but that proved difficult because the difference between the ERDF and other funds was the need to evidence disbursement. Community groups can prove that they have paid for something because they have a receipt—often, a person has gone to a shop and has the till receipt, which will be the evidence—but the ERDF needs disbursement to be proved. It was really onerous, as was the level of administration that was required to audit a £2.50 receipt—I am exaggerating, but it was out of kilter. There are then however many levels of audit, all auditing the same thing, with each level audited by another, which is also very onerous.

The Convener: Wow.

Roddy MacDonald: My colleagues in the West of Scotland European Forum and in local authorities tell me that the current labyrinthine administrative mechanisms stifle innovation, flexibility and delivery of the programme. It is clear that the new fund offers an opportunity to listen carefully to the people who work with the funds from day to day about the lessons that have to be learned.

We are not saying that we do not want to be audited or accountable, but we do not want auditing and accountability to get in the way of delivering for our communities. That balance is key, and we have not got the balance right just now. The new fund provides the opportunity to see the positive things that have come from European funds and what should be maintained as part of the new order.

Surely to goodness, the current system does not work. I have spoken to people across Scotland, as I am sure you have. I know from personal experience with the LEADER programme in Ayrshire that the staff work hard and engage with community groups as best they can, but those groups find it really hard to cope with the amount of accountability and bureaucracy that are involved in programmes. If we are going to make a step change so that the new fund is better for our communities—which is who it is for—we need to find ways to minimise unnecessary administrative burdens and maintain the ones that are required for legal purposes and scrutiny.

Malcolm Burr: I will be very brief. The approach needs to be more outcome focused. Are the outcomes being achieved? When we talk about aspirational programmes, have all reasonable efforts been made to achieve the outcomes, or have the outcomes been achieved in a different way? The problem with the current system is that it is labyrinthine and ambiguous. There is nothing wrong with a rigorous system; wearing one of my other hats, as a returning officer, I know that the election rules are rigorous and complex, but they are unambiguous. The current system is labyrinthine and ambiguous, and that is what needs to change.

The Convener: What would a new process look like?

Malcolm Burr: Lessons could be learned from how Audit Scotland goes about its work on auditing outcomes across the public sector, which is proportionate but rigorous.

The Convener: The comment was made in a previous evidence session that the Scottish Government disburses lots of money to many organisations across the country and there is a normal process for doing so. When the EU funds no longer operate, would it be sensible to default to a system that we already have in Scotland, whereby the Government disburses money and there is an audit process? That would save us from having to reinvent the wheel. I am just throwing the suggestion out there; I am not saying that it is the right solution. What are people's thoughts?

Angus MacLeod: We make that very point in our submission. We say:

"In order to avoid duplication of process",

there could be

"the use of the existing internal and external ... audit systems".

To pick up on other points that have been made, it is important to have clear and consistent rules from the outset. What we are experiencing just now is some retrospective application of rules, which is causing difficulties for some of our organisations.

On the process itself, it would be useful to have a fall-back system, by which I mean a paper-based system, so that we are not relying on a system that depends on broadband access. Some of our LEADER areas are our most remote and rural areas, and trying to fill out application forms online causes people unnecessary stress.

Angela Constance: I have been thinking about a comment that David Bell made in the discussion about having a proportionate system. Is there a role for proper evaluation of outcomes as opposed to the monitoring of minutiae and cumbersome verification processes? The Scottish Government introduced a communities fund for small-scale projects—it was a bit of an experiment. The Scottish Community Alliance managed the fund, which was intended to enable small amounts of money to be disbursed at a very local level with minimum bureaucracy if people could demonstrate that they had a solution to a local need. It might be interesting to look at how that work has developed in relation to outcomes.

I am interested in hearing folk's views on the pros and cons of match funding.

The Convener: Stuart Bews, I think that the cities have a view on how that could be done better—if I have read your submission correctly.

Stuart Bews: Sorry, which part are you thinking about?

The Convener: I am thinking about what you say about how the city deals funding is being used. It would be helpful to hear about your experience, because we have heard a lot—understandably—about LEADER, the rural perspective and the islands and Western Isles.

Stuart Bews: From the city perspective, we feel that the amount of evidence that is required for payments of disbursements through to bank statements is overly bureaucratic. Where they are in place, the city region deals and the local outcomes improvement plans are very outcome focused. We are outcome focused and trying to deliver in that regard, so it makes no sense that we are asked to present evidence not of our achievements but of how we have spent the money.

Do not get me wrong—we are happy to provide evidence of what we spent the money on to the level that is required. However, we need a balanced approach that takes account of the achievement of our outcomes. Currently, we could totally fail to deliver what we are trying to deliver but that would be acceptable as long as we could evidence everything that we spent the money on and it was all eligible.

The Convener: Does anyone want to pick up on Angela Constance's point about getting money into communities?

Roddy MacDonald: I understand that, under EU regulation, the Scottish Government cannot exceed an intervention rate of 50 per cent. That appears to be a fact. Alliance Scotland, in consultation with its members, has come to the view that the 50 per cent rate should be adopted as a minimum and not a maximum. We think that that would help communities and community groups to go about their business in a supported way.

The current intervention rate is not helpful. We recommend that, for any new funding system that comes into play outwith the EU, the Scottish Government should give serious consideration to 50 per cent being the minimum and not the maximum.

12:00

Malcolm Burr: I strongly support that view. I come from a council whose match fund is virtually entirely committed halfway through the council's term. As public sector funding falls and as the Scottish Government and, hence, local government face capital pressures, the capacity to match fund as we used to do is seriously reduced. Some councils have reserve funds and access to other means, but others do not. The subject needs to be looked at with a view to there being greater flexibility. Roddy MacDonald's suggestion on the intervention rate would be one way of doing it.

If I may, I will say a few words in response to Ms Constance's question about outcomes. We had a situation whereby a greater number of people were helped to achieve the outcomes that were the objective of the funding but the original client group was drawn so narrowly that—rightly, in audit terms—we did not meet the criteria. The work helped a very small number of people who were caught within the definition, but a greater number of people benefited from the money. We ended up repaying some of it. I am not criticising anyone who was involved in that process, but that is a relevant point about outcomes. The outcomes were achieved for the community, but the client group was drawn so tightly that I do not think that it would ever have been possible to meet the outcomes with such a narrow focus.

The Convener: We are going to move on to outcomes but, before we do so, is there anything else that you want to pick up on, James?

James Kelly: No. We have covered that subject well.

The Convener: I think that Angus MacLeod wants to add a point.

Angus MacLeod: I will be very brief, convener. On Monday, I had a conversation with a colleague who advised me that private match funding had not been written into the current programme. That seems to be an oversight.

The Convener: We have strayed quite far into the area that Willie Coffey is going to ask about. I ask him to see where he can take the conversation as we begin to bring the session to an end.

Willie Coffey: I seek the witnesses' views and thoughts on outcomes in general and on whether there is a fresh opportunity to think about what outcomes there should be. I was interested in Malcolm Burr's comments about how, in practice, he has found particular outcome definitions pretty restrictive.

Generally speaking, what should the new outcomes be if the funds continue? Should we change the models for what they are and what they are supposed to deliver? Should we apply the Scottish Government's national performance framework outcomes? Should we expect outcomes to fall out of the shared prosperity fund? What should we do to make things better and truly deliver benefits for the communities that we represent?

Malcolm Burr: My bureaucratic answer has to be that it depends on the criteria for the funding and what the Scottish Government and others can do within those criteria. That is the obvious answer, although it has to be stated. We do not know what the criteria will be. I think that we are all worried about the burden that will fall on us when all of this comes, as we hope it will.

There is a wealth of material out there. You mentioned the national performance framework. There are also local outcomes improvement plans, and a great deal of work is being done through the Convention of Scottish Local Authorities, the Scottish local authorities economic development group and other bodies. We will be pressed for time, but it will certainly not be beyond us to work out outcomes that are suitable for regions and localities.

For example, the focus in my area will be population retention, which is about skills, housing, infrastructure and jobs. In other areas, it may be more about innovation and the infrastructure that supports that—5G and all the rest of it. I do not think that it is beyond us, but it must be focused on outcomes. For example, we will need to ask whether the Western Isles has slowed the rate of depopulation. We have done that, but it is still a concern. When jobs are created—in that regard, I echo Gill Lawrie's point about microbusinesses that small numbers are transformational—do the people who are employed in them have a place to stay? Those are the questions that need to be asked. In the public sector and the Parliament of Scotland, there is a capacity to derive and define measurable and useful outcomes.

The Convener: Does anyone else want to come in? Does Lynn Murray want to come in with a Zero Waste Scotland perspective?

Lynn Murray: I agree. The national performance framework for Scotland is overarching, and any local authority or public sector organisation should link up to it, so in theory it would be a good base. There is a question about how we weight different aspects within the framework—we might need an economist to look at that. I agree that the process should be outcome-based.

The Convener: Given that economists are being talked about, would David Bell like to contribute?

Professor Bell: I generally agree that we could have a set of outcomes that vary between different parts of Scotland but which are still consistent with the national performance framework. My submission mentions population decline, which is a significant concern.

One area that is difficult to measure but which a lot of recent work seems to be moving towards involves trying to maximise the amount of social capital in communities, which is about cohesion. Some work is being done on that. It relates a little to the work on wellbeing, and it is interesting that New Zealand is now seeking to maximise wellbeing rather than GDP. I do not think that the

question can be answered off the cuff. Nevertheless, the shared prosperity fund would be an interesting exemplar if we want to have a national conversation about the key elements that fit within the national performance framework with a particular weight that is appropriate for each locality.

The Convener: Whether the shared prosperity fund operates at a UK or Scottish level—from what I hear from those round the table, the preference seems to be for the latter—we need to discuss and decide on the outcomes that we want before we start to design and create the architecture for delivery. I would like to hear your reflections on that.

Professor Bell: I tend to agree with that. In addition, we need to consider how we will evaluate the outcomes. We can have outcomes at different levels. One level of evaluation is considering whether a project achieved the stated outcomes that were written into it at the outset. That is important, but we also need overall evaluations, which are generally undertaken after the event.

For example, I recently saw a paper that looked at regional selective assistance, which is still available in Scotland to support companies that the Scottish Government has, for whatever reason, decided to support. Basically, the argument was that RSA had been a successful policy and that it typically added to growth in particular areas. We have to think about all the outcomes and layer them, and figure out how they fit within the Scottish national performance framework.

Stuart Bews: From a local authority perspective, there are city region deals and local outcomes improvement plans, and I think that it would be a bad idea to introduce something additional to those. If we used the outcomes that we have as the outcomes that we would like the UK shared prosperity fund to help us to achieve, that would help us to deliver some of the priorities at a Scottish level, too. A fair amount of work needs to be done, but using those existing models would reduce the amount of work, as we would not need to create something new.

Roddy MacDonald: A movement away from a reliance on figures, numbers and graphs of all sorts would be welcomed by everyone. A key aspect is about the softer aspects of the discussion, such as how communities can feel involved, what their views are about how funding should be spent in their areas and what is important to them rather than to the people in the county buildings in Ayr or the city chambers in Glasgow. The Community Empowerment (Scotland) Act 2015 is a really interesting piece of legislation because it starts to open up the box with regard to letting people get on with things for themselves. Governments and councils can only do so much. The communities themselves are the X factor that can make a real difference to funding. Therefore, I would like there to be more discussion with people to find out what is happening in communities and how we can help them to spend the money in a way that is fundamentally transformational for them.

I agree that, when we are dealing with large sums of money, we need to be focused on figures and so on. However, there is also the important soft element that involves ensuring that we are not just spending money for the sake of it and saying, “I’ve spent that money and that’s good.” We need to think about how we are spending the money and how we engage with people to ensure that the community gets the optimum benefits from that funding. That is an important consideration with regard to any funding options. It is about what difference the funding will make, where the ownership lies and how the communities are being engaged.

Gill Lawrie: Roddy MacDonald has hit the nail on the head. Again, I stress that I am talking about LEADER funding. At the start of the LEADER programme, we were asked to work through local development strategies, which were policies that were focused on each LEADER LAG area. That involved community consultations with all sorts of groups, including my group, which was workers in Angus, and it brought out a lot of issues at that local level.

On evaluation, it is easy—I place that word in inverted commas—to follow the stated outcomes of jobs created and so on. However, what is missing is a consideration of the social outcomes of projects, because those outcomes take a while to come through and become visible. In the coming weeks, the LEADER groups will be focusing on some of the more long-term gains that have come through the projects, whether they have supported community village halls, tourism facilities, industrial facilities or whatever. We are going to try to evaluate some of those softer things that Roddy MacDonald mentioned. That work is on-going, so there might be something that we can take out of that at a later date.

Angus MacLeod: Building on the local and regional elements of the discussion, the Highlands and Islands European partnership has produced a regional policy position paper that highlights some of the themes that we would like to explore in relation to the new funding and where we would like the region to go. In addition, the convention of the Highlands and Islands has highlighted a number of priorities, which are not too different from the ones that Malcolm Burr talked about—talent attraction, housing, digital infrastructure, physical infrastructure, marine infrastructure and

building capacities in communities. We can use the existing documents and the existing organisations to help build on our ideas about what our priorities should be.

A final point that I would make is that I understand that the UK's shared prosperity fund is linked to its industrial strategy. That sits quite uncomfortably with our part of the world. I do not necessarily see how that fits in with a rural perspective.

12:15

Willie Coffey: I am encouraged by what I am hearing. I represent Kilmarnock and Irvine Valley. At any point in the past 10 or 20 years, our indicators have always seemed to be behind the Scottish figures. The same could be said for any community in the Western Isles, for any rural community, for any community in inner-city Glasgow and for other areas of deprivation. If the kind of money, effort and investment that we are talking about is not turning those indicators around, people are entitled to hold us to account and ask why.

I like what I am hearing about localising priorities and ensuring that the money is aimed at delivering what matters for communities in Scotland. If the process gives us an opportunity to let us rethink what the outcomes should be for communities, that is a great service that will deliver results for the people who we represent.

The Convener: This has been a useful evidence session. We will pull together a report, with the aim of publishing it in the autumn, although that will depend on other things that might be in our work programme. I thank everyone for coming to contribute to our process.

Meeting closed at 12:16.

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba