OFFICIAL REPORT
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Finance and Constitution Committee

Wednesday 16 September 2020

Session 5

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Pàrlamaid na h-Alba

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FINANCE AND CONSTITUTION COMMITTEE
20th Meeting 2020, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Tom Arthur (Renfrewshire South) (SNP)
Jackie Baillie (Dumbarton) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Angela Constance (Almond Valley) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Dean Lockhart (Mid Scotland and Fife) (Con)
*John Mason (Glasgow Shettleston) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor David Bell (University of Stirling)
Dr Dominic de Cogan (University of Cambridge)
Jonathan Hall (NFU Scotland)
Professor Michael Keating (University of Aberdeen)
George Peretz QC (Monckton Chambers)
David Thomson (Food and Drink Federation Scotland)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Virtual Meeting

Scottish Parliament

Finance and Constitution Committee

Wednesday 16 September 2020

[The Convener opened the meeting at 09:30]

United Kingdom Internal Market Bill

The Convener (Bruce Crawford): Good morning, and welcome to the 20th meeting in 2020 of the Finance and Constitution Committee. We have received apologies from Jackie Baillie.

The only item on the agenda today is evidence from two panels of witnesses on the United Kingdom Internal Market Bill. First, we will hear from Professor Michael Keating, professor of politics at the University of Aberdeen; George Peretz QC of the Monckton Chambers; and Dr Dominic de Cogan, from the University of Cambridge. I warmly welcome our witnesses. I remind members that they should direct their questions to a named person. If another witness wishes also to respond, they should request to speak using the chat function.

We will go straight to questions from the committee. I will start. The witnesses might be aware that the Public Administration and Constitutional Affairs Committee at Westminster, when commenting on the internal market white paper, stated:

> "to set in law the principles of mutual recognition and non-discrimination ... will effectively create new reservations in areas of devolved competence."

Does the panel agree with the PACAC? If so, would the bill not potentially provide powers that could significantly undermine the devolution settlement? If so, given the level of opposition to the bill in Wales and Scotland, how can we move forward constructively in a way that respects the devolution settlement?

George Peretz QC (Monckton Chambers): I will comment on the first part of the question, which was about the legal effect of the United Kingdom Internal Market Bill on devolved competence.

Two points arise. The first is that devolved competence in the areas that are not reserved was always subject to European Union law, and EU internal market law imposes considerable constraints on the sorts of matters that are broadly to be covered by the internal market bill. You will remember the proposal for minimum alcohol unit pricing in Scotland. Although, in the event, it was declared to be compatible with EU law, many people strongly argued for some time that it was not. That is an example of the sort of constraint that EU law imposed. Therefore, EU law, while we were in the EU, constrained the devolved competences. It is fair to say that, once the constraint of EU law is removed, the internal market bill will, in a sense, reimpose—in a different way—a number of constraints that EU law provided.

We might discuss later the extent to which the regime that is set up in the internal market bill differs from EU law. It does so both in substantive content and in the institutional mechanisms, which are entirely different because everything will be a UK matter.

It perhaps helps to think of the internal market bill as a horizontal measure. If one thinks of reserved and non-reserved competences as essentially vertical, the reserved competences are essentially defined areas of law in relation to which the devolved Administrations are not allowed to legislate. An example is competition policy. We might discuss what that means later, but competition policy is a reserved matter and none of the devolved Administrations have had the competence to pass a law that regulates anti-competitive conduct, such as cartels or monopoly power. That matter is reserved to Westminster.

There are vertical areas of competence, such as consumer or environmental protection law, that are not entirely devolved. When thought of in that light, the internal market bill is, in essence, acting as a horizontal control, because it reaches into every area of legislative activity and, within each of those, it imposes a further constraint. In essence, it signals to the devolved Administrations that they can legislate in an area that is not reserved, subject to the principles that are laid down in the bill. It parallels what one might think of as horizontal restraints on devolved competence, such as the reservation of matters in relation to which the United Kingdom has made an international treaty commitment, because the devolved Administrations are not generally competent to legislate in a way that is contrary to the international obligations of the United Kingdom. We may come on to that later.

As to the political consequences, I will leave that to others on the panel.

Professor Michael Keating (University of Aberdeen): The bill has constitutional implications, as George Peretz has just said. The devolution settlement was based on the reserved powers model, whereby some things are reserved to Westminster and everything else is devolved. European matters are also a constraint. However, the bill introduces to the UK system the idea of

transversal or horizontal powers that are very broad reaching and can reach into almost any competences of the Scottish Parliament.

It is true that that is how the EU works and that, once we have come out of the EU, we will not have it imposing that framework. However, the difference is that, under the internal market bill, the secretary of state will be able to change the exceptions by statutory instrument—and there are generally always exceptions to mutual recognition and non-discrimination and the internal market. The tricky bit is where the boundary will be drawn between matters that will be subject to mutual recognition and internal market rules and what will be excepted—because all kinds of things are excepted within the European single market.

The grounds for exception in the internal market bill are a lot narrower than they are in the EU legislation, so we are not talking about the same kinds of constraint. Also, within the EU, the procedure for setting rules involves intergovernmental negotiation, the Council of the European Union and the European Parliament. It is not a case of one level simply legislating unilaterally to impose things on another level.

In the European Union, there are principles of subsidiarity and proportionality such that measures can be taken only at the lowest possible level and can be as detailed only as is necessary, and, under certain circumstances, those measures can be appealed by member states or sub-state Governments in the European Court of Justice. The institutional protections that exist in the European single market for member states and devolved Governments are not present in the bill, which represents a significant change. Of course, the UK has always had the power to intervene in devolved matters, but it has hardly ever been exercised, and that power is given to the Parliament and not to ministers.

The Convener: I will move on to a slightly different area. I have not heard from anyone how we can sort that out. Before I move on to my other area of questioning, do any of the panellists have a view about how we can move forward in a way that might respect the devolution settlements? What amendments might be required?

Professor Michael Keating: I do not see the justification for the bill, given that we are having a process of negotiation about policy frameworks. Those negotiations have been going quite well, and all the Governments are engaged. That would suggest that the bill is about something that goes beyond the agreed policy frameworks, and it is not quite clear to me exactly what that is. It may be that the single market bill will not amount to very much—the term “single market” means the same thing as the term “internal market”, by the way. It may be that the powers in the bill will not be exercised, because the frameworks will deal with all the problems, but we just do not seem to know. It is concerning that such broad powers are being taken without the circumstances in which they might be needed being specified, but I suspect that they will probably not be needed at all.

Dr Dominic de Cogan (University of Cambridge): As a tax lawyer, I was a bit concerned that I might have nothing to say in this session, but I have found something. I am very concerned about the reservation in clause 48, on distortive and harmful subsidies. When I first read the bill, I thought that tax was excluded from the entire bill—there are exclusions in schedules 1 and 2—but, in fact, I cannot see any exclusion for clause 48.

The Government’s white paper mentions a tax break as something that might constitute a distortive or harmful subsidy. I note that there is no grandfathering procedure, so it seems that existing powers over harmful subsidies in the form of tax breaks will not be preserved in the Scotland Act 1998. I wonder whether this is perhaps an opportunity for the Westminster Parliament to interfere with the tax devolution settlement by saying, “You might have been giving this business rates break, or you may have plans to develop your tax system in this particular way, but, in fact, that may constitute a distortive or harmful subsidy, and, as it’s a reserved matter, we now have a degree of control over that.” My recommendation might be to get tax also exempted from the reservation in clause 48.

The Convener: That is quite a statement, Dominic. Thank you for making it, because it helps us to understand some of the challenges.

I am thinking about the current basket of powers that the Scottish Government exercises—including, for instance, over land and buildings transaction tax and landfill tax. If the Scottish Government was to move in those areas in a way that the UK Government decided distorted the market, the principles of the United Kingdom Internal Market Bill would apply. Therefore, in those areas, or in any other area of taxation, the UK Government could potentially interfere in the Scottish Government’s taxation policies.

Dr de Cogan: I may be overstating it, but I think there may be an issue here because state aid law in the EU is very slippery and requires a selective advantage. George Peretz will be able to speak to that better than I can. Depending on how you interpret things, it may be that a tax provision can be seen as selectively advantageous. It is a very slippery area of law in terms of people being able to say, “This tax measure gives a selective advantage.” Obviously, we do not know what the new state aid regime will be within the UK, but I

think that, at the very least, that is an area worth watching.

The Convener: Alex Rowley wants to ask a supplementary question, but I am going to bring in George Peretz first.

George Peretz: I want to make two points, one of which is a comment on what each of the previous two speakers has said.

First, a point that is worth making on the supposed urgency of the internal market bill is that clause 9 of the bill, in a sense, protects anything that exists from the scope of the bill. That is the effect of clause 9, and there is a corresponding provision relating to the mutual recognition provision. That being so, it is slightly hard to see why part 1 of the bill—I might come on to the even more extraordinary bits later—is urgent. The bill is only going to start biting to the extent that further rules will be made in England, Scotland, Wales and Northern Ireland from the beginning of 2021. The initial bite will be very small—it will bite only on new things—and that makes the urgency quite difficult to understand.

One startling feature of the bill is that it makes no reference at all to common frameworks. The common frameworks process is on-going, but it is recognised only implicitly as one basis for the wide powers that are being given to the secretary of state to, in essence, carve out whole areas from the principles of the bill. One imagines that what is envisaged is that, if areas become subject to the common frameworks, the secretary of state will use his powers to carve out those areas from the bill. However, there is a very indirect way of doing that.

09:45

The state aid provisions at the back of the bill do not, in any way, change the substantive law; they are simply a matter of assigning subsidy control as a reserved competence. Nothing immediately flows from that, but it is a restriction on the powers of the devolved Administrations that, certainly in my view, was not there before. We might come on to that issue later, but, in my view, there was no reservation of state aid or subsidy control in the devolution settlements, so those provisions are new and pull power back to Westminster.

Nevertheless, the Government's current policy in relation to subsidy control is to do very little. There will be no new UK subsidy regime coming into force on 1 January, although we are promised that there will be some consideration of a new regime in due course. We are told that the remainder of the EU state aid regime will be wound up, which, in relation to state aid, will leave us with only article 10 of the Northern Ireland protocol, which is, of course, the subject of clause 43 of the bill.

The only other development on that front is that, in the new agreement between the United Kingdom and Japan, the United Kingdom has entered into commitments to Japan in relation to subsidy control that, in my view, will require legislation, because they prohibit certain kinds of subsidy completely to the extent that they affect trade with Japan. I suspect that that might be the first bit of legislation based on the reserved competence that will be taken. However, because that is contained in an international agreement, the UK Government could probably have done it anyway on the basis that it is necessary to implement the international agreement.

Alex Rowley (Mid Scotland and Fife) (Lab): I want to go back to Professor Keating's point that the bill might never be used. The change from the May Government to the Johnson Government seemed to signal a significant shift in policy. Things such as common frameworks, in which the devolved Administrations were fully participating, seem to have been put to the side, or there is less interest in them. My fear is that the bill could be the foundation of a future trade deal with, for example, the USA that could be used to force goods to be sold in Scotland. Worryingly, that could also allow companies to get in about public services, which could be privatised by the back door.

The convener asked about possible amendments. Professor Keating's written submission states that

"There are no principles of subsidiarity and proportionality"

in the UK devolution legislation. Would it be possible to amend the bill so that we can move towards a UK framework that has built into it the principles of subsidiarity and proportionality?

Professor Michael Keating: I was struck by a phrase in the internal market white paper, which says that

"the UK is a unitary state."

That is just a phrase, but it needs to be unpacked a bit. Is it a unitary state or something like a federal system? That is the big philosophical issue that is not resolved.

On the frameworks, I understand that negotiations on them are still proceeding—they have not been finalised—but there is a lot of technical work going on.

On the last part of your question, the critical thing is what is exempted from mutual recognition or harmonisation. That is absolutely crucial, because the exemption would apply in the case of trade deals, with standards recognised by the UK

Government in respect of England also applying to the rest of the United Kingdom irrespective of local regulations. What is exempted? The bill says that health and social services are not part of mutual recognition and that they would be exempted. There is a narrow clause that talks about public safety and public health. However, apart from that, we do not know very much.

As I said, the corresponding clause in the EU internal market legislation is really quite broad. It talks about general public policy grounds and it covers things such as the environment and ethical questions, which are not covered by the rather narrow exemption provisions in the UK legislation. The bill also gives the secretary of state the power to change those things by affirmative resolution in Parliament, so it puts a lot of power in the hands of UK ministers to do things that would otherwise be constrained. That is the nature of our devolution settlement. Parliament can give ministers those powers, and it proposes to do so, which would be a change from the way in which devolution has worked hitherto.

Subsidiarity and proportionality are important in the European Union. It is particularly important that they can be enforced by the courts, but we do not have anything like that in the UK settlement. The Supreme Court can rule on the validity of acts of the Scottish Parliament but not on the validity of acts of the Westminster Parliament. In certain circumstances, the Supreme Court can rule on the use of powers by ministers, but, again, that is constraint.

I would like to see a lot more detail of the safeguards that are being put in the bill so that we are not relying on the good will of UK ministers. I am not questioning their good intentions, but we need a bill that would bind the current and future Governments to a clearer set of rules that would constrain what they could do, thereby safeguarding the prerogatives of the devolved Administrations and legislatures.

The Convener: I want to ask questions on a second area, but I will bring in Murdo Fraser first, because he wants to ask a question about this issue.

Murdo Fraser (Mid Scotland and Fife) (Con): It is a follow-up to Alex Rowley's question to Michael Keating, and it is on the impact on devolved services and, specifically, the comment about the national health service. There are specific exclusions in schedule 2 to the bill relating to mutual recognition and non-discrimination, which include a whole range of services, including the provision of healthcare. Is it not the case that the bill as it stands ensures that the NHS in Scotland is exempted from those provisions?

Professor Keating: I think so. I would like that, and the wording of it, to be confirmed, but I believe so. There are things around the health service, such as the provision of medicines, that may be in a grey area, but certainly the UK Government has recognised that health services are a Government responsibility and that broadly speaking they would not be subject to the bill.

Murdo Fraser: I have another question on an issue that Alex Rowley touched on. I will put it to Professor Keating, but the other witnesses can come in if they want to comment. If there is a concern that there would be an impact on devolved powers, is the fix to build into the bill a proportionality provision that would, in effect, reflect what is in current EU law? Would that cure the problem?

Professor Keating: It could. An impartial authority would be required to make a judgment or give advice about that. The Competition and Markets Authority acts as an adviser to the UK Government, but it is appointed by and responsible to the UK Government. On various occasions, my colleagues and I have said that it would be useful to have an independent body in the intergovernmental arena to give advice about such matters and do the analysis—a body that would be responsible to all the Parliaments of the United Kingdom, not just the UK Government.

George Peretz: I have a couple of observations. On the exclusions in schedule 2, it worth saying that, under clause 16(2), the secretary of state has power to add to or remove those exclusions by regulation. Therefore, the heft, or weight, of schedule 2 has to be seen in light of the fact that the secretary of state can make adjustments by regulation.

As Professor Keating said, one of the differences between this regime and the regime of EU law is that what one might think of as the public policy justification is much narrower. It is essentially restricted to public health and safety, whereas EU law recognises all sorts of other factors as potential public policy justifications, including environmental factors and animal welfare.

An example that I have used in thinking about this is one that comes from EU law. There is an EU law provision, which will become retained EU law on 1 January, that prohibits the sale of cosmetic products that have been tested on animals. That prohibition is nothing to do with public health or safety—nobody is saying that cosmetic products that have been tested on animals are any more or less safe for humans. The objection to their sale is an animal welfare objection. If, in future, the UK Government, acting for England, contemplated changing that regulation—for example, as a result of a trade

agreement with certain countries that do not have an objection to cosmetic products being tested on animals—under the mutual recognition principles in the bill, it does not seem to me that devolved Administrations would have capacity to stop that. That is an example of an issue that we might get into. One might hope that, politically, something like that would be resolved through a joint framework, but there is nothing in the bill that would require that to happen.

Tom Arthur (Renfrewshire South) (SNP): My question is for Mr Peretz and relates to clause 16(2). Clause 16(4) allows the secretary of state to

"make regulations under ... made affirmative resolution procedure"

for a period of up to

"three months beginning with the day"

on which that part of the act comes into force. However, clause 16(4) does not specify that that is for ancillary, saving or transitory reasons. Are there significant policy implications behind clause 16(4), or is it just a contingency power to deal with any unknown unknowns that could crop up after the act comes into force?

George Peretz: I am afraid that I do not know what the justification for that is. You are quite right that the affirmative resolution procedure does not apply for the first three months; only the made affirmative resolution procedure does. I am afraid that I simply do not know the thinking behind that. Perhaps it was thought that a number of regulations might need to be made rather more quickly during the first three months. I think that you will have to ask the UK Government what the justification is.

Tom Arthur: Just so that I understand clearly, the UK Government could remove health services from schedule 2 without immediate parliamentary approval.

George Peretz: Yes, that must be right. A made affirmative resolution leaves Parliament with the ability to do things but requires it to take the initiative. I think that you are right; the check on the UK Government's ability to do that is political rather than legal.

10:00

Tom Arthur: Thank you—that is helpful.

The Convener: The second area that I want to ask about relates to clause 46, which creates a new power for ministers to provide money directly to anyone, including organisations working in devolved areas. Michael Keating states in his paper that

"UK ministers are given wide powers to spend in devolved fields. This changes the previous assumption that they would spend only in reserved fields and that, with a few exceptions, financial transfers to the devolved administrations would go through the Block allocation governed by the Barnett Formula."

Is there not a risk that, by changing the established way that devolution is funded, clause 46 brings into question the whole premise of the Barnett formula, which is mechanistic and therefore not subject to the whim of UK ministers? I will go first to Michael Keating.

Professor Keating: Yes, it does. Of course, the Barnett formula is not statutory either; it is a rule of thumb that the Treasury adopts and, over a period of 40 years, we have gradually found out how it works. UK ministers have increasingly been spending in the devolved territories on small things, such as—[*Inaudible*.]—programme and other measures. They can do that, but it has never been done systematically.

We do not know what clause 46 is for. It might be just to deal with the proposed shared prosperity fund, which is the UK Government's proposed replacement for EU cohesion and structural funds, in which case, although much bigger in Wales and Northern Ireland, it is a relatively small matter in Scotland. However, once again, we have to take the UK Government's word that that is what it is all about, because, potentially, it is a far-reaching power.

That became a huge issue in Canada, where it is called the federal spending power. It was a major provocation that the federal Government was stepping on provincial competences. Although the federal Government does not have the power to legislate in those fields, through the use of that power, it can spend and, therefore, get its own way.

There are tremendous concerns about that from a public policy point of view, because it does not always make for good public policy if two Governments are spending in the same field without sharing the same objectives. It also creates scope for enormous arguments. If the UK Government spends here and there around the UK, we will want to know who is winning and who is losing. The Barnett formula is based on historical patterns of expenditure, so it might not be terribly logical, but at least it is fairly transparent—at least we now know how it works. It is much more difficult if UK ministers are simply spending on what might appear to be political or other grounds. It is about how that adds up. It is a worrying development that the Government would be given those powers.

The Convener: Dominic de Cogan, I know that your particular area of expertise is tax but, given that this is to do with financial matters, do you want to make any comment?

Dr de Cogan: It is really a question for David Bell, who is a witness in your next evidence session. Would the power change the allocation under the Barnett formula? I assume that it would not, but that would be my question; it is for others to answer it.

The Convener: In that case, we will move on.

Angela Constance (Almond Valley) (SNP): Good morning, panel. My first question is to Professor Keating.

You talk a lot about the reserved model of power. In the paper that you sent to the committee, you talk about the two interpretations of the UK: one interpretation is that it is "a unitary state" that merely lends powers to devolved Administrations, and the other interpretation is that we are "a union of nations". Given the sweeping powers that could affect standards in food, safety and animal welfare, given clause 46, which the convener spoke about, with UK ministers designing replacement EU programmes in devolved areas, and given what we have heard about clause 48 and the reservation of state aid, how are those things compatible with the current devolution settlement, or do they just exemplify the settlement's weakness?

Professor Keating: They exemplify the ambiguities of the current devolution settlement. Anybody can use phrases such as "a unitary state". We are not a federation, that is clear, but are we a federal kind of system? That vocabulary was used after the 2014 referendum—it was said that there would be a federalising process.

My point is that the argument is not about semantics but about whether the devolution settlement should be seen as a constitutional settlement, with the Scottish Parliament not just a local government but a Parliament with its own powers and competences, which should be respected. How we get to that, short of a complete federal system and a written constitution, I do not know, but when the issue comes up, as it does in these cases, it is appropriate to say that those powers are premised on the assumption that we are a unitary state and they ignore the fact that there was a constitutional settlement in Scotland, Wales and Northern Ireland. It is really about the spirit in which we understand devolution, rather than an argument about the precise words.

Of course, a lot of this is political. We know that the UK Government, for understandable reasons, feels that it spends a lot of money in Scotland and does not get the credit, because the money is handed over to the Scottish Parliament and the Scottish Government then spends it at its discretion. A lot of it is about visibility. As I say, the UK Government's position is perfectly understandable because it does spend a lot of money in Scotland.

However, that raises the danger that a lot of the spending will be guided by that kind of political consideration—who gets the credit for this and that. That is my experience of what happened in Canada and it does not necessarily make for good public policy; nor does it make for clarity about who is responsible for what.

Angela Constance: I suppose that that is a fact of life. The Scottish Government complains that it does not always get the credit for the funding and policies that local government benefits from.

I want to pick up on a point that Murdo Fraser raised. Do Professor Keating and the panel feel that the nub of the issue is not so much the allocation of competences but how competences and powers are exercised? Does the biggest threat to the evolution of devolution lie in and around mutual recognition, which is very different from how the European single market works? Given that the devolved Administrations appear to have limited opportunity to refuse mutual recognition on the basis of public interest, is the danger with it that the biggest part of the UK will dominate constitutionally and economically?

The Convener: Dominic de Cogan and George Peretz also want to come in on some of Angela Constance's questions, so I will let Dominic answer the initial questions. I realise that she has taken the questioning on a bit, so I will come back to Professor Keating. I am not sure that she directed that last question to somebody specific.

Angela Constance: I directed it to all the panel.

The Convener: That is what I am saying. We will start with Dominic de Cogan.

Dr de Cogan: I have a short point in response to Professor Keating's comment on federalism. In countries where there are formalised fiscal federalism systems, such as Canada, Australia and Germany, people can, if necessary, go to court to preserve the proper function of each part of the territorial constitution. For example, if the centre encroaches on a devolved Administration's powers, that can be adjudicated to a much greater degree than is possible under our system.

The provisions in the bill seem to indicate a lack of trust, because, if there was trust between all the different Administrations, we would not need legislation to deal with this stuff. If I was sitting in Scotland, I would be asking for formalisation of the fiscal settlement as well, so that, if necessary, the matter could be taken to court. Of course, you would still remain vulnerable to the exercise of parliamentary sovereignty, but that would be fundamental.

George Peretz: I have a couple of comments, the first of which picks up on a point in relation to the funding provision in clause 48, which we talked about earlier. A point to remember is that, if the UK decides not to have a system of domestic state aid control, that will also free the UK Government to spend in devolved areas. It would, in a sense, be handing out money to companies in devolved areas pretty freely and without any control by the devolved areas in relation to who gets that money. That has implications as well.

My other comment is on the constitutional points that we have discussed earlier. I wrote a piece for *Prospect* magazine in which I said this about the white paper, but it applies equally to the provisions of the bill. In many ways, from the perspective of the devolved Administrations, the United Kingdom Internal Market Bill is a bit like being invited to participate in a game where the UK Government is by far the strongest player in terms of population, because it is also the English Government, but it is also the umpire, because in many respects it decides what happens. As we find in provisions throughout the bill, it will have the power to rewrite the rules whenever it wishes to.

Of course, if the internal market regime ever disadvantages the UK Government in legislating for England—if it is ever a nuisance, to put it colloquially—the UK Government will simply be able to override it using Westminster's unfettered sovereignty. That is not something that the devolved Parliaments will be able to do.

The question is how one could address that within the constitutional framework that we have, which is not a federal framework, in the sense of the powers of the UK Government, and the powers of the UK Government acting as the English Government, being constrained, set out in law or subject to control by the courts. In a sense, it is a fundamental provision of the UK constitution that that is not so. How one entrenches the position of the devolved Administrations within that framework is, I think, a difficult question, and it goes beyond the scope of the bill. It would involve a very different type of constitution.

Within the scope of the constitution that we have, one would be looking for, I think, some much more express recognition of common frameworks. One would be looking at least for the secretary of state's powers to be exercisable only after certain safeguards had been gone through—at least some process such as consultation with the devolved Administrations. One could imagine various other things that would, in a sense, offer protections to the devolved Administrations within the current settlement, but those protections are simply not there.

Professor Keating: I agree.

Angela Constance: I have a final question. The bill says that there may be exclusions from the principle of non-discrimination, but the explanatory notes say:

> "The Bill will provide the ... Secretary of State with a power to alter these exclusions to retain flexibility for the internal market system in response to changes in market conditions."

In other words, the secretary of state will be able to do what they want. Would Professor Keating or Mr Peretz like to comment on that?

10:15

Professor Keating: What is missing from the bill is any consent provision. Although we have the Sewel convention for primary legislation, it does not apply to statutory instruments, which has always been somewhat problematic. It has been extended to statutory instruments in the EU (Withdrawal Agreement) Bill in a limited way, but the principle of consent should inform the discussion.

As to what form consent takes, although we know that the Sewel convention is not legally binding, it is at least something—there is an expectation, with it. What we see in the white paper and the bill is the principle of consultation, which is not quite the same as consent.

Dean Lockhart (Mid Scotland and Fife) (Con): I will follow up on how and when the legislation might apply to trade in the internal market. As we have heard, the UK and Scottish Governments both intend that common frameworks will be the cornerstone of the internal market. The Scottish Government anticipates six common frameworks and a number of regulatory frameworks being in place by the end of the year.

Given that background, will the panel give a general sense of what residual powers might be left over to be governed by the internal market legislation? If the common frameworks are in place, could we see a scenario in which the internal market proposals would apply to only a relatively small number of trading arrangements that are left outside the common frameworks? I ask Professor Keating to kick off on that question.

Professor Keating: They might do that. However, as I said, we do not know what the scope of the powers will be in practice. They are reserved powers that are to be used if nothing else works, but I do not see the justification for giving the secretary of state such sweeping powers based simply on trust that they will be used only to fix the odd anomaly. If that is what we are talking about, the framework process—it is a process, because frameworks will continue to be renegotiated—should probably be the vehicle for

that. That process is, at least, about negotiation and consent.

Although—again—we do not know, I suspect that the main reason for taking the powers back in such a sweeping way is to do with trade deals. The schedule of exceptions might have to be accepted to take account of new trade deals. That raises questions: what should the role of the devolved Administrations be in trade deals and what would those trade deals be? However, once again, I note that we are contemplating giving ministers sweeping powers without knowing the extent to which those powers will be used in practice.

Dean Lockhart: Before I move on to other members of the panel, I note that if the common frameworks—which cover a wide range of sectors including agriculture, fisheries and labelling—are in place, we are left, in terms of what the internal market proposals might apply to, with a relatively limited set of powers. Given that the powers are not specified, it possibly makes sense to have a sweep-up mechanism in the form of the internal market proposals to deal with issues outside the frameworks that might come up in the future.

Professor Keating: The frameworks are not constitutionally entrenched, though; they could be changed by the UK Parliament at any time. Some of the changes will be legislative, and would be through Westminster legislation with legislative consent. The constitutional implications are therefore quite different.

Dean Lockhart: What are other witnesses' views on the question?

George Peretz: As a lawyer, I will add an observation on the negotiations that will take place within the common frameworks between the devolved Administrations and the Government.

As a lawyer, the question one always asks oneself when engaged in negotiations is what will happen if the negotiations break down, because that is a critical question that governs how negotiations proceed, and it greatly affects the relative strengths and weaknesses of the parties in the negotiations. From a Scotland, Wales and Northern Ireland point of view, the difficulty is that the bill's structure means that, if framework negotiations were to break down, the secretary of state could legislate in a way that would get him what he wants. That background will greatly affect how framework negotiations are conducted, because having the power to get what you want, whatever happens in the negotiations, greatly affects what you say and do in the negotiations.

On the other hand, knowing that you will get a result that you do not like if the negotiations break down will also affect what you say in the negotiations. The framework negotiations might take place first, with legislation as a fallback, but the fact that the legislation exists will affect the negotiations.

The Convener: Dominic, do you want to pick up on anything in that area? I am not sure whether it is your area of expertise.

Dr de Cogan: I would say only that, as far as I know, there is no common framework on tax; indeed, you would not expect one, because tax competence is being repatriated, on VAT and things that you would not be expect to be devolved competences anyway. However, there are gateways in the bill for the introduction of tax issues—clause 48, or a minister amending the exceptions in schedules 1 and 2—so I do not think that tax would be covered by a common framework, but would stay within the scope of the act.

The Convener: There was an earlier proposal for a form of assignment of VAT to the Scottish Parliament. Now that VAT is no longer a competence that is controlled by the European Union, I guess that there is more scope for greater devolution in that area in the future. Could there be a common framework on VAT?

Dr de Cogan: Exactly. I am saying that I think that there are gateways in the bill for the introduction of tax issues. I do not believe that there is currently a framework. Of course, an assignment of revenues is just paying across a certain sum of money, rather than deciding about zero rating or exemptions or anything. However, if devolution were to go further, that might become an issue.

Dean Lockhart: I will ask about a slightly different topic. George Peretz mentioned the free trade agreement that the UK Government has just signed with Japan. Do you have sufficient knowledge of the process and the outcome to say whether that economic partnership, which goes beyond the existing EU-Japan free trade agreement, will have any impact on the devolved settlement or result in any lowering of standards on the UK side?

George Peretz: When last I looked, the text of the agreement had not been published, which makes the question difficult to answer. I am afraid that my source for this is a story in the *Financial Times,* but I think that it is a fairly well-sourced story; it was the source of my earlier comments about the subsidy provisions. I understand that the subsidy provisions in the UK-Japan agreement have simply been rolled over from the existing subsidy provisions in the EU-Japan agreement. However, in the UK those provisions will require legislation, whereas in the EU they do not, because the EU complies with the provisions anyway because of its state aid rules. I am afraid

that that is all that I know about the UK-Japan agreement. I will have to park the question until the text of the agreement is released.

Dean Lockhart: That is helpful. Thank you.

John Mason (Glasgow Shettleston) (SNP): I want to pursue a bit more the matter of common frameworks and the bill. George Peretz made the point that if the common framework discussions were to come apart, negotiations would resort to the provisions in the bill. However, assuming that there is a common framework, what is the relationship between the common frameworks and the bill? The whisky industry went to court about minimum pricing. Could it go to court or challenge a common framework?

George Peretz: The problem with the bill is that it does not explain or make reference at all to the common frameworks. The thinking must be that if a common framework is agreed the secretary of state will use his powers to add to the schedules, or to cut back the scope of the principles that are set out in the bill in order to make sure that the subject matter of a common framework is carved out of the scope of the bill.

If that happens, the question for an entity that thinks to itself, "If we had been able to go court and ask it to apply the non-discrimination and mutual recognition principles, we think that we would have won, but now we cannot because regulation takes the issue outside the scope of the bill", is what scope it would have to challenge effectively the regulation-making power of the secretary of state. The answer would be the usual judicial review, because the bill has no ouster clause.

An ouster clause is an attempt to protect regulations from the scope of judicial review. There is a very dramatic one to be found at clause 45, but in relation to the regulation-making powers that we have talked about so far there is no such ouster clause. Therefore, the challenge would be on the standard grounds of irrationality, excess of powers and so on.

In practice, I suspect that it would be hard to challenge such regulations, particularly against the background of an agreed common framework. I could not say that it would be impossible for an entity to do that, but it would depend on the particular regulation. For example, if there were to be prescriptions that looked absurd, one might be able to use an irrationality challenge.

John Mason: Would the common frameworks always be in the form of regulations? Would they ever be in primary legislation?

George Peretz: The frameworks could be in primary legislation. If the technique is that a common framework is dealt with by passing an act at Westminster that then gets legislative consent in the devolved Parliaments, it would, in effect, be immune to judicial challenge because acts of the Westminster Parliament are not subject to judicial scrutiny of any kind.

John Mason: Thank you. My other area of questioning is for Michael Keating, although you might also want to come back on the previous question. The question is on areas in which there might be a "legitimate aim", where the Scottish Parliament has more power to control things. In your submission you mention

"(a) The protection of the life or health of humans, animals or plants:"

and

"(b) The protection of public safety and security."

Will you expand on how much freedom the Scottish Parliament has in those areas?

Professor Keating: My point was that the relevant clause in the bill is very narrowly drawn compared with the relevant European clause, which I also quote in the paper. It is a highly controversial area. There have been a lot of cases at the European Court of Justice patrolling the boundary between areas that are exempted and areas that are included. Cases will eventually be given to the courts in the United Kingdom, which do not have a lot of experience except in relation to EU law. We do not have such regulations in the UK because the EU has looked after the matter.

The question was about the meaning of a clause. One could, for example, think of the Scottish Government or Parliament wanting to ban a product—genetically modified crops or hormone-treated beef, for example—that is not harmful to human, or even animal, safety, but for which environmental, ethical or cultural reasons could be brought to bear. However, if a case were to come before the UK courts, only those narrow reasons could be pleaded, which could be problematic.

That is not how it works in Europe. When a case goes to court in Europe, there is a lot of negotiation and debate, and boundaries are gradually drawn between the matters that could be subject to the market and others that could be subject to public regulation.

10:30

That process is still going on, as it has done since the founding of the European Economic Community, and especially since the single market programme in the 1990s. The bill and the white paper seem to suggest that it is a rather straightforward matter, but it is not; it is difficult and very political.

John Mason: Mr Peretz suggested earlier that, for example, products tested on animals would not be sufficient grounds for an exception, despite animal health being part of the issue. Do you agree with his comments?

Professor Keating: I do not know. It seems to me that that would be precisely the kind of issue in which we would get disagreements and legal uncertainties and matters could end up in the courts.

John Mason: We also received a paper from Professor Dougan of the University of Liverpool, who commented on minimum unit pricing for alcohol. I think that his understanding is that the existing regime would stay in place, but, if we were to try to increase the unit price, that would be open to challenge. Is that another unknown? Do you have a view on that?

Professor Keating: It seems to me that what he is saying is right. He is a lawyer and knows the legal interpretation better than I do, but that seems to be fairly plausible.

George Peretz: A point that I would make about animal health is that one must look carefully at what schedule 1 to the bill defines animal health to be. It is certainly not obvious to me that that would extend to the sort of concerns that are the basis of the regulation on cosmetic products that we were talking about earlier.

I am looking at the bill and I am trying to find at the relevant provision in schedule 1 that deals with animal health. As I read that schedule, it is not so much about general concerns about animal welfare, but more about the concerns arising from the foot-and-mouth disease and BSE bans on movement of beef and cattle and so on. The schedule covers pests and diseases, not animal health more widely.

In any event, one might have an argument about the extent to which a blanket ban in the regulation on cosmetic products on any testing on any animals whatsoever is necessary to protect animal health. One could argue that not all testing of cosmetics is particularly harmful or distressing to the animals. One can imagine forms of testing that are not.

As I understand the basis of the provision, although it is, obviously, partly concerned about pain and suffering, it is also a general blanket ethical rejection of the idea that cosmetics should be tested on animals, whether there is any real suffering of the animals concerned or not. So far as that is the motivation behind the blanket ban, that would be difficult to fit into an animal health exception. As I have said, I also read schedule 1 as having a rather narrower definition of animal health than that.

Michael Keating is right. One can imagine lawyers spending much profitable time arguing about those things.

Patrick Harvie (Glasgow) (Green): Good morning. We have already had quite a lot of discussion about the relationship between the bill and the common frameworks. I want to press you both a little further on that.

The UK Government's position is clearly that the bill is not only necessary but urgent. The position of the Scottish Government is that the bill is entirely unnecessary and the common frameworks approach is capable of dealing with everything that needs to be addressed.

Notwithstanding Michael Keating commenting in his paper that there is no single, well-understood definition of what an internal market is, either globally or in the bill, is it the view of each of the witnesses that the operation of the UK's market economy can be secured and safeguarded adequately with the common frameworks approach and without the bill or anything like it?

Are you closer to the Scottish Government's view that the bill is simply unnecessary or do you take the UK Government's view that the bill is necessary and common frameworks cannot be an adequate resolution to these issues? Can we hear from Michael Keating first and then George Peretz?

Professor Keating: I would want to give common frameworks a go. We still do not know exactly what they look like but the process of negotiating has been surprisingly constructive, considering the level of political conflict between the Governments. Once it comes down to the detail of issues, there seems to be a fair degree of consensus on what is needed. If something else comes up, it would be better and more consistent with our constitutional settlement to go on negotiating to expand the common frameworks where necessary.

Even though these new internal market powers may not be used widely, there is a matter of principle here that these things should be negotiated; that is how devolution has worked so far, so I would be hesitant from a constitutional perspective about giving UK ministers such wide powers and just trusting that future UK Governments will not abuse those powers.

George Peretz: I would add two points. I think that I have made this point already but it is hard to see the urgency of part 1 of the bill, given that it does not apply to legislation that will be in force on 31 December. It only applies to new legislation and, by definition, there will not be much new legislation—certainly not for the initial few months. The vast majority of the rules that affect the sale of

goods will be old legislation. That makes the urgency justification a bit thin.

My only footnote to what Michael Keating said about common frameworks is that yes, it is obviously a good idea—within the settlement that we have—to try to negotiate frameworks between Governments but, to return to my earlier point, as a lawyer, one is always interested in what happens when the negotiations break down. I think that there is a need for something to be there if negotiations break down.

There is, at least in theory, the possibility of quite serious interference with the operation of the UK internal market, however one defines what an internal market is, as a result of the wide powers that the devolved Administrations have and of course that the UK Government has, including as the English legislator.

One posits slightly fanciful examples of attempts simply to ban all products from another part of the UK either expressly or not expressly, through provisions that in effect have that effect. Those are not fanciful risks if one looks at EU case law over the past 40 years; you can see ways in which member states have, on occasion, tried to legislate in ways that are designed to protect their home markets against things coming in from other member states. They have used all sorts of clever wheezes to do so, not necessarily expressly saying that, for example, products from Germany are not allowed in their market but setting up regulations in a way that make it difficult for products from Germany to be sold in that market.

There is clearly a risk here. How one evaluates the risk is a political judgment but there is undoubtedly a risk.

Patrick Harvie: Yes, I take the point. I cannot think of an example where devolved powers have been used in that way for that kind of purpose in the 20-plus years that devolution has existed within the UK. However, the flipside of the risk that you set out is that, if neighbours of good will sit down and try to reach an agreement, which we are calling a common framework, and cannot, that is simply a political decision, because the downside of a potential regulatory divergence is acceptable, compared with the downside of the only compromise that was on offer. That is a political judgment about what is acceptable.

The other aspect of this bill that has been massively controversial is in relation to the breach of an existing international agreement that the UK has entered into. Given that context, surely, we are now in a position where the Scottish and Welsh Governments cannot enter into common frameworks by agreement with the UK with confidence that the UK will stick to its word. Surely the bill and its political ramifications make it harder to reach common frameworks by mutual agreement.

George Peretz: I find it difficult to disagree with that last part. The UK Government's position is dangerous if it starts expressly breaching provisions of an agreement that it has entered into; just as in daily life, if somebody is seen as a person who breaks their promises, people will stop believing in their promises. That is one of the reasons why it is often a good idea to keep our promises. I do not disagree with you about that.

It is absolutely fair to say that it is a political judgment as to what degree of risk of disturbance of the internal market we are prepared to accept. If one looks at federal systems throughout the world, one can see the different degrees of acceptance of that. At one end, the United States has very limited controls on what the states do with their legislative powers. As anyone who has ever spent time there or dealt with issues of the United States knows, there are endless cross-state restrictions on the ability of entities that are based in one state to trade in another. In many ways, the US internal market is far less developed than the EU internal market, particularly in areas such as mutual recognition of professional qualifications. An architect with a licence in California cannot set up business in Las Vegas, because it is in a different state. None of that would exist within the EU. That is a decision, dating back to 1789, that the framers of the constitution took.

In Australia, there is a different approach, with a much wider constitutional principle that constrains state powers in those areas. There is also the Swiss position, which Ken Armstrong set out in his paper that he wrote for the committee on the bill. There are different approaches. Patrick Harvie is right that it is a political judgment to make. However, if you are saying that the approach should involve common frameworks alone, with nothing as a back-up, you are making a political judgment about what happens if the common frameworks break down. Effectively, you are saying that you are prepared to take the risk that there might be significant disruption in the internal market, because we want to fight to preserve the overall principle that—except when they agree—the devolved Governments must not be interfered with.

Patrick Harvie: If there is time, convener, I have another point to put to Michael Keating, with regard to the comment in his written submission about the role of the CMA. That was touched on very briefly in discussion with Murdo Fraser earlier but not in much detail. The CMA—Competition Markets Authority—is being appointed as the devolved Governments' adviser as well as the UK Government's adviser, so its advisory role would be in relation to the devolved functions of the

Scottish Government, not just in relation to UK-wide matters. Michael Keating's paper makes the point that there is no Scottish input to the appointment of the CMA's chair, board or panel.

10:45

The Enterprise and Regulatory Reform Act 2013, which sets up the appointment powers, places no requirement on the secretary of state to ensure that the chair, the board or the panel have, for example, individuals with a professional background in public health or environmental protection. Can Michael Keating expand on the potential deficiencies of appointing the CMA as the adviser? If the bill was passed as it stands, would the Scottish Government still have the power to appoint a different adviser? Given that its devolved functions are still devolved, would it retain the power to pass a separate piece of legislation to appoint a different adviser to carry out those functions in relation to devolved matters?

Professor Keating: On that last point, yes, the Scottish Government can take advice from wherever it likes. It has engaged counsel for previous cases, such as the minimum pricing of alcohol, so it would not be obliged to rely simply on the CMA.

The CMA is problematic. In various submissions, including one that the Royal Society of Edinburgh, with my participation, sent to the Scottish Parliament, we talked about the need for an arbitrator and impartial source of research and evidence, not just in relation to the bill, but more generally to intergovernmental disputes. The bill is a clear example of the need for that. Such a body exists in Spain, which has passed a controversial unity of the market act; a council on the internal market represents the central Government and the autonomous communities, which are the devolved Governments. The council has a voting procedure and a secretariat that does the research. Only at the last resort do matters come to the courts; before they do, there is a lot of negotiation. That is a model that we might think of for here.

Given that the matters that are being debated here are not purely technical, but are highly politically charged, it seems reasonable that the CMA should have broader representation or at least be appointed and owned by all the Governments of the United Kingdom, not just by the UK Government. No matter what good will exists and how professional those people are, the lines of accountability have to be clear and their loyalty has to be to the United Kingdom, not to the UK Government of the time or to a particular concept of the UK. That would be a fairly easy thing to do; it would be a useful amendment and set a precedent for other areas of intergovernmental relations, where that capacity is likely.

George Peretz: I will speak briefly on the CMA. In exercise of its competition jurisdiction, the CMA already has to think about issues related to the environment and public health, because, sometimes, an anti-competitive agreement is justified on environmental or health grounds. So far, it has done that fairly well, without having to have environmental or health competence.

On the broader point, about 18 months ago, when it was mooted that the CMA might have state aid responsibilities, I suggested in evidence to the Committee on the Future Relationship with the European Union that it seemed sensible that, if that were so, the CMA should be appointed jointly by all the devolved Administrations and the UK Government. I remember that Joanna Cherry, who you all know, rather understandably picked me up on that bit of evidence. She suggested that the CMA might usefully be based in Edinburgh, which was perhaps not a bad suggestion, although, if Scotland became independent, there would be an issue about moving the CMA back to England, which might be slightly expensive.

If the CMA is ever given state aid or anti-subsidy responsibilities—which has not been ruled out and is very much an incursion into the activities of Government—the case becomes unanswerable for the CMA, instead of being a creature of Westminster, to become a creature of all four Governments. That would have the incidental advantage of increasing its independence from Westminster, which, if it were to be given anti-subsidy responsibilities, it would need, although, at the moment, that is neither certain nor expressly mooted.

Patrick Harvie: Its remit is still framed as competition and markets, rather than the wider public good. I thank both of you for your comments.

The Convener: Earlier, we touched on matters to do with trade. Angela Constance has a supplementary question on that area.

Angela Constance: George Peretz spoke earlier about the impact of reputational damage when a Government or country breaches international law. That is particularly true when it breaches international law that it has passed only some months ago. Can George Peretz say more about the impact that people finding a government less than trustworthy would have on the ability to negotiate a trade deal, as well as whether and how that action by the UK Government puts at risk sustainable and beneficial trading relationships with international partners? Does it mean that the UK will have to be less choosy about who it enters

a trade agreement with, as well as the terms of any such agreement?

George Peretz: As always, with questions of international law, there are political and legal aspects. Starting closest to home, the most obvious difficulty that the UK Government's position causes is in our negotiations with the EU. The position of the EU and the European Parliament has already been made clear. It seems to me that there is simply no way in which the EU will be prepared to conclude a free trade agreement with the UK while those provisions are going through Parliament; it will insist that the Government withdraws them.

Interestingly, as you might have picked up on, Lord Keen, the Advocate General for Scotland and the Government's chief legal adviser on Scots law, said yesterday in the House of Lords that, as far as he was concerned, the powers in the bill would be used only in circumstances where article 16—the safeguards provision, which, in some situations, allows parties to take unilateral action in response to serious economic or social disturbances—of the Northern Ireland protocol applied, or if there was a fundamental breach by the EU, which, as a matter of international law, would entitle the UK to depart from its obligations under the treaty.

If the other side breaches a treaty, a country's own obligations under the treaty are reduced, in the same way as if somebody breaks a contract with you, your contractual obligations reduce. Essentially, Lord Keen was saying that the bill would be used only in circumstances where international law permitted it, which raises the question of why we need to exclude relevant international law as grounds for challenge from the regulations. I suspect that somebody will have a go at testing that.

To return to Angela Constance's question, obviously, as far as the EU is concerned, the issue of international law is a deal breaker. As members are probably aware, the United States Congress, which would have to ratify any deal between the UK and the US, has stated it would not be prepared to do so if there was a threat to the Good Friday agreement.

More generally, it is a matter of reputation. We could say that some trading partners might take the view that they do not care about any of that, because it is all about the UK's complicated relationship with the EU. They might accept the UK Government's position that it is only because of the extraordinary circumstances of our withdrawal that the UK took that action. Of course, in general terms, it would be said that the UK sticks to its international commitments.

It is possible that some partners will accept that and will not be particularly concerned, while other partners might be. It is a fairly obvious example, but the UK has been strongly condemnatory of China for its breaches of the Sino-British joint declaration, and the Chinese law on Hong Kong has rightly been denounced by the Foreign Secretary as a breach of that agreement. We can already see references in the Chinese press to a specific and limited breach of the Chinese obligations. Your words get thrown back at you.

The Convener: Time is getting short so I will move on to George Adam.

George Adam (Paisley) (SNP): I am desperately trying to find a question that has not already been asked. I am also trying to find a way to relate all this to the people in my constituency, what they are dealing with, and how it will affect them.

A question came to mind when I heard the cabinet secretary, Michael Russell, talk about Scottish Water having problems or potentially being exposed to some of the issues within the bill. We have already been advised that the bill could expose the Scottish public sector to external market forces. My question is directed at George Peretz. Would that be the case? Could the bill be a threat to Scottish Water in its current guise?

George Peretz: I find it slightly hard to see how. Water going through pipes is not traded across borders, not because there is any legal impediment: it just is not. The water that Scotland consumes comes from the beautiful Scottish mountains; it does not, by and large, come from England. We English have to consume our own water, unfortunately, rather than have access to yours.

I therefore find it slightly difficult to see how water would be affected, but the fact that I do not see it does not mean that it is not there. I would like to see the argument.

George Adam: I was trying to say that Scottish Water is a publicly owned company and the market in water in England is in effect a free market. Could certain operators make the argument that, in a UK internal market, Scottish Water has the full Scottish market to itself and they have the right to access that market? Would that not threaten Scottish Water in its current guise?

George Peretz: To be frank, I had not thought about that issue. I would need a bit of notice of that question, then I could look through the bill with it in mind to see whether I could work out a way in which that argument might get purchase. Without having done that exercise, I cannot say that it could not happen but it did not strike me as something that could. Frankly, that is because I

was not thinking about that issue as I was going through the bill. I simply do not know.

George Adam: Could you possibly have a look at that and get back to us?

George Peretz: I could have a look at it.

George Adam: It would be quite interesting.

George Peretz: When commenting on a legal concern, it would help to see the basis of the concern so if Michael Russell has put something in the public domain, it would help if someone could send me a copy.

George Adam: My final question is also to George Peretz. You talked about negotiations on frameworks in the internal market and how they would work.

If there is a change or if businesses are trying to access certain markets in the public sector, particularly the NHS, how do we manage to negotiate that? You have already talked about this to a certain degree. If we are trying to negotiate a framework to make sure that we are protecting the NHS, for example, but UK ministers can just decide to push through what they want under the internal market bill, what is the motivation for any of the devolved nations to work constructively within that process? Basically, we have UK ministers coming at us at 100mph on a juggernaut and we have to get out of the way quite quickly, or do it their way.

George Peretz: I made the point earlier that the strength of the parties' positions in any negotiation is very much determined by what happens if the negotiation breaks down. If, as a result of the internal market bill, the answer to that question is that the UK Government can do what it wants, that greatly strengthens its hand in the negotiations. At that point, the constraints are political. Politically, one assumes that the UK Government will not want to be obviously high-handed. I say that more as a hope than an expectation; that is a political comment. There will be some political constraints on the extent to which the UK Government is seen to be throwing its weight around. However, if, legally, it can respond to the failure of a framework negotiation to turn into an agreed consensus by simply doing what it wanted to do in the first place, it is in a strong position. There is no way around that. The extent to which one relies on the political constraints is an exercise in political judgment. I suspect that the members have their views on that.

The Convener: As George Adam has completed his questions, I warmly thank our witnesses for their evidence this morning. We have covered a lot of ground and we have given them some homework to do, so we are grateful to them.

11:02

Meeting suspended.

11:07

On resuming—

The Convener: We continue to our next evidence session on the United Kingdom Internal Market Bill.

I welcome Jonathan Hall, who is director of policy at NFU Scotland; Professor David Bell from the University of Stirling; and David Thomson, who is chief executive of the Food and Drink Federation Scotland.

I remind members that they should address their questions to a named witness. If any witness wishes to respond, I ask them please to request to speak using the chat function.

I will begin. As you know, clause 46 of the bill would create a new power for ministers to provide money directly to anyone, including organisations working in devolved areas.

Professor David Bell, you have said in your paper that the bill gives the UK Government

"wide powers over who might receive funding"

and

"Specifically ... power to 'provide financial assistance to any person'".

You go on to say that, for instance,

"Direct funding to local government may provide greater recognition for the role of UK Government in funding projects, but it is difficult to see that the lack of consultation and cooperation between different levels of government will lead to an efficient use of public money."

Will you expand on your views, and on what those provisions might mean for the principle of taking decisions as close as possible to the people who are affected? You may have heard some of the evidence in the previous session about the potential effect—unintentional, perhaps—on the Barnett formula process.

I do not think that David Bell can hear me. In that case, would any other witness be prepared to pick up on that? If not, I will go to my second question area, and come back to David Bell.

Okay; I will go to my second question area.

Previously, NFU Scotland said that proposals in the UK Government's internal market white paper on mutual recognition and non-discrimination

"would, in effect, drive a coach and horses through the concept of commonly agreed frameworks, because ... something that could be produced to a significantly different environmental standard in one part of the UK would have to be accepted as a legitimate product to be sold or used in another part of the UK."—[*Official Report, Finance and Constitution Committee,* 2 September 2020; c 3.]

Jonnie Hall, now that you have seen the bill, is that still the NFU's position, and, if so, are there any amendments to the bill that you believe would protect the concept of commonly agreed frameworks?

Jonathan Hall (NFU Scotland): Yes, that is still our position, in general terms. We still have some significant outstanding concerns that, although the intention of the mutual recognition and non-discrimination proposals in the bill is to facilitate the free flow of goods and services throughout the UK internal market, nevertheless, through the way in which the bill is currently set up, it seems basically to sidestep the issue of commonly agreed frameworks.

As I think the committee is already aware, we do not view the non-discrimination and mutual recognition elements as being a direct alternative to common frameworks. We do not believe that it is a binary choice. We believe that there could be the backstop—if that is an appropriate expression—of the proposals in the bill. However, to protect the devolution settlement, and in order to have a degree of divergence at regulatory level, where appropriate, but still to enable the free flow of goods and services, the better approach would be to establish proper common frameworks, with governance and dispute resolution elements written into that.

The bill sets up the office of the internal market, but that seems from the bill to be very much just a data collection and reporting exercise, with insufficient teeth to govern issues on things such as disputes. The bill as currently drafted—it has only just gone through report stage—is lacking in the provision of a more constructive approach that would respect the devolution settlement.

The Convener: Thank you very much.

David Thomson, given the Food and Drink Federation's perspective on those areas, will you contribute on that question as well?

David Thomson (Food and Drink Federation Scotland): It is clear that the view of the witnesses in the earlier evidence session was that the internal market bill would, specifically, undermine any frameworks that were agreed. I can understand that point of view. Our question on the bill and on the frameworks is this: where are the frameworks? We have neither seen nor been consulted on the frameworks, so it is difficult to comment on whether there will be an impact on the best way to work.

From a business perspective, having a clear set of regulations across the UK, and their being as converged as possible, makes it easier to do business; that is a positive thing. If the frameworks were to be published and provide a clear way for that to happen, it would be helpful. However, as of now we have not seen any of the frameworks or been consulted on them.

11:15

The Convener: In its submission to the committee's initial inquiry on the UK internal market, the Food and Drink Federation recommended that the

"devolved nations"

should

"work together with the UK Government to create an arbitrator for the UK internal market."

and that

"This could include Scottish, English, Irish and Welsh judges and or an internal market commissioner."

Does that remain your view, to what extent does the bill address your concerns in that regard and do you think that there is still some way to go?

David Thomson: It remains our view. That is what we submitted in response to the white paper on the internal market bill as well. The bill goes some way to doing that; it establishes a mechanism to regulate or, at least, comment on regulation. However, it does not, as we pointed out previously, seem to have created a set of interactions and relationships with the devolved Administrations, which we also called for in our response to the white paper on the internal market bill.

It is very clear that the bill has taken some steps, but in order for it to be equitable and work in a way that all Administrations will be likely to respect, it should have embedded into it a better set of relationships with the devolved Administrations—not only the UK Parliament.

Jonathan Hall: I concur with David Thomson. We have been relatively unsighted on the development of common frameworks by both the UK and Scottish Governments. It is a frustration on the part of many stakeholders that we have talked about common frameworks, their governance and their role in dispute resolution and so on for at least two years now, if not three, and yet we still find ourselves here at the 11th hour, almost with a gun to our head, looking at an internal market bill. If we had put the time and effort into developing common frameworks properly in the first place, the need for some of the bill would not be the same. I think that that frustration is shared by many stakeholders.

Tom Arthur: What did you mean when you described the internal market bill as a "backstop"?

Jonathan Hall: The concept of mutual recognition and non-discrimination is, in essence, the basis of all internal markets that already exist.

That includes the EU single market, which we are still effectively part of. Having some form of mutual recognition and non-discrimination is also the basis of nearly all free trade agreements. Otherwise, those trade agreements and internal markets would not work. That was hinted at quite heavily during the previous committee meeting.

Perhaps "backstop" was not the right expression—especially in the context of the Northern Irish protocol—but I meant that it provides a baseline. Nevertheless, it is not and should not be the only way in which we operate in an internal market, because if we are going to respect differentials across an internal market with different nations and devolved Administrations involved, which therefore have different needs and approaches, we need something to operate over and above that. That is where the common frameworks have to come in. It is simply an insurance policy and nothing else. It should not be the first and foremost approach; it should be an insurance policy.

Tom Arthur: I am just seeking to clarify your position to ensure that I understand it. When you gave evidence to the committee a couple of weeks ago, I said to you:

"To make sure that I have understood your position, I will summarise: we should agree through negotiation and we should never have to use any backstop measures. Ultimately, it should be a relationship of equality and parity, with no Administration being able to cast a veto, but equally no Administration being able to impose on another."

You responded to that by saying:

"Absolutely. Everything that we have said about commonly agreed frameworks is couched in terms of no one Administration imposing on the others, and none being able to veto. That will coerce the point at which a common agreement is reached, because ultimately no single party has a final say over the others."—[*Official Report, Finance and Constitution Committee,* 2 September 2020; c 16.]

Perhaps—[*Inaudible*.]

Jonathan Hall: Sorry, you have broken up slightly.

The Convener: Try to say your final sentence again, Tom.

Tom Arthur: I just want to clarify that what I quoted from the *Official Report* is still Mr Hall's position. There should be absolutely no need to use any backstop measures, and it should be a relationship of parity and equality.

Jonathan Hall: It absolutely should, which is why using common frameworks is our proposed and much preferred approach. However, to ensure continuity within a UK internal market, there should be an insurance policy that, we hope, we will not have to use. We need some sort of non-discrimination and mutual recognition approach to be in place.

I am not saying that the provisions, as they are written, are the right way to do that, because a very—dare I say it?—heavy-handed approach has been set out in the white paper and the bill. In an ideal internal market or in any free trade agreement, equal interests should be protected and maintained in relation to who has say over what. The bill's proposals appear to ride roughshod over that and sideline the common frameworks.

The Convener: I want to go back to David Bell. I asked a couple of other questions while you were gone, but I will repeat the question that I asked at the beginning of the session. I understand that you are here now.

Professor David Bell (University of Stirling): I think so.

The Convener: Good. As you know, clause 46 would create a new power for ministers to provide money directly to anyone, including organisations that work in devolved areas. In your paper, you say that the bill provides wide powers to the UK Government over who might receive funding—specifically, the power to provide financial assistance to any person. Will you expand on your view on what that might mean for the principle of taking decisions as close to the people affected as possible? You might have heard some of the earlier evidence about the Barnett formula, so you might want to reflect on that, too

Professor Bell: I assume that everyone can hear me now. I am sorry about the delay.

The powers that are proposed in the bill are extremely wide in relation to financial support. The UK Government is taking the power to, in effect, spend across a wide range of topics and to deliver that money to "any person"—that is the phrase that is specifically used in the bill. The issue has been parachuted into the debate without any previous discussion or negotiation.

What do the provisions do? I heard the earlier debate. Michael Keating made the point that the provisions might provide a way of getting around the Barnett formula, so that, instead of being directed through block grants to the Scottish Government, moneys could be given directly to a wide range of possible actors, including individuals, companies and local authorities. There is an interesting point—I have asked about this—as to whether non-departmental public bodies, which are children of the Scottish Government, could receive funding in that way. That may still be possible. I am thinking of bodies such as Skills Development Scotland, which has received large amounts of European funding in the past. There are possibilities for bypassing the Scottish Government. As Michael Keating said, the Barnett formula is not written in law and the bill may be a

way to try to erode its longevity, which has been quite amazing, given that it started in 1979 as a sort of interim measure.

The question of bypassing the Scottish block grant depends partly on how big the amounts of money that might be doing the bypassing amount to. The Department for Business, Energy and Industrial Strategy published a note alongside the United Kingdom Internal Market Bill, which alluded to the shared prosperity fund, which is the fund that is intended to replace the European structural funds. For Scotland, that is not a huge amount of money. That money came through the Scottish Government and the Scottish Government acted as the EU's agent in Scotland. If that fund is what is being thought of in the bill, the overall effect on Barnett would probably not be that large. However, the list of areas on which the UK Government is apparently taking a view that it might spend is pretty wide. It starts with economic development but goes on to infrastructure and then talks about culture and sport. In the past, the last two have been thought to be the preserve of the Scottish Government. If it is about badging relatively small amounts of money, just as the EU did in the past, then, as Michael Keating said, it might not be too threatening, but as it is drafted, the bill does not make any of that clear.

Murdo Fraser: I have a question for David Bell, which is a supplementary to your question, convener, and then I have another question for the other witnesses.

On the point about the spending powers of the UK Government, is that provision not really a replacement for the EU structural funds, which already bend across a broad range of areas? There is another current model of which you will be aware, Professor Bell, which is the city deal. City deals are partly funded by the UK Government and partly funded by the Scottish Government. To give a local example with which you will also be familiar, under the Tay cities deal, the UK Government is contributing £10 million to the development of the Perth city hall project—that is a cultural project that is being funded by the UK Government. Are we looking at the development of something that was already happening?

Professor Bell: That is possible. The note from BEIS only mentions the European structural funds and the shared prosperity fund as a replacement for those. However, it is not clear from the way in which the bill is worded that that is the extent of the ambition. None of us is in a position to know whether that is the case.

11:30

The city deals certainly increase the profile of the UK Government around the whole of the UK. It is worth asking whether the many deals that have been done are necessarily the best way to operate public policy—perhaps that will come out in the evaluation. The possibility of different levels of government trying to do different things without having a common agreement on the way forward seems to be a potential danger. The onus is on both parties to figure out what the best approach is to delivering objectives. One of the points that I made in the written submission is that, potentially, the UK and Scottish Governments have differing objectives. Resolution will have to be through a form of negotiation.

In all that—Michael Keating mentioned this during the earlier session—is the subsidiarity issue. I have been looking at ways of replacing the European funding in Scotland, and part of the debate that we have been having is about the level of government at which funding decisions should be made. We have had some interesting debates about community empowerment and getting communities involved in designing projects and so on.

It is a complex issue and we need an overall framework that is negotiated by the different levels of government, whether that is between the UK and Scottish Governments, or the Scottish Government and local authorities or the regional enterprise partnerships. Whatever it might be, there has to be a shared understanding of what it is that we are trying to achieve with interventions such as the Tay cities deal.

Murdo Fraser: There is a lot that we could explore, not least giving more powers to local government. That is probably slightly outwith the scope of this discussion, but I am sure that we can come back to it in the future.

I have a separate question for David Thomson and Jonnie Hall. It goes back a little bit to the earlier discussion. David Thomson, what is the advantage of the bill and the value of the UK market to your member companies? Why does the smooth operation of the internal market matter to your members?

David Thomson: We represent native Scottish companies that are headquartered here and others that manufacture here. The operation of the internal market, as it currently exists through EU rules, allows a turnover of about £16 billion-worth of food and drink manufacturing in Scotland. It is critical. Although we export about £6 billion-worth of that, 80 per cent of the rest of it—about £8 billion—is the worth of the rest of the UK market to Scottish companies. It is a significantly important industry, so the smooth operation of the UK market and having minimal regulatory differences are of key importance to us.

The bill seeks to address the common framework that we had under the European Union rules, which were set by the European Parliament and put in place by the European Commission. Those provided an underpinning so that any regulation in any part of the UK would always be part of the framework. When we come out of Europe, we will not have that framework and there is the potential for much greater differences between the regulations in each part of the UK. That is the cause of our members' concern. They would like to see minimal regulatory divergence, because that makes it less costly and easier for them to produce and sell food across the UK. That is why it is important to have some sort of understanding of what the UK internal market would be like.

Murdo Fraser: I ask the same question of Jonnie Hall.

Jonathan Hall: Good morning, Murdo. The Scottish Government's figures show that agricultural exports—rather than sales of food and drink per se—to the rest of the UK are worth about £855 million to the Scottish agricultural industry out of a total figure of about £1.5 billion for exports out of Scotland. About 60 per cent of all the agricultural products that leave Scotland are destined for other parts of the UK. The internal market is therefore extremely important—more important than the markets in the EU and the rest of the world put together. That is in terms of agriculture, not necessarily food and drink.

I would go a stage further and say that the internal market is also very important to the inputs to agricultural businesses. It is not just about what we produce and what we sell; Scotland relies on the rest of the UK for inputs to agriculture. At the end of the day, an agricultural business uses a lot of inputs—not only from the rest of the UK, but from Europe and other parts of the world—to produce an output.

I echo and concur with David Bell's comments on the need to operate on an even footing in regulatory arrangements in order to avoid any cost disparity between the production of food—certainly agricultural production—in Scotland and its production in other parts of the United Kingdom. That is the fundamental reason why we have always maintained that we need regulatory convergence in the UK on all things related to agriculture. We must make sure that we are playing to the same set of rules and there is no distortion in terms of competition. That is the fundamental premise of our argument.

Murdo Fraser: Thank you.

The Convener: I was going to ask a supplementary question, but I thought better of it. I ask George Adam to come in. I might come back in later.

George Adam: Good morning, gentlemen. This is a question for Professor David Bell. We heard from George Peretz that the UK Government would have the final say in the negotiations if there was any disagreement between the devolved nations. Surely, when we are talking about trying to localise everything, such a position does not make for constructive intergovernmental dialogue. In the mid to long term, will that not cause a problem in the relationship between the devolved nations and central Government? Does it not make it seem as though the devolved nations are powerless?

Professor Bell: I echo what Michael Keating said: we are actually not really sure, in the UK, whether we are a single, unitary state or something close to a federation of nations. Because of that unease and the sovereignty of the UK Parliament, it is not clear, under the current circumstances, that the devolved nations have much in the way of bargaining power. Of course, it does not make for good relations if, in any card game that you play, you think that the other side always has a winning hand. It seems to place the devolved nations in a difficult situation. Given the current constitutional framework, I cannot see an easy path out whereby the devolved powers can go into negotiations with a stronger hand.

George Adam: Again, this question is for Professor Bell. There was a discussion with the previous panel about the threat to the public sector in Scotland from the internal market bill. I brought up the idea with Scottish Water of relating that threat to something that could affect my constituents' daily lives. For example, there could be a threat to a public company like Scottish Water from water companies down south wanting access to the Scottish market through the UK internal market. Do you believe that that could be a threat for us in Scotland? If so, is there a way in which we could combat it?

The Convener: I am not hearing David Bell, folks. Can everyone else hear him?

George Adam: No.

The Convener: We are not hearing you, David. Can broadcasting staff clarify what is happening? I am still not hearing David Bell. I apologise to George Adam, because, for the sake of continuity, I need to move on to another committee member unless he has questions for the other two witnesses.

George Adam: No. I am fine with that, convener. Just move on at this stage.

The Convener: I might come back to you later, George. I hope that we can connect with David Bell again, but we go now to Patrick Harvie.

Patrick Harvie: Thank you, convener, and good morning to the witnesses.

I was a bit amused by Murdo Fraser's question, as he asked in one breath what the bill's value was and what the value of the UK's internal market was, as though those are the same things. Jonathan Hall gave a fairly clear indication that there is a preference for the common frameworks approach of reaching agreement by negotiation while still saying that there might be, in the absence of common frameworks, a need for a fall-back position.

I will come to Mr Hall first, then to the other panellists, if they want. What do you say about the view that, through the bill, the UK Government is saying that it will retain the power at the end of the day, so negotiation means agreeing to what it wants or it will do it anyway? What are the political ramifications of a bill that explicitly gives the power to break an international treaty, thereby undermining the trust that any negotiating partners, including the devolved Governments, have in the UK Government's word? Do the bill and its political context not make it harder to achieve common frameworks and any kind of negotiated outcome, thereby putting at risk the co-operation that a mutually agreed internal market relies on?

Jonathan Hall: I concur with your view. Currently, we have EU regulation that is applied at a UK level but that involves a certain amount of differentiation, where possible, under the devolved Administrations. However, with the bill, we are facing something that will replace the EU governance of regulation and trade with a rather blunter instrument.

I suspect that the logic behind the UK Government's thinking is that international trade and trade deals are a reserved matter, so, in order to preserve the integrity of international trade agreements, it wants to be seen to be operating uniformly on a UK basis, without any differentiation that might undermine a trade deal. However, some sensitive areas, such as food standards, are devolved, to a degree. It is that premise on which the UK Government has built the bill, in the sense that it is looking at its potential to negotiate international trade agreements and it wants to give the impression that the UK internal market will be smooth, uniform and complete.

11:45

On the political issues around the potential for undermining international treaties, particularly with reference to the Northern Irish protocol, there is a significant concern shared by all of us—certainly by NFU Scotland—that any Government can, at its choice or preference, renege—if that is the right expression—on its commitments.

Going back to Patrick Harvie's first point, our preferred approach would be to have commonly agreed frameworks into which each and every Administration of the UK has had a say or input about how they operate. When there are disputes, there should be a process of dispute resolution to iron those things out. In some ways, that is how the EU institutions operate. However, that does not seem to be replicated in what is proposed for the UK internal market in the bill.

Patrick Harvie: I am going to talk about dispute resolution in a moment.

In relation to policy making, the other difference with the EU is that the UK does not have anything comparable to a Council of Ministers for co-decision making between member states. There is a UK Government and a UK Parliament, but there is nothing that brings together the different Governments within the UK to make decisions jointly, except the argument for common frameworks.

You said that, in the absence of common frameworks, there is still the case for having a single, UK-wide approach on many issues. Is there a danger that some of your members might come to regret that position if, for example, a non-negotiated single position is imposed not in relation to their production standards, but in relation to the acceptable standards of imports for sale, potentially undercutting your members? Is there a danger that single imposed standards might come to be harmful to your members and to other parts of the Scottish economy?

Jonathan Hall: Yes, and the key word that you used is "imposed", because that is taking away the ability of the devolved Administrations—particularly Scotland—to seek a variance around something or at least to come to an agreement about the standards that should be applied. As soon as mutual recognition, particularly non-discrimination, was in place regardless of Scotland's view of the world or what standards should be set, it would become an imposition, because there would be no legal way of preventing something that had been produced to a different standard either coming into the UK and then being sold or being distributed across the UK—or, indeed, being produced in one part of the UK and then being sold or distributed in another part of the UK.

That word "imposed" is the critical word here. The whole point of common frameworks is that they are commonly and mutually agreed, and they are not imposed by the process; you get to

agreement by consensus rather than by consultation. That is what is missing at the moment, and that is what NFU Scotland has argued for.

Patrick Harvie: On the question of resolving potential disputes, the convener discussed with David Thomson his organisation's proposal that panels of judges from the different jurisdictions in the UK could take on such matters. In some ways, that would be a stronger mechanism than just having the Competition and Markets Authority advising the Governments about regulations that they might consider making.

Notwithstanding the concerns that I expressed about the CMA and its lack of devolved representation, its lack of specific sectoral representation—for example, it has no environmental protection representation—and its lack of public health expertise, would there not be a danger that, in giving dispute resolution decisions to a panel of judges, that would take away the democratic accountability that is necessary? Decisions on the balance between the pros and cons of market differentiation compared with the public health, environmental or other public policy benefits should be democratically accountable decisions—those are political and policy choices that Parliaments and Governments should be making. Would there not be a danger of a lack of accountability if those matters were resolved purely by panels of lawyers?

Jonathan Hall: Is that question for me, Patrick?

Patrick Harvie: It was intended for Mr Thomson, because the issue was brought up with him earlier, but you are both welcome to comment.

Jonathan Hall: I am happy for David Thomson to lead on that.

David Thomson: I am happy to say that that is a particular disbenefit of the proposal that was in our first submission.

On dispute resolution, we would say that there needs to be some relationship with the legal systems and the laws of the four Administrations. In our response to the white paper, we said that that should be part of what is there. As I said in response to the convener's question, the current assignment to the CMA does not seem to involve such a relationship with the four Administrations. We remain agnostic on whether the role could be performed by a judge or someone who was better equipped to represent a wider range of views.

The second point about dispute resolution and the role of the CMA relates to the specialisms involved, a few of which you mentioned. We would suggest that, given the technical and specialist nature of much of the food legislation that will be covered, which includes legislation on things such as contaminants, food composition and production methods, there is a strong need—we argued this in our response to the white paper—for there to be an understanding of those kinds of issues in whatever analysis and dispute resolution is set in place, because they are highly technical and complicated issues that might or might not have market effects, depending on how they are applied and in what country in the UK they are applied. We were keen to get across the point that there needs to be the necessary specialist understanding.

Patrick Harvie: Whether the focus is on the interests of market competitors, such as the food and drink businesses that you represent, or on the public good—whether that takes the form of public health or regulation—you would agree that the bill is, in effect, silent on the question and that that is deeply problematic.

David Thomson: Yes, probably.

The Convener: I can inform the panel and committee members that Professor Bell is back online again. If we have time at the end, I will come back to George Adam to allow him to ask his question. In the meantime, Alex Rowley has a supplementary question.

Alex Rowley: Patrick Harvie touched on this, but I want to go over it with the Food and Drink Federation and NFU Scotland. Earlier, George Peretz gave the example of doing a trade deal with a country that allowed animal testing. I worry that the bill lays the ground for the UK Government to do a trade deal with, for example, the USA that would result in a massive decline in food standards. We would see animals being imported into this country, so although we would have cheap meat, there would be issues of animal rights and the way that animals are looked after. Could it present a real threat to farming and food and drink production across the country if there is a race to the bottom?

David Thomson: We are clear that the food industry needs to retain high standards. It needs to do that throughout the UK as well as from a Scottish perspective—as you know, we trade very highly on the quality of our produce. From that point of view, as Jonnie Hall said, anything that is imposed on the industry without proper consultation, discussion and understanding of the different food industries that exist in different parts of the UK would be problematic. The bill may or may not do that, but it certainly seems to allow for anything that can be imported into one part of the UK—in this case it would be England, because the UK Government is responsible for making international trade deals—to be sold in other parts of the UK.

The key thing is the understanding that the UK Government or any of the devolved Administrations has of the needs and aspirations of industry—the food and drink industry in our case—in the trade deals. We argue that Governments in Scotland and the rest of the UK should seek to be defensive of such an important industry.

Jonathan Hall: I back what David Thomson said. One outstanding concern that we have, which I am sure is shared by many others and on which we need reassurance, is the use of the mutual recognition and non-discrimination principles in areas where no common frameworks have been agreed or implemented, which we know will be the case. We cannot allow those principles to operate in such a way that they allow a race to the bottom by opening up the door to the introduction into the UK market of food that is produced to different standards—whether it is animal health and welfare, environmental or other standards—which is then allowed to move within the UK market across all the devolved Administrations. That is definitely a risk to Scottish agriculture and, equally, the integrity of Scotland's food and drink industry. That industry is built on high standards and provenance, which we need to safeguard very carefully indeed.

Angela Constance: We have touched on how the internal market needs to deal with the implications of external trade. The panel might have heard the earlier discussion about the reputational impact on economic and trading relationships when a state breaches international law. However, given that we also have a public health pandemic, a global recession, an EU transition deadline of 31 December and uncertainty around a no deal or a low deal with the EU, I wondered whether the panel had any concerns, and whether there is anything in the bill that alleviates or increases those concerns. I ask the professor of economics to start, please.

Professor Bell: That is a wide-ranging question. There is certainly a lot to be worried about at the moment. The course of the pandemic is not good for economic activity across the world. Obviously and primarily, it is not good for public health.

12:00

The UK leaving the EU will also be problematic for the economy. There is an issue about the UK negotiating trade deals with countries that are less important, in trade terms, than our EU neighbours. It is always worth remembering that countries go into trade deals with the expectation that they will benefit in some way from them. The US, in particular, goes into trade deals with the expectation that its agriculture sector, which is huge and efficient, will make gains out of any trade arrangement that is reached. A country must see that there are benefits from a trade deal. The recently agreed deal with Japan is supposedly going to be good for Stilton cheese, but the overall effect on the economy will be relatively small.

To come back to your question, I am not clear on whether the bill helps to quell the various worries that we have at the moment. I am not sure that there was a need to rush to have legislation in place before we leave the EU, given that at least some progress is being made on common frameworks. As I mentioned, it is not entirely clear what the financial provisions in the bill are for. Are we talking about the shared prosperity fund? There is nothing as yet that seems to me to be terribly clear about it. The bill has certainly created a lot of problems for the UK Government. I am not clear that it was necessary to introduce the provisions that affect Scotland at this stage.

Angela Constance: Mr Thomson, do you have anything to add from your perspective?

David Thomson: You asked a wide-ranging question. Obviously, we have concerns about the progress of the free trade agreement with the EU. Those negotiations are exceptionally important to the food and drink industry in Scotland because about 70 per cent of everything that we export goes to the European Union. The progress of that deal and the need to conclude something that is better than a no-deal outcome is important. However, the likelihood of that seems quite low at the moment, given the impact of the clauses in the bill and the fact that we are getting close to the 1 January deadline. Those are critical issues for us.

As others have said, leaving aside the changes to the Northern Ireland protocol, which have a direct impact, the bill does not seem to answer any of our direct worries. It does not answer anything to do with the EU free trade agreement, as far as we can see, except for perhaps saying that the UK Government can impose whatever that agreement is across the rest of the UK, and it does not help with any of the other free trade agreements, such as the Japanese one, except in the same way.

If you had asked me before the white paper came out whether my members were concerned about the functioning of the internal market, the answer would have been a resounding no. Although we see the need to find a way to make it clear to businesses how things will operate, we do not understand the rush to get the bill done and we are agnostic about the precise nature of the bill, which does not appear to answer any of the questions that we are most worried about.

Angela Constance: Mr Hall, I am sure that you have something to say.

Jonathan Hall: Yes. As the two Davids have noted, we are entering a period of incredible uncertainty, particularly from an agricultural point of view and from the perspective of individual farms and crofts. There is a whole storm of unknowns approaching as we end the transition period. As we go into 2021, we are leaving the umbrella of the common agricultural policy as well as entering an unknown trading environment.

Although our aspiration and that of the Scottish Government is to see an agricultural industry that is far more focused on the market, deriving more of its income from the marketplace and so on and delivering on the environmental agenda, I suspect that, in the short to medium term, the turbulence that many farm businesses will face will mean that there will be a significant increase in reliance on direct support payments. That is all in the context of what will be an incredibly difficult public spending arena, given that public finances in the UK and Scotland will be extremely stretched, not least because of the fallout and inevitable recovery from the Covid crisis that we have all endured.

There are still some incredible unknowns out there about how supply chains will align and all sorts of other things. Certainty is never abundant, but that all means that individual businesses are operating with less certainty than ever before. Businesses will have to make harsh decisions about what they do and do not do in the near future. We could see significant restructuring of Scottish agriculture because of a whole mix of influences.

Alexander Burnett (Aberdeenshire West) (Con): My question is about how the bill interacts with the common frameworks and is directed to Jonathan Hall. Both the NFUS and the Food and Drink Federation Scotland have been clear in their submissions about the benefits of the UK internal market continuing to operate as it does now, and I believe that we are all in favour of the introduction of common frameworks. However, the NFUS suggests that the insurance policy or sweeping-up powers of the UK internal market legislation should come after the development and implementation of the common frameworks. Given that only six of the common frameworks might be completed by the end of the transition period and that there is no extension to the period under EU law, which preserves our internal market, what is the risk to our internal market if a bill is not in place by 1 January?

Jonathan Hall: I would like to think that the risk would not be that great because, at the end of the day, the withdrawal agreement essentially rolls over all existing EU regulation into UK and Scots law and we would continue to operate, as we do now, under current directives and policy. As things develop over time and changes start to be made through which we diverge from Europe—whatever shape or form that takes—cracks will start to appear. It will not be an overnight issue, because the UK internal market will operate pretty much as it does now, given that all the legislation governing the EU single market will transfer to governing the UK single market. That is not the immediate concern.

The concern is how, when trade agreements are put in place—not only with the US and Japan, but also the trading relationship with the EU, which will come about pretty quickly—those will shape and influence the way in which things are done in the UK. As I mentioned in response to another question, we have had long enough to put in place a process by which we could reach mutually agreed frameworks.

We have been talking about them for a minimum of two to three years, yet, not entirely out of the blue but certainly at the 11th hour, we had a four-week consultation on a white paper in July, and a bill was introduced in the UK Parliament in the first week of September that is now on a fast-track course to be put in place by the end of the year. I still think that we need to put as much effort as possible into getting common frameworks that are governed properly and adequately and which have all the right processes in place so that, in essence, we can divert the need to implement some of the elements of the bill.

Alexander Burnett: Might the bill provide the necessary motivation to progress common frameworks?

Jonathan Hall: The dialogue and discussion on common frameworks have certainly increased in recent weeks. The white paper was put in front of us all back in July and the beginning of August, which refocused a lot of thinking and discussion on common frameworks. At the end of the day, as stakeholders, we have little or no involvement in that process, other than through a degree of consultation. It is down to the UK Government, working with the devolved Administrations, to create those common frameworks. There has been a degree of movement in some areas, but we are still significantly lacking in others.

Alexander Burnett: Does Professor Bell want to add anything to that?

Professor Bell: Not really. I agree with Jonathan Hall that the rate of progress towards establishing common frameworks is very disappointing. I, too, do not have serious concerns that, after 31 December, the UK market will somehow have a seizure; I do not think that it will. It will carry on. There will be an issue only when policy differences emerge, and Edinburgh and London are probably too concerned with other issues at the moment to be thinking about areas in

which such divergence might occur. It will take a bit of time before there is a need to focus on that.

David Thomson: As I said, I do not think that there is an immediate need. The market will not collapse on 1 January, but I will be slightly more prosaic. As we said in our submission on the white paper, there are numerous areas that interact, or could interact, with the proposals. There might not necessarily be an immediate impact over the next six months, but there will be an impact.

We have used the example of the deposit return scheme in Scotland. The scheme was announced two or three years ago; the secondary legislation was put in place this year; and the scheme is due to be in place in July next year. There could be an impact on the planning for the scheme. We have asked the Scottish and UK Governments how the Deposit and Return Scheme for Scotland Regulations 2020 interact with the bill. It looked as though it would not matter much in Scotland, because that legislation was in place before the start of the bill process. However, our reading of the bill is that the restraint on trade, which will not be in place until later, might have an impact.

From our reading of the bill—we need this to be confirmed by both Governments—that means that bottles that are placed on the market in Scotland would have to follow a scheme and there will be labelling requirements and so on. That is a potential issue. As I said, food legislation is a complicated area, so it is likely that numerous things will fly up and be impacted by the bill. Until we have answers to those questions, the bill makes the DRS more complicated.

12:15

Dean Lockhart: I return to the question of how and when the internal market proposals might apply. There has been a lot of hypothetical discussion around the scope of the legislation, how much trade it will actually apply to and its potential impact on devolution. I understand the panel's concerns and frustrations around the progress of the common frameworks, but the committee has heard evidence that they are progressing—I think that a couple of witnesses on the panel have mentioned that, too.

Both Governments appear to be committed to having in place common frameworks to cover a number of areas, including agriculture, fisheries management and food standards and labelling. It is hoped that those will be in place by the end of the year, when the transition period ends. If they are in place, or almost in place with a view to being implemented, what levels of residual trade will the internal market provisions apply to, given that most of the common frameworks will, it is hoped, apply to the substance of the trade that we have been discussing? That question is for Jonathan Hall first, and then David Thomson.

Jonathan Hall: Estimating exactly how much of the residual trade that you refer to would require to be covered by the non-discrimination and mutual recognition proposals is quite a difficult challenge. We still simply do not know exactly how many of the required common frameworks will be operational or how they will operate.

Let me take agriculture as an example. There is not just one set of agricultural regulations—agriculture is impacted by a host of different regulations, for good reason and in different ways. We might have in place an agricultural framework that covers agricultural support and how that will operate within an internal market, to ensure that support payments do not distort that market. However, all sorts of other aspects of agricultural production are governed by many issues that cut across national boundaries within the UK. For example, there are EU regulations, including the nitrates directive, the water framework directive and directives on everything to do with habitats and birds, and that is before we get to elements such as food labelling, food safety and issues around organics, genetically modified products and gene editing. There are many different interfaces with regulation that influence agriculture. Therefore, it is hard to quantify—certainly in my mind—exactly what might be left over that would not be covered, because we still do not know the full extent of what will be in place through the common frameworks by the time we get to 2021, or even part way through that period, when we will start to need them.

I am afraid that that is not a very helpful reply.

Dean Lockhart: It is helpful, because it relates to the other question, which is whether legislation, in whatever form, is necessary. It sounds as though the best outcome is for common frameworks to be in place. We all want them to be as comprehensive as possible, but, as you say, realistically, can they cover 45 years' worth of EU regulations and EU case law? We have to have some form of fallback or sweep-up mechanism, and that is the United Kingdom Internal Market Bill.

Jonathan Hall: I tend to agree with that. As I have said, we need an insurance policy. As far as I am concerned, we do not want to use it, but given that we need to stitch an incredible array of complex regulations into commonly agreed approaches, and given the frustrating lack of progress in that respect, it might be that, in order to maintain a smooth and free flow of goods and services within the UK internal market, you might rely on that mutual recognition, non-discrimination approach in some areas for a period.

Dean Lockhart: I appreciate that time is tight, convener, but can I ask David Thomson and Professor Bell to comment?

The Convener: Yes, and maybe they can also tell us what the hurry is.

David Thomson: What is the hurry? As Jonnie Hall said, this is all very difficult. We have not seen the agreements that are being developed and we have not been consulted on them. There is only a very small amount of time if we are looking to get them in place by 31 December, although multiple years have passed in which that could have been done. I know that the Governments are working on a range of agreements but the Scottish Government has, I think, resiled itself from participating in the internal market discussions. The frameworks are still in the balance, as far as we are concerned, and we have not seen the proof of the pudding. That is why it is difficult to say what else would be affected.

As I hope that I outlined in my comments on the deposit return system, there are pieces of regulation that will not necessarily fall within the agreements and frameworks. It is very difficult to try to understand the impact of the interaction of all that, particularly with the bill.

Professor Bell: I am going to take a slightly different view and, in a sense, argue against myself. A possible reason for needing the bill immediately is that, in effect, the financial provisions will allow the UK Government to spend money across the devolved nations on whichever institution it wants. EU regional funding is due to end very soon, so the shared prosperity fund, which has been promised and talked about a lot but has not really adopted a clear form yet, will need to be implemented very quickly.

In a sense, the internal market bill may be a necessary precursor for the shared prosperity fund, although it will depend on how the fund is designed. There is not necessarily a need to follow the EU's design, which basically has two large funds—the European social fund and the European regional development fund—that are then handed over, with the various institutions, Governments and sub-national Governments allowed to make their own decisions.

If there is going to be a case-by-case approach along the lines of the UK city deals, maybe the internal market bill is all that is needed to kick the shared prosperity fund into existence. Of course, a lot of people have built up expertise and capacity around the regional development and levelling-up agenda, and they are anxious to know exactly how the fund is going to be designed.

Dean Lockhart: Thank you. As time is tight, I will leave it there.

The Convener: Before I bring in John Mason, I will ask a daft-laddie question. Why do we need an internal market bill for the UK Government to create a shared prosperity fund and spend money?

Professor Bell: True.

The Convener: Why is it needed?

Professor Bell: Only one clause in the bill allows the spending powers. I do not have a clear understanding of why it was felt necessary to have this very large bill. It is interesting that the BEIS note refers to the shared prosperity fund only in relation to the application of the bill. The answer may be that it is an enabling provision, but the clause that does the enabling is a pretty small aspect of the overall bill.

John Mason: I was interested in that as well, because if the city deals could go ahead without legislation, presumably the replacements for EU funds could as well. Professor Bell said that, potentially, the UK Government could bypass the Scottish Government and give money directly to Skills Development Scotland. The EU would not have done that; it would have done things only in conjunction with the Scottish Government.

Professor Bell: Yes, that is right. Skills Development Scotland is an agency of the Scottish Government; money from the EU passes through the Scottish Government and on to Skills Development Scotland. The Scottish Government must account to the EU for the funding being used in the right and proper manner.

John Mason: Thank you. I have another question for Professor Bell. In the last paragraph of the paper that you gave us, you said that it was "surprising" that procurement is not mentioned in the bill. What is happening in that field?

Professor Bell: Procurement is important, but it is going through the common frameworks approach. As David Thomson and Jonathan Hall have said, we are not really party to what is going on in the negotiations, but that is one of the common frameworks that is being worked on. It is important to know where it is going; public procurement is an important issue that tends to appear in trade deals because countries want access to other countries' public contracts markets. The answer is that procurement is on another track and, at the moment, we do not know where that track is leading.

John Mason: It is important, because although in some ways we want to favour Scottish companies, we do not want English regions to disadvantage Scottish companies.

Professor Bell also mentioned the living wage, which has been a key political issue in Scotland. We wanted to insist on the living wage but EU

rules precluded it. Do we have even an indication that that rule might be relaxed, or will there be a copy of the EU rule?

Professor Bell: I do not know. The Scottish Government is in those discussions, but we do not know much about what is going on within the common frameworks arrangements. They go through various stages and not many of them have got through many stages yet. It remains to be seen what will come out, in terms of the Scottish Government not so much favouring Scottish companies as being able to insist on certain conditions for those who win public contracts in Scotland.

John Mason: I have a final question, which is for Mr Hall. The bill appears to allow more freedom for Scotland to have its own animal health regulations. Do you feel that there is enough certainty about that? In the past, we have needed different rules from other countries on transporting animals because of issues involving distance and ferries. Are you comfortable with where we are on that at the moment?

Jonathan Hall: That illustrates the fact that we all need to operate to basic standards—in this case, basic standards in relation to animal health, welfare and disease. However, in certain situations, we need differentiation. If we all operated to the same, uniformly applied rules, one part of the UK might be disadvantaged in comparison with others. It works in different ways. Having devolved powers in that context remains pretty important—in fact, it is very important indeed.

You mentioned animal transport issues. If, for example, rules about journey times or live sea transport were applied at a UK level—which has been mooted—that could seriously threaten the livestock industry in more peripheral parts of Scotland, simply because of the distance that animals require to travel.

12:30

Such issues mean that we have to preserve the ability to have a differentiated approach, while operating to a minimum standard that ensures animal health and welfare. A one-size-fits-all approach produces unintended consequences. For example, if we limited total journey times for livestock to four hours or less, livestock would be cleared from many parts of Scotland, because it would be unsustainable to breed animals in one part of Scotland and move them to other parts of Scotland—even just to the point of slaughter.

John Mason: Thank you.

The Convener: I warmly thank our witnesses for the evidence that they have given us today. We have covered a broad range of subjects.

Before I close the meeting, I want to update colleagues on our invitation to UK ministers to give evidence on the United Kingdom Internal Market Bill. Although the media release that we discussed previously was issued, I now confirm that the Chancellor of the Duchy of Lancaster's office has advised the clerks that Michael Gove is available to give evidence on the bill and that, in due course, his officials will confirm timings with the clerks. That is a welcome development, and I look forward to hearing from Mr Gove, as do, I am sure, other committee members.

I thank everyone who has been involved in the meeting, including the broadcasting team.

Meeting closed at 12:31.

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