EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Tuesday 16 January 2007

Session 2

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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE
1st Meeting 2007, Session 2

CONVENER

*Linda Fabiani (Central Scotland) (SNP)

DEPUTY CONVENER

Irene Oldfather (Cunninghame South) (Lab)

COMMITTEE MEMBERS

*Dennis Canavan (Falkirk West) (Ind)
Bruce Crawford (Mid Scotland and Fife) (SNP)
Phil Gallie (South of Scotland) (Con)
*Mr Charlie Gordon (Glasgow Cathcart) (Lab)
John Home Robertson (East Lothian) (Lab)
*Gordon Jackson (Glasgow Govan) (Lab)
*Mr Jim Wallace (Orkney) (LD)

COMMITTEE SUBSTITUTES

*Derek Brownlee (South of Scotland) (Con)
Marilyn Livingstone (Kirkcaldy) (Lab)
Richard Lochhead (Moray) (SNP)
Nora Radcliffe (Gordon) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Bill Adamson (Food Standards Agency Scotland)
Colin Bayes (Scottish Environment Protection Agency)
Stephen Boyd (Scottish Trades Union Congress)
Dave Gorman (Scottish Environment Protection Agency)
Sandy McDougall (Food Standards Agency Scotland)
Neil Mitchison (European Commission Office in Scotland)
Andy Robertson (NFU Scotland)
Jonathon Stoodley (European Commission Secretariat-General)
James Withers (NFU Scotland)

CLERK TO THE COMMITTEE

Jim Johnston

ASSISTANT CLERKS

Emma Berry
Alun Davidson

LOCATION

Committee Room 6

Scottish Parliament

European and External Relations Committee

Tuesday 16 January 2007

[THE CONVENER *opened the meeting at 14:00*]

Transposition and Implementation of European Directives Inquiry

The Convener (Linda Fabiani): Good afternoon and welcome, everyone. This is the first meeting of the European and External Relations Committee in 2007. I have received quite a few apologies today, so we are a select bunch here this afternoon. I have apologies from Bruce Crawford, John Home Robertson, Irene Oldfather and Phil Gallie. I welcome Derek Brownlee, who is attending as Phil Gallie's substitute.

Item 1 is our inquiry into the transposition and implementation of European directives in Scotland. Our inquiry has so far been carried out by our rapporteur, Jim Wallace, and this is our first oral evidence session on the subject. Our first panel includes Colin Bayes, director of environment protection and improvement, and Dave Gorman, better regulation manager, both from the Scottish Environment Protection Agency. Also with us is Stephen Boyd, assistant secretary of the Scottish Trades Union Congress. Welcome again, Stephen. Bill Adamson is head of the strategic branch at the Food Standards Agency Scotland, and Sandy McDougall is head of the contaminants, hygiene, additives and shellfish branch at the Food Standards Agency. Gosh—that is quite a title.

As there are three panels of witnesses, and as there are so many of you, I do not intend to hear opening statements from this panel. We will move straight into questions. In the interests of keeping the discussion flowing smoothly, rather than having everyone jumping in, please indicate to me whether you wish to contribute in answer to a committee member's question.

Mr Jim Wallace (Orkney) (LD): In our preliminary work, we found that it is possible to consider this issue at three stages. First, there is the formative stage of European legislation; secondly, there is the stage of transposition into our domestic law; and thirdly, there is the implementation and enforcement stage.

I will start with the formulation stage of European legislation, although I would certainly like to come on to the other stages later. There are a good range of people here, with their environmental, trade union and food protection interests in the subject. I would be interested to hear how the witnesses and their organisations relate in this respect. Are you engaged by the Scottish Executive to identify specific Scottish issues as draft European legislation comes out of Brussels? What is your organisation's approach—international bodies might have a role here—for keeping track of what is happening in Europe and making your own direct input?

Colin Bayes (Scottish Environment Protection Agency): I suggest that our experience varies, depending on the proposed legislation concerned. The negotiation of legislation from Europe is clearly led by the United Kingdom Government. Often, the Whitehall civil service departments lead, and the route through the Scottish Executive to Whitehall colleagues is slightly convoluted when it comes to influencing legislation.

That said, we have had some notable successes. The Executive particularly encouraged us to engage in the final stages of negotiation on the water framework directive, and we deployed staff in Brussels, working directly with the European Commission and the European Parliament as we sought to give advice. However, we do not have a direct role. Things are definitely done through the chain that I have just described.

Stephen Boyd (Scottish Trades Union Congress): I will use the public procurement directive as an example. I hope that this is reflected in our written submission—the matter was a real concern to us around this time last year. We had no contact with the Scottish Executive until very late in the day—almost at the implementation phase. We have no offices in Brussels, although we have a number of informal contacts and our larger affiliates have a presence in Brussels. We therefore worked closely with the GMB, which was already working with a range of stakeholders at European Union level to try to influence the directive—that reflects the directive's importance to a number of non-governmental organisations.

I am not aware of any EU directive during the past few years on which we have worked with the Executive at formulation stage. Depending on a directive's importance to trade unionists, we make use of our informal contacts in Brussels.

Bill Adamson (Food Standards Agency Scotland): Unlike SEPA, the Food Standards Agency is a United Kingdom ministerial department, which is responsible to Westminster and the Scottish Parliament. In that respect, I

guess that we have the advantage of being a little closer to negotiations on European matters at an early stage, in committee working parties and so on. We need to ensure that we include the Scottish dimension in negotiations, so we spend quite a bit of time trying to involve a wide range of stakeholders.

As others said, the formulation depends on the nature of the business. A piece of work might be narrowly focused and have few implications for Scotland. In 2006, a major piece of work was the implementation of European legislation on food hygiene, which brought a number of directives together into one, directly applicable regulation. A great deal of discussion took place to ensure that there was a Scottish influence in the negotiations on that piece of legislation. In that regard, the FSA has the advantage of being a UK department.

Mr Wallace: In your experience of dealing with European legislation, have you come across examples in which you thought that a Scottish dimension was overlooked, which you might have been able to flag up if your knowledge and expertise had been tapped earlier? If there was an opportunity for your organisations to contribute at an earlier stage, would you have the resources and capability to do so?

Dave Gorman (Scottish Environment Protection Agency): We cannot get involved in policy issues but we can certainly advise and we can take part if the Executive asks us to do so.

SEPA has been trying to develop its role in the European Union network for the implementation and enforcement of environmental law—IMPEL—which is in effect the regulator and involves the 25 countries informally. We have persuaded the European Commission that we have something to say about how practicable and enforceable legislation is, so we have tried to develop a role in pointing out problems, which are often to do with definitions, terminology, or how directives relate to one another. We think that we have had some success. We are involved through IMPEL in a series of meetings, in an attempt to influence the review of the integrated pollution prevention and control directive. As I said, the work is not about policy issues but about the problems that are caused by how the IPPC directive relates to other directives, the lack of definitions and so on. The work is a promising area for us and we are trying to take it forward.

Stephen Boyd: I do not think that there were particular Scottish issues to do with the public sector procurement directive. The issues were the same throughout the member states. The Executive's decision to implement the directive separately from the rest of the UK presented an opportunity to do something a bit different in Scotland, but the Executive just mirrored the Office of Government Commerce's regulations. The approach seemed a trifle bizarre to us and represented a lost opportunity to work with a range of stakeholders and to make use of the additional scope that the directive offered, in particular on environmental matters, for the benefit of Scottish workers, communities and businesses.

There are always resource constraints, as Mr Wallace knows from his experience as Minister for Enterprise and Lifelong Learning. Perhaps at times we offer more than we are able to deliver, but on important matters it would be good to work as closely as possible with the Executive within our resource constraints.

Sandy McDougall (Food Standards Agency Scotland): Our experience is almost the opposite of what Mr Wallace was suggesting. We have been able to identify significant Scottish differences, sometimes in areas in which—on the face of it—one might not expect to find differences. That is a benefit of having part of a UK agency based in Aberdeen, with one of its clear duties being to seek out Scottish differences or issues specific to Scotland that relate to anything coming from Europe. An example that comes to mind is the recent ceramics legislation. Although one would have thought that the issues for the ceramics industry would be common across the UK, by investigating specific sectors in Scotland we came across things that were specific to Scotland and on which we were able to have influence in the negotiation process.

Mr Wallace: Stephen Boyd indicated that there was scope for flexibility in implementation of the procurement directive, particularly in relation to importing environmental and social considerations. Did the STUC make suggestions to the Scottish Executive off its own bat or did the Scottish Executive invite discussion on how there might be differential implementation in Scotland, given that we had decided to do it ourselves?

Stephen Boyd: The Executive conducted a formal consultation exercise on the draft regulations, which elicited about nine responses. It was a consultation like any other. The Executive did not come to us directly and invite us to respond to the consultation. Our normal processes identified this as a consultation to which we should respond as a priority. In doing so, we worked very closely with colleagues down south who were about six months ahead of us in the process. We were therefore in the fortunate position of being able to build on the evidence that they had already provided to the OGC. At no point in the process did the Executive come to the STUC, or any other stakeholder as far as I am aware, and explicitly ask for its views on the directive.

Colin Bayes: You are moving on to talk about implementation rather than negotiation in Europe.

Our experience has been that latterly we have had much closer engagement with the Executive and those on whom the new directive or regulations will impact than has been the case in the past. We had an Executive-sponsored national forum about the controlled activities regulations, which implement the water framework directive, and the regulated industries stakeholder group that I chair engaged with those on whom the regulations impact. We have advised on taking a more risk-based approach to implementation of that directive in Scotland. I would argue that, as a result of that engagement with the Executive, we have a simpler and more straightforward approach towards the lower-risk activities than England and Wales do.

Mr Wallace: Convener, I might want to ask some questions about enforcement later, but I can come back to that.

Dennis Canavan (Falkirk West) (Ind): SEPA's written submission refers to overimplementation of some EU directives, some of which is justifiable but some of which is described as "accidental or unjustified". Can the panel members give some examples of directives that have been overimplemented but not justifiably so?

Colin Bayes: At the moment, we are faced with circumstances where the integrated pollution prevention and control directive, which was meant to deal with the potentially most polluting industrial activities, is applied to high street dry-cleaners. That would seem to be crazy and not a proportionate approach to dealing with something with such a level of risk. That might have happened accidentally, so we have raised the issue with the minister and said that any opportunity should be taken to correct that situation.

The Convener: Is that being done accidentally by Scotland, the UK or Europe?

Colin Bayes: I think that it has arisen as an accident all the way from Europe down. It needs to be addressed.

14:15

Dave Gorman: In our evidence we were trying to draw attention to the Davidson report in general and the fact that it might be true that what we could technically term gold plating occurs, but that that is not always a bad thing. There could be reasons why it has been done.

In our evidence, we made the point, which Colin Bayes has just touched on, that from European level down, not enough consideration is given to the tiering of control within environmental law. There is the idea that one needs to get pre-approval from the regulator, but that does not always need to be done in the same way and a lighter touch could sometimes be used. The tiers in the car regulations are a good example of that. Colin Bayes said that in the past there was not enough emphasis on tiering in other regimes. In pollution prevention and control, the general approach that is taken to Grangemouth is taken to areas where a lighter touch should be applied. That causes us difficulties, because we have to follow the law. We have pointed out that that is an issue for Europe to include when it considers its terminology.

Dennis Canavan: SEPA's submission refers to

"the need to identify accidental or unjustified over-implementation."

Are you suggesting that some overimplementation that is unjustified might be deliberate, rather than accidental?

Dave Gorman: I do not think so. We were talking more about accidental overimplementation where there was not enough consideration of the proportionality of the controls. There is a genuine problem in relation to the environment that needs to be fixed. With regard to the tools that we can bring to deal with the problem, perhaps it is more about the tiers of control, as Colin Bayes said. Does that help?

Colin Bayes: Judging by Dennis Canavan's reaction, possibly not. Would you like me to expand on that?

Dennis Canavan: There might be an overzealous minister who deliberately overimplements something, in order to reach a higher standard than the minimum standard, as it were.

Colin Bayes: We are not suggesting that. We are suggesting that, with more thought, a more proportionate approach could have been taken to implementation in some areas.

Dennis Canavan: Right. Thank you.

Derek Brownlee (South of Scotland) (Con): Earlier today, my colleague Alex Fergusson passed me details of a case that highlights the practicalities of some of the issues that we are discussing and the different approaches to European directives that are taken in Scotland and the rest of the UK. It would be interesting to see whether, in the case in question, the difference in the approach taken was a result of ministerial decisions or of a difference in the implementation of the directive. The case concerns a small garage, which was burning waste oil to heat it. Its owner was told that, under the waste incineration regulations in Scotland, that is no longer permissible. I understand that in England, burning waste oil in similar circumstances was thought to

fall under a different directive, which meant that it was permissible.

It has been suggested that the European Commission might challenge the situation in England. However, that is an example of a different approach being taken to what would seem to be the same set of laws. I cannot see any real reason why there should be a different approach taken in Scotland that is specific to the peculiarities of Scots law as opposed to the peculiarities of English law. Who is taking the decision, why is there a difference of approach and, in a devolved context, to what extent do the people taking the decisions and implementing the law compare implementation not just in other European countries but in other parts of the UK?

Colin Bayes: The guidance in Scotland, as issued by the Executive, to which we contributed, is that the burning of oil in SWABs—small waste oil burners—is classed as burning of waste and is covered by the waste incineration directive. This goes back to what Mr Canavan asked. There is no de minimis, so the waste incineration directive applies to something as big as a massive industrial waste incinerator right the way down to a small waste oil burner that is used to heat a garage. The legal opinion in Scotland from the Executive and SEPA's lawyers is that SWABs were caught by the waste incineration directive. We have always given that consistent view to the industry in Scotland. The Department for Environment, Food and Rural Affairs took a different view, as Derek Brownlee indicated, and issued guidance that suggested that SWABs were not small incinerators. That guidance is now being challenged and DEFRA has received an article 226 infraction letter from the European Commission saying that it considers that DEFRA's guidance was incorrect.

There has been a difference without doubt. It is no great pleasure to say that we appear to have followed the right legal interpretation in Scotland because, as I indicated, one might argue that, if the directive had been sensibly drawn up with a de minimis provision in the first place, this might not have been an issue. Unfortunately, the directive was not couched in those terms and we are charged with implementing the law. England and Wales are now under infraction proceedings for following an interpretation that was wrong in the Commission's view.

On the wider issue, SEPA's policy staff liaise closely with our colleagues in England and Wales, Northern Ireland and the Environmental Protection Agency of Ireland, whom we meet on a quadripartite basis. We endeavour to take a common approach to such matters. In this case, there was no united front. That was largely down to DEFRA and the Scottish Executive but, as I said, it has finished up with infraction proceedings being initiated against England.

Mr Wallace: I will quote from a letter that Rhona Brankin sent me on 7 November when she was still the Deputy Minister for Environment and Rural Development. It forms an annex to our report. In the letter, she states:

> "the Executive's lawyers are looking again at the detail of the Directive to check whether there is any flexibility to disapply the full requirements of the Directive in respect of small burners. Should this prove to be the case, we would, of course, make SEPA aware of our views. It is, however, for SEPA to implement the regulations transposing the Directive at the end of the day and, as you will be aware, the Executive has no role in interpreting legislation on behalf of the regulator."

Will you clarify the matter? You seemed to indicate that, although the Executive and SEPA had taken separate legal advice and come to the same conclusion, you had acted under guidance from the Executive. For the benefit of the committee, will you explain where the Executive's responsibility stops and yours starts and whether the implementation and enforcement of the directive are SEPA's decision?

Colin Bayes: Whenever we come to an issue of interpretation, the Executive makes it clear that it is for SEPA as the Executive's agency to interpret the legislation and, ultimately, for the courts to decide whether we are right or wrong. In this case, SEPA and the Executive issued common guidance on the waste incineration directive under the badge of the Executive to try to provide clarification when implementation was initiated. However, I agree entirely with Rhona Brankin's comments that, at the end of the day, it is for SEPA to decide and the courts to challenge us if we are wrong.

The Convener: Would Bill Adamson or Sandy McDougall like to comment?

Bill Adamson: I guess that there is a contrast between the Food Standards Agency's role and SEPA's in so far as the FSA is the Government department that is responsible for formulating policy and also has responsibility for ensuring that the policy is being implemented by local authorities and the agency's meat hygiene service.

We are also aware that the major review of food safety legislation that the Commission instigated to consolidate the legislation that I mentioned earlier contained the ideas of proportionality and flexibility, so we have not suffered from the same problems with respect to what might be considered to be inappropriate application of directives for smaller businesses. Through local authorities, the agency arranged for work to be done with small businesses on some of the new requirements of the food hygiene legislation, such as food safety management systems, and has

spent quite a bit of time working with small businesses in particular to assist them through the process of implementation.

We have flexibility because of the nature of the food safety legislation. There is no tension between the agency's policy directive and its implementation because, to a certain extent, we are given direction in seeing through the process of implementation.

Sandy McDougall: We are aware of your point about the need to work consistently across the UK. We have extremely close working relationships with our officers throughout the UK. We are well aware of any recognisable differences of interpretation that exist in England or Wales. Perhaps the best example is the well-known raw milk ban. Clearly, the situation in Scotland is different from that in Wales, but the differences have been well thought out and reviewed through the years. All four countries in the UK are involved in the reviews and we work together very closely to minimise differences.

Mr Wallace: I want to pursue the issue of consistency. My question is directed at SEPA, as our next evidence-taking session will involve NFU Scotland. I know that if our colleague John Home Robertson were here, he would raise the issue that concerns me, because he has done so previously on a number of occasions when we have dealt with the subject. I am referring to the issue of waste charges for recycling road planings. Mr Home Robertson has made the point that immediately south of his constituency, in Berwick-upon-Tweed, the surface material that is removed when the tarmac surface of roads is renewed, which is called road planings, can be used or recycled to cover car parks, driveways and farm roads without any let or hindrance, as there is clearly an environmental benefit from such recycling. However, a few miles to the north, in East Lothian, SEPA takes the view that road planings can be reused, but only under a waste management licensing exemption, for which a charge is made. Given that recycling is a good environmental objective, how do we justify charging in East Lothian but not in Berwick-upon-Tweed?

Colin Bayes: I will fill in the background to the issue. The waste management licensing system normally requires waste management licensing for utilising or disposing of waste on land. There are a host of exemptions to ensure a lighter touch within the regulatory framework. As you say, the recycling of road planings is an exempt activity, so one can register to use them on that basis.

Back in the late 1990s there was considerable disquiet about the abuse of materials that was going back to land, supposedly for recycling. The Parliament expressed concern about the lack of control over such activities. A petition was submitted to Parliament on the matter and hearings were held, at which residents groups expressed concern about some of the activities. As a result, the regulations on exemption were amended to require that they be controlled slightly more actively.

The recycling of road planings is one activity that was caught by the changes. As you say, there is now a small charge for registering the exemption, which increases in line with the scale of use. The charge should be paid by the person who is trying to get rid of the material, rather than by those who are trying to use it. We argue that it should be paid by those who are trying to dispose of it, because they benefit from taking that route rather going to landfill, which would require them to pay landfill tax. There is still a positive incentive to recycle road planings. I accept that there is a charge, but it was introduced following amendments to the regulations that were made because of abuse of exempted activities in the 1990s.

Mr Wallace: The abuse in the 1990s to which you refer predated the establishment of the Scottish Parliament. Did this Parliament recommend that the change be made?

Colin Bayes: I am referring to events in the late 1990s.

Mr Wallace: Are you saying that the Westminster Parliament changed the regulations?

Colin Bayes: No. The change was made by the Scottish Parliament in the late 1990s.

Mr Wallace: It must have been very quick work. Was the change made in only six months?

14:30

Colin Bayes: The petition was considered very early on. I should correct my earlier comments—the petition was submitted in the 1990s, but the change to the regulations was made in 2003. I apologise for not making that clear.

Mr Wallace: A result of the groundwater directive is that sheep farmers have to apply to SEPA for authorisation to dispose of used sheep dip. I understand that there is a big difference between the charges in Scotland and those in England. What is the difference? Does a higher charge in Scotland drive some sheep farmers to use other dips, which run contrary to Executive policy on health and safety?

Colin Bayes: The groundwater directive, which concerns the protection of groundwater, was passed by the European Commission in 1980. Groundwater is of particular concern in that it is a precious resource and, if polluted, takes decades

or longer to recover. That puts the charges into perspective.

The United Kingdom did not implement the groundwater regulations until a case from Scotland, in which a person claimed that their private water supply had been polluted by sheep dip, causing them to be ill, was referred to the Commission. The groundwater regulations were then introduced. Because of that case, we had a short time in which to implement the regulations, on which we worked with the NFUS and the Scottish Crofters Union.

There are fundamental differences between the charging regimes in England and Wales and Scotland. In England and Wales, someone requires a groundwater authorisation for each point at which they wish to dispose of sheep dip. In Scotland, we have worked on the basis of a farm unit, so a farmer can have a number of disposal points. In the crofting counties, a crofting township can hold the groundwater authorisation on behalf of all the crofters. Although the price is higher to the tune of £30 to £40 for the subsistence fee, it is a different regime, which we believe allows greater flexibility. It is also more sensible in terms of the burden of the persons who are disposing of the sheep dip and environmentally: it is better to rotate where the sheep dip is disposed around a number of places rather than put it in just one place all the time.

There are differences, but they are sensible and were negotiated with the industrial bodies concerned when we were implementing the regulations. There has undoubtedly been a move away from using sheep dip to using pour-ons and injectables, for example. In fact, we have seen a reduction from about 2,500 to 1,500 authorisations for disposal.

Under our duty to ensure that we recover costs, we have put up the application fee to a cost-recoverable level. It was not at that level previously. We tried to help to implement the regulations as easily as possible for the industry, so we did not recover costs. We hope that we introduced it sensibly for agriculture and the farmers and crofters concerned.

The application fee is now significantly higher than it was, but we are not getting new applications. People applied for the authorisations in the late 1990s, but they are now moving away from using them or making arrangements to share facilities so that, for example, two farms use the sheep dipping facility on one and therefore do not need two authorisations. There are differences, but we have tried to be helpful.

Mr Wallace: I do not want to go through the list, but I can perhaps generalise and say that you have identified differences and that SEPA can have a different charging regime. It is not driven by Europe.

Colin Bayes: That is correct.

Mr Wallace: You have given explanations for the differences, but why is there a strong perception, which has been represented to us in evidence, that there is a disproportionate and unjustified burden on Scottish agriculture compared with that south of the border?

Colin Bayes: We have done a benchmarking report to compare ourselves with England and Wales. We have published it and it is available on our website. Without doubt, it shows that there are winners and losers. When the charging schemes are not UK-wide—a few are UK charging schemes—there are differences. In some cases, it is cheaper to have an environmental licence in Scotland; in others, it is more expensive. People often see only the headline figure and do not get into the detail that I have just described to you, which is very different.

There was considerable concern about abstractions for agricultural irrigation when the controlled activities regulations and the charging scheme were being developed. Those were developed through a stakeholder group that operated from 2001 onwards, which included representatives from industry, agriculture and the hydropower sector. There is no doubt that we made some mistakes, which we corrected as a result of the consultation. Considerable concern was expressed, to which I hope we responded. As a result, Scotland now has arrangements for the use of a mobile irrigator whereby a mobile irrigator can be used at a number of points without a licence being necessary for each point at which it is used. It is cheaper to irrigate north of the Tweed than it is south of the Tweed.

The Convener: I want to ask about differential enforcement within the UK. As Jim Wallace said, in business in general—not just in the agriculture industry—there is a feeling that Scotland is disadvantaged by much of the enforcement of European Union regulations. I invite the panel's views on that and on differential enforcement in different member state countries. There is an even greater perception that whereas this country carries out a great deal of enforcement, other European countries do not, which puts us at a disadvantage. I will give Colin Bayes and Dave Gorman a rest for a minute.

Bill Adamson: It would be fair to say that we are less conscious of any such perceptions in the field that we are involved in regulating, but that is not to say that there may not be differences in implementation. As we mentioned earlier, local authorities are involved at the sharp end of enforcement on most aspects of food law. We

have sought to establish with them a framework agreement on the approach to enforcement, which is the same whether an authority is in Scotland, England, Wales or Northern Ireland. In addition, there is an enforcement code of practice that requires authorities to enforce the legislation in a particular way. One raison d'être for those pieces of work is to ensure consistency of application.

It would be fair to say that our colleagues at headquarters would suggest that more complaints about inconsistent application or enforcement of food law are made in England than in Scotland. That is principally because in England more than 350 local authorities are used to enforce food law, whereas in Scotland, in effect, only 32 people are involved, our close relationship with whom allows us to discuss consistency. The views that are expressed to us as an agency are that there may be inconsistency, but that that inconsistency is between different authorities down south rather than between England, Scotland, Wales and Northern Ireland. That tends to be what we hear.

However, we are conscious that consistent enforcement is an issue and we have spent a considerable amount of time ensuring that we can achieve it. It is probably worth saying that the agency is responsible to the Commission as a central competent authority and that the Commission carries out a number of audits of our activities across the piece. The Commission will often raise consistency of enforcement with the agency, given that so many local agents are involved in enforcing the law. The issue is in our mind, but we have not been aware of any significant allegations of inconsistency throughout Scotland. We probably feel that we have tighter arrangements than are in place in England.

The Convener: What is your perception of the position throughout Europe?

Bill Adamson: We frequently hear allegations of disproportionate enforcement throughout the Community but, to be fair, one of the reasons the Commission has moved towards the direct application of regulations in our area of policy instead of the use of directives is to ensure that there is less opportunity for different approaches to be adopted. That has to be the case: we are not entitled to change the wording of agreed, directly applying, European regulations. Of course, that does not mean that there is no prospect of the implementation of such laws being different, but the Commission's Food and Veterinary Office plays a strong role in ensuring consistency of application of food law—indeed, it would be fair to say that it is probably the most active of the Commission's departments in that field. That is perhaps why allegations of inconsistency in the enforcement of food law do not carry such weight. From time to time, suggestions of a lack of consistency are made to us, but our experience is that such allegations are not always well founded.

Sandy McDougall: I want to reinforce the point Bill Adamson made about the FVO. This year, five missions are planned; Scotland may well be covered in the mission to the UK. All FVO reports are publicly available on the office's website, so anyone can see how its enforcement practices in any member state stack up.

Stephen Boyd: I will make some general points. We make clear in our written evidence that we do not believe that Scottish business is overburdened by European or other regulation. The evidence is on our side on that point. On St Andrew's day last year, I attended a public hearing in Brussels on the single market. It was crystal clear that employer organisations from all member states think that gold plating occurs; the issue is not peculiar to Scotland in any way, shape or form. Everyone had stories to tell, although how compelling those stories were is a different issue.

You asked why the perception of gold plating exists in Scotland. There is a range of reasons. Jim Wallace's report indicates that there is a lack of clarity about roles and responsibilities. If some clarity could be established, that might be of assistance. The lack in Scotland of what we refer to as social partnership is also a concern. Jim Wallace looked at Ireland and Denmark. Although allegations of gold plating are made in those countries, a wider range of stakeholders are engaged at formulation stage. That culture does not exist in Scotland.

If the argument is that Scotland is overregulated, comparative analysis of relative economic performance is appropriate. In Scotland and the UK as a whole, profitability is high compared with other European countries, but productivity is very low. Neither of those statistics indicates that Scotland is overregulated. We have argued time and again that that perception and the amount of time and effort that is spent addressing it are a huge distraction from the main economic challenges that we face. Our aspiration is that people should start to address those challenges. In particular, we should consider what we can learn from Europe to increase our domestic productivity rate, which is the main challenge that we face.

The Convener: Is the main issue enforcement rather than transposition?

Dave Gorman: Recently we reviewed our enforcement policy, and last year we put it out for public consultation. Our approach is to set some general guidelines and to leave other matters to the professionalism of staff. We think that that approach is best, but it is different from the approach of the Environment Agency, whose

enforcement policy is 180 pages of detailed, recipe book guidance that specifies the punishment for particular offences. We do not think that that is being a modern regulator. We think that the best way of responding to local concerns and taking account of circumstances is to set general guidelines and to work within them.

We have also studied outcomes, which are about the same in both cases. In 2005 we carried out some research that showed that in just about every regime that we examined there are no glaring differences between the number of actions that we take and the number of actions that the Environment Agency takes. There are obviously differences in scale, but the number of actions per licence is about the same in both cases.

Part of my job is to travel around Europe talking to other regulators about how they do things. We use IMPEL, the network to which I referred earlier. Over the past few years we have been involved in dozens of projects: at least half a dozen projects this year and the same number—possibly more—last year. Those include everything from how regulators interpret a piece of law through to how they enforce it. We are trying to assess how others are doing and to learn from them. There is no evidence to support the allegation that we are the only people who enforce European legislation. The European Commission now writes to Governments weeks or months after the deadline for implementation of a directive has passed to ask them what they are doing about it. It reports on implementation annually, which allows us to see which countries are doing well and which are not. The Commission regularly takes action against countries that are not doing well.

On 12 December last year, I looked at a random sample and found that 26 different actions were being taken against countries across the European Union for failure to transpose or enforce directives. That is evidence that, if a country is not enforcing, it will be taken seriously.

14:45

It is difficult to generalise about enforcement in Europe, but while we are required to report on the number of permits we issue, the number and type of inspections we do, or the level of enforcement action we take, we are also required to report on subjects such as data and environmental standards and outcomes. If non-enforcement was taking place throughout Europe, the Commission would surely pick it up.

My final comment is that we are unusual in the UK in having a national environmental regulator that carries out the science and monitoring, the awarding of permits and licences, and the inspections. In other countries, licensing is done by one body or possibly two or more, inspections are done by an entirely different body—sometimes dozens—scientific monitoring is done by another set of people, and prosecutions are often done by a further group. That has hidden costs, because the permits are not always consistent with the inspections, and enforcement is not necessarily consistent.

Italy, for example, is a bit of a nightmare for businesses because dozens of different bodies are involved and it is difficult to get an answer to what they should be doing. They will be told by one body that they should be doing something, only to find that they are prosecuted later because another body disagrees. SEPA would argue that, whether or not business agrees with the standards that we set, they are at least consistent.

The Convener: Colin Bayes can comment quickly, as Charlie Gordon has decided that he has another avenue of questioning to open up.

Colin Bayes: I shall be brief. We have a challenge to implement the law and European directives pragmatically, to protect the environment in a way that allows Scottish industry and Scotland as a whole to prosper. That is always in the forefront of our minds.

When costs and competitiveness are considered, people tend to focus on charging schemes because they are easily seen on a trading account. I chair a number of national forums, and I find it regrettable when 90 per cent of conversations are about charging schemes when in fact the far greater burden of a piece of environmental legislation can be the restrictions it places on how a business or industry works, or in the extra things it is required to do, such as install abatement technology.

I want to get the balance clear, because there is a grave danger of always asking how much it costs to have a licence. Ineos at Grangemouth would probably argue that the requirements that it has to comply with for its licence dwarf the subsistence fees it pays to SEPA for auditing its performance. I just want to put charges in perspective.

To ensure that we always balance the competing issues of environmental protection and the development and prospering of Scotland, we regularly meet a host of trade bodies to get feedback from them. Only yesterday I was with the CIA—the Chemical Industries Association, I should explain. It is frank with us when it thinks we are wrong or burdensome, and it certainly tells us when things are different south of the border. We also meet paper industry representatives, the Scotch Whisky Association and the NFUS, and we have a host of regular liaison meetings to ensure

that there is a forum for raising, discussing and tackling any genuine issue.

Mr Charlie Gordon (Glasgow Cathcart) (Lab): This is not a new avenue of questioning; I want to ask briefly about enforcement at the operational level. I heard recently of an incident—it does not matter where—when the nearest SEPA person was far away. It struck me that there must be times when you are thin on the ground. I was struck by the partnership model the FSA described, with local authorities. Would that approach be open to you?

Colin Bayes: I think I know the location you are talking about.

Mr Gordon: I am talking about what the Public Petitions Committee debated recently.

Colin Bayes: Yes. You are talking about a site that is causing us a considerable challenge in getting it to operate within the terms of its environmental licence—that is probably the best way I can put it.

We have 23 offices scattered across Scotland, which we are operational from and where my inspectorate staff are deployed. There are undoubtedly times when that can be challenging—especially in the Western Isles, because there is only one office there. We try to work in collaboration with our colleagues in different agencies, including local authorities and environmental health officers, and we have informal working relationships with them. For example, considering some of the difficulties that we have had with waste activities in your part of the world, Mr Gordon, we are trying to work more closely with our colleagues in Glasgow City Council. Similarly, we have national arrangements, such as the national fly-tipping forum, which is trying to promote co-operation to solve the problems. It is and will always be a challenge—we cannot predict where tomorrow's pollution incident will be—but we have good working relationships with sister agencies.

The Convener: I have just a quick question to round off the session. As you are directly involved in European matters from a legislative point of view, would you welcome the committee becoming more involved—[*Interruption.*]

Gordon Jackson (Glasgow Govan) (Lab): I am sorry, I was speaking more loudly than I meant to.

The Convener: That is okay.

Would the witnesses welcome this and future European committees becoming involved at an earlier stage in European legislation, to listen to stakeholders' views?

Colin Bayes: I am happy to answer that with a resounding yes. Industry and stakeholders often come to us after the ink has dried on a European directive, and it is hard for us to change things then.

Stephen Boyd: I concur completely.

The Convener: Are you going to disagree, Mr Adamson, or are you just going to nod?

Bill Adamson: We would have no problem with the committee's involvement. We have certainly tried to involve the Scottish ministers as much as possible. As the FSA is a UK agency, at least it has a seat at the table in the negotiations. For major Scottish issues, it is important that as loud and broad a Scottish stakeholder voice is heard as possible. My only caveat is that I suspect that the committee might not wish to spend its time on a lot of the relatively small, minor and technical matters, but the committee's input would be appropriate for the major issues involving Scotland.

The Convener: That is right: it would be up to the committee to focus on what was important for Scotland.

I thank you all for coming. It has been an interesting session. No doubt we will see you again at some point—or some of us will see some of you at some point.

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

14:53

Meeting suspended.

14:56

On resuming—

The Convener: Our second panel is Andy Robertson, chief executive, and James Withers, deputy chief executive, of NFU Scotland. We were also supposed to be hearing from Garry Clark, of the Scottish Chambers of Commerce, but, unfortunately, he has been unavoidably detained. We will go straight to questions to the panel. There are only two of you, so I reckon that I can cope if you interrupt each other.

Mr Wallace: I thank Andy Robertson and James Withers for coming to give evidence. In your original submission to the inquiry, you listed five principles of better regulation, as defined by the better regulation taskforce, and described how they might be implemented as part of a procedure. Will you elaborate on that?

James Withers (NFU Scotland): As was discussed with the previous panel, there is, rightly or wrongly, a perception of overregulation. We are concerned about the lack of a transparent process

for decision making on regulation at European level and, in particular, for implementation. A clear process needs to be followed that involves industry right at the start in making decisions, such as those on protecting the water environment or food quality.

This is not rocket science, but the basic principle should be that when a directive lands on the Executive's desk, the Executive must consider the extent to which there is a problem in Scotland that needs to be addressed and how the situation differs in different geographic areas. It must then consider the available options and must not necessarily presume that regulation is the only option. It must consider whether codes of practice and voluntary or incentive-based schemes might deliver the same result, without a one-size-fits-all regulation.

I turn to cost-benefit analysis. Although the regulatory impact assessment procedure is helpful, it is difficult to measure the effectiveness of a regulation purely by considering its cost on industry, because that cost needs to be set against its benefits. In effect, regulatory impact assessments do only half the job by outlining the costs but not judging them against the benefits thereafter.

The element that we think is missing is a process of regular regulatory review. There is no effective analysis of whether the regulations that are in place are overly burdensome on industry or, crucially, are achieving their objectives. That lack of analysis leads to three distinct problems. First, it leads to the perception—regardless of whether it is true—that regulation raises revenue without delivering any benefits. Secondly, when new regulation is proposed, we have no means of assessing whether existing rules and regulations are in place to deal with the matter, because we do not analyse the effectiveness of existing red tape. Thirdly, we do not identify best practice, so we end up repeating the mistakes that were made in previous regulations. The lack of analysis of existing regulation will cause a problem for our dealing with regulation in future.

Mr Wallace: I take it from what you say that, after a draft piece of European legislation lands on a minister's desk and is reported to the Parliament, your experience is that engagement with you as a stakeholder is not extensive. Is that fair?

15:00

Andy Robertson (NFU Scotland): That is absolutely right. Engagement through the Executive is minimal. Anything that we manage to contribute through the Executive—of course, new directives are negotiated at member-state level—gets diluted through DEFRA or whatever the relevant Whitehall department is.

By the time a view gets to Brussels, the Scottish dimension may have been heavily diluted. My experience is that I can get more direct access to officials in Brussels by working through the NFUS than I could in my previous existence as a Scottish Executive official. That shows the committee the extent to which the Executive is involved in the original negotiations on directives. If the original part of the process is not got right and implementation is the only aspect that we can discuss, we are working in a fairly restricted zone. That is part of the problem.

The waste incineration directive and the legal interpretation of what could and could not be done under it have been mentioned. The committee is probably aware that the directive banned the burning of tallow in rendering plants. Everyone accepted that that was not the directive's original intention and that it should not have banned the burning of a green fuel—which was, in effect, a form of recycling—but we never had the opportunity to influence the original directive. Part of the process is definitely lacking.

The Convener: Before we move on, Gordon Jackson has a specific query about what Andy Robertson has said.

Gordon Jackson: You have given us quite a damning indictment of the system. Can you speculate on why it should be like that? I can think of a range of reasons. It might be because the Executive is unwilling to engage with people, because there is a lack of resources, because everyone is too busy or because there has been a system failure. Why is there such a lack of engagement?

Andy Robertson: There is undoubtedly a resource issue and, as you say, everyone is busy running around doing things. However, sometimes there is a reluctance at official level to have a really open discussion with European Commission officials in case something is said that comes back to haunt us. That is perhaps more of a factor with implementation than it is at the outset of the process. In my experience, if we explain to European Commission officials what we want and ask what they think of our ideas, quite a constructive conversation can be had. However, there is sometimes a reluctance to have such a discussion in case it bounces back on us and causes us difficulty later on.

Gordon Jackson: Will you explain how that might happen?

Andy Robertson: Civil servants do not often have discussions with Brussels in which they openly explain what the problem is and how they would like to tackle it. The reason for that is that

exposing the problem might present a difficulty later on. It is easier for me to say that there is a problem and to ask what can be done about it when I am wearing a stakeholder hat, because I do not have the same responsibility as a civil servant has and can afford to be more open. There is a serious issue about how much can be said and what conversations can be had with officials in Europe.

James Withers: I add that, in my experience, since devolution the Executive has struggled to find its feet in dealing with Europe. There is a lack of clarity about where the boundaries are. The fact that the UK is the member state means that, technically, we go through London when dealing with Europe. Even with issues such as agriculture, on which implementation is completely devolved to the Scottish Executive and the Scottish Parliament and 95 per cent of the policy is driven by Europe, the default position is that we go through London first.

In our view, there is no need to formalise the relationship between the Commission and the Scottish Executive, but there is a requirement to have informal contact at official level. We sometimes find ourselves in the difficult position of feeling that we are doing the Executive's job for it. We run to the Commission to find out the parameters within which we are working and then feed the message back to the Executive.

The Convener: That is extremely interesting.

Mr Wallace: I do not want to labour the point too much, but Mr Robertson said that there were two issues. First, by the time that any view gets through Scottish ministers and DEFRA to the Commission, it will have been diluted. Secondly, in his initial response to my question, he said that sometimes there is not even a view to be diluted because ministers do not seek views or because there is no mechanism for input at that early stage.

Andy Robertson: There is no such mechanism. At the stage of negotiation of the original directive, stakeholder involvement is pretty minimal, because there is no procedure for that. Most stakeholder involvement relates to implementation, because that is what is devolved, rather than negotiation of the original directive. I can give members specific examples of cases in which Scottish interests are a bit different. If I may put on my anorak for a minute, the sheep identification rules, which were drawn up at European level, are focused very much on the smaller, fairly self-contained sheep flocks that exist in much of Europe. The rules do not work and are completely impractical for large hill flocks in Scotland. For whatever reason, that point was not made when the rules were being negotiated. We are left fighting about implementation, but at that stage we are working within much narrower parameters.

Mr Wallace: Do you have much contact with your Irish and Danish counterparts about their involvement at an early stage? Have you discussed the issue with them?

Andy Robertson: Yes, especially with our Irish colleagues, who clearly have a close relationship with their Government. Like us, they have representatives in Brussels, so they are taking the same twin-track approach. Because Ireland is a member state, its Government is involved in the negotiation of the original legislation. Our Irish colleagues seem to be heavily involved at an early stage.

Dennis Canavan: We often hear complaints from the business community about overregulation threatening competitiveness. Can you give us some examples of European directives that are implemented in such a way in Scotland that they pose greater difficulties to Scottish farmers than to their European counterparts?

Andy Robertson: A very current example is the nitrates directive, which has been around for some time. Nitrates regulations were issued a few years ago and a nitrates action programme has been in place for the past four years. Despite the fact that in the four years that the programme has been in place nitrate levels in groundwater have remained fairly static, nitrate levels in surface water are decreasing and very few of the officially monitored sites are anywhere near the prescribed limit, we are now faced with a new, more stringent set of action programme rules, which will undoubtedly restrict farmers' ability to operate their businesses in a number of ways.

If members wish, I can go into detail on the issue. The new rules will impinge particularly on dairy farmers in the Dumfriesshire area, many of whom will find that the extra capital cost that they will have to incur to meet the requirements of the proposed new regulations will probably put them out of business. It is well known that many dairy farmers are already struggling to make a profit. A newspaper article that appeared today gave the example of guy who may have to invest several hundreds of thousands of pounds to meet the requirements of the regulations. The difficulty is that the drive seems to be as much about keeping the Commission happy as about drawing up rules based on scientific or technical experience that indicates that they will deliver the directive's original objectives. In other words, it is less about someone saying, "If you do X, you will get a lower level of nitrates in water," than about their saying, "If you do X, the Commission will not initiate infraction proceedings against you". There is a crucial difference between those two approaches.

Dennis Canavan: Are you critical of the attitude of the European Commission towards the issue or of the way in which the Scottish Executive or the Scottish Parliament has implemented the legislation?

Andy Robertson: It is a Scottish Executive issue and, to put it bluntly, the question is how the directive will be implemented and whether what the Executive is doing will deliver the directive's original objectives or simply keep the Commission happy. We have had direct discussions with the Commission to find out exactly what it wants, because our feeling is that we should find out the Commission's exact concerns and try to draw up an action programme that delivers the original objectives and addresses the Commission's concerns about whether those objectives are being met. It is important that we do not do more than is required just to play safe; our suspicion is that we are currently doing that in order to keep the Commission happy.

James Withers: Another example, which Colin Bayes from the previous witness panel mentioned, is the integrated pollution prevention and control regulations. He said that, although they were designed to target large-scale industrial installations and to control emissions, high street dry cleaners have been caught up in them. Pig farms are also caught up in them—by the end of this month, a pig farm in, for example, the north-east of Scotland will have to pay SEPA £3,500 to register and £2,500 as an annual fee thereafter. If that pig farm was in Holland, Belgium, Spain or Portugal, it would not pay a penny.

My criticism falls on two areas: first, on the Executive for instructing SEPA to levy those charges; and secondly, on SEPA, because I could not explain to a farmer what is delivered for, and what costs are covered by, a £3,500 registration fee and £2,500 thereafter or why pig farms are more of a threat here than they are in Belgium, Holland, Spain or Portugal.

The Convener: For my own benefit, can I get some clarification? Are you saying that the IPPC regulations are another example of gold plating—if I may use that term—by the Scottish Executive and SEPA? If it is gold plating, why are they taking that approach?

Andy Robertson mentioned the nitrates directive. I understood what he was saying, but I did not pick up how Scotland is disadvantaged in comparison with other parts of the UK or Europe. Is it another question of enforcement?

Andy Robertson: We should go back to the starting point. Generally speaking, Scotland has a good story to tell, environmentally. I have forgotten the exact figure, but 80-plus per cent of our water is in good environmental condition. The directive imposes the same requirements throughout Europe, but there should be more flexibility so that we can say that we do not need to go as far in Scotland because we do not have the same problem to address. My point is that the monitoring shows that, with a very few exceptions, the level of nitrates in water here is not at the level that the EU has determined is a problem.

The Convener: Is this a case in which particular Scottish circumstances have not been taken into account by the member state in implementation?

Andy Robertson: That is our argument. Otherwise, every member state would end up doing exactly the same thing, regardless of whether there is a problem to address. That takes us back to James Withers's point that, when a new regulation is introduced, one of the first questions should be, "Is there a problem to address?" If there is no problem, why should we introduce a host of regulations and requirements that will achieve nothing? That is the point. I am not saying that there is no issue with nitrates—there are some areas where nitrates issues have to be addressed—but we have to be careful not to apply a one-size-fits-all policy and not to impose unnecessary restrictions.

James Withers: On the IPPC regime, the comparison with the high street dry cleaner is probably unfair, because SEPA seemed to say that that was an accident of drafting. The pigs and poultry industries are included in the IPPC regime because of a conscious decision by European farming ministers to include them, although the UK Government lobbied hard for them to be excluded.

I suppose that it comes down to the definition of gold plating. If it means going beyond the minimal requirements of the directive or going beyond what other member states are doing—we would argue that the comparison is still fair for the latter category—the IPPC regulations appear to be over the top compared with how the directive has been implemented elsewhere in Europe.

To its credit, SEPA has instigated a process of reviewing the charges under the IPPC regulations to find out whether the costs are justified. That is welcome, although it is rather like putting the cart before the horse. That is the sort of process that we think should be gone through before the charges are implemented. As it is, pig and poultry farmers will face charges for three years before a decision is reached on whether those charges are justified in the first place.

15:15

The Convener: Poor old SEPA has been getting a bit of a hammering here. Do you, as people who are directly concerned, feel that

regulators in general are accountable, and if so, to whom?

James Withers: That is one of the big issues that we mention in our submission. We are concerned that there is an accountability vacuum. Let us stick with SEPA as an example. About three weeks ago, we wrote to the then Deputy Minister for Environment and Rural Development about IPPC charges, questioning their detail and the way in which the high figures had been arrived at. To paraphrase the minister's letter, she said that, if we had concerns about the detail of the figures, we should go and speak to the director of finance at SEPA. SEPA might hold a discussion with us, but it would end with SEPA saying that, ultimately, the decisions are those of ministers, so if we have concerns about them, we should go and speak to the ministers. SEPA will say, "Hold on a minute—the Executive makes the big decisions." On some issues, the Executive will say, "Actually, you need to speak to the enforcement authority about that." That is where accountability tends to falls down.

There is another accountability issue. Either Colin Bayes or SEPA's better regulation manager said that SEPA seems to be fairly unique in the way in which it operates. In other European countries, separate bodies deal with advice, enforcement or the collection of charges. The inference from SEPA's evidence is that systems involving different bodies contain hidden costs. If everything is put under one roof, as with SEPA, that apparently delivers a benefit. We would argue, however, that there is a potential hidden cost in things coming under one roof. Effectively, SEPA is the body that advises Government on what regulations are required as well as being the body that collects the charges and the revenue. With that closed-loop policy-formation system, where is the incentive to deliver either a lighter touch or better regulatory options?

Andy Robertson: That is an important point. There are many different ways of doing things. We could point to examples in which there is a real overlap and duplication between different enforcement agencies. As James Withers said, if the regulator itself is the only organisation that we can ask questions about how to regulate something, we will tend to get more of the same. Hence, we might get regulations and similar sets of enforcement rules stacking on top of each other. A lot of regulations deal with broadly similar issues and, with a little forethought, they could be rationalised a bit. That would reduce the cost to government while reducing the burden on industry.

Mr Wallace: I return to the points that you were making about the IPPC directive. You indicated that, in spite of some lobbying, the European legislation takes in pigs and poultry. That legislation must include Belgium, Spain, Portugal and the Netherlands—to which you referred—where there do not seem to be the same burdens as those that are borne by Scottish pig and poultry producers. Is it just a question of licence charges, or is it to do with the transposition of the directive? Do you have any detailed knowledge about that?

James Withers: My gut instinct is that it is a cultural difference. This partly relates to the lack of contact between the Executive and the Commission that we discussed earlier. Here, the presumption in this instance is of belt-and-braces regulation, with a desire not to fall foul of Brussels and not to end up getting disallowance penalties. Elsewhere in Europe, particularly in Ireland and, to a lesser extent, in Denmark, the approach is to ask what the spirit of the legislation is. It is not so much about what the letter of the law says, but about determining what the legislation is trying to deliver and coming up with a system to do that.

That is why the countries that we mentioned—Spain, Portugal, Belgium and Holland—have ended up with IPPC systems about which the Commission has expressed no concerns as a whole and which seem to be delivering on the objectives without the same paperwork and costs. The difference is between the letter-of-the-law approach that we take in this country and the spirit-of-the-law approach that is taken elsewhere.

Mr Wallace: You heard the questions that I put to SEPA about road planings and about how the groundwater regulations affect sheep dip. To be fair, Mr Bayes's reply was that after a petition was submitted to the Parliament, the Parliament asked for a change. That was not a bad reply. Likewise, he accepted that different charges for disposing of sheep dip apply in Scotland and south of the border. The charge is for a unit in Scotland, whereas I assume that it is for individual outflows south of the border. There may well be a difference, not least in the crofting areas. I invite you to comment on that. Is explanation sometimes lacking, which gives rise to the perception that there is more rigid or more onerous enforcement than is the case?

Andy Robertson: There may be a bit of that—James Withers will respond to that point shortly. On consultation with stakeholders, I will say that consultation depends on where we start from. If we start by saying, "This is coming. Ninety per cent of this is non-negotiable and we will discuss the 10 per cent that is negotiable," it is a bit debatable how much of a consultation that is. The consultation is often a process that is gone through, but the extent to which anything can be changed is limited, particularly if the terms of the directive have already been agreed—that was my original point. The consultation is about how much latitude exists for different implementation, so we

often talk about the details that Colin Bayes mentioned, such as whether we go for one point of disposal or several and how we impose charges.

It is not unfair to say that some consultation takes place, but the scope for influencing matters at that stage is limited. Therefore, I say with no disrespect to SEPA that it can say that it has consulted the industry and that the industry has agreed, although we will have had to agree within very limited parameters.

James Withers: Communication is a big issue. In relation to sheep dip, the cost of initial registration has risen by about 300 per cent. The farming industry just gets the invoice and little explanation is given of what is being delivered.

Jim Wallace said to the previous witnesses that regulatory policies might conflict with other Government strategies. Sheep dip falls into that category, because the Executive has a good animal health and welfare strategy to tackle animal diseases such as sheep scab to which everyone is signed up, yet we have an environmental regulatory system that discourages farmers from using sheep dip.

SEPA says yes, a charge is made for recycling road planings, but it is still cheaper than a landfill tax. I hear what it says, but that is not justification for levying a charge. The amount is nominal—registering costs £58, so it will break no one's back—but what is the principle behind charging if we are trying to encourage people to recycle such material?

We need to be careful about how we approach regulation. SEPA's argument is that road planings could become a waste problem. There is no doubt about that—if a farmer dumped a pile of road planings outside this building, that would be a problem. However, we cannot regulate on the presumption that people will do that. If we did so, regulation would go crazy. I could grab a Mars bar on my way home but have to apply for a waste operator licence because I might drop the wrapper. The presumption must be that I will dispose of the wrapper carefully, just as it must be that farmers will use road planings sensibly. If farmers do not do that, powers are available to fine them and take them through the courts, but we should not regulate on the presumption that they may use something wrongly.

Andy Robertson: Where we are stuck on many such issues, many of which involve environmental matters and the control of pollution, is that we have no problem with the polluter-pays principle. If someone pollutes, they should pay to put that right. However, we are dealing not with the polluter-pays principle, but with the different principle of asking people to pay a lot of money to show that they are not polluting. That is a burden on industry.

Mr Wallace: If we were to come up with a report for our successor committee that took your point on board, would the NFUS be willing to engage with it and the Parliament to examine pieces of emerging European legislation at an earlier stage?

Andy Robertson: Very much so. That is why we responded to you originally with six points—I think that that there are now seven—about how we think things should be done.

The key lies in the very first question: is there a problem here that we have to address? That is probably the issue that does not get looked at hard enough.

The Convener: Thank you. Your contribution is much appreciated and I am sure that we have learned a lot from your evidence. Thank you for coming.

I suspend the meeting for two minutes to allow for a changeover of witnesses.

15:25

Meeting suspended.

15:28

On resuming—

The Convener: I move on to our final panel. I am pleased to welcome Jonathon Stoodley, who is head of the application of law unit in the secretariat-general of the European Commission, and Neil Mitchison, who we all know, who is head of the European Commission representation in Scotland.

I ask Jonathon Stoodley briefly to outline the Commission's position. We will follow up with questions from members.

Jonathon Stoodley (European Commission Secretariat-General): It is a pleasure to attend the committee meeting and to benefit from the weather in Scotland, which is far better than it is in Brussels.

I confirm that the application of Community law is one of the strategic objectives of this Commission and it is one of the central functions that the Commission has always exercised. We find Jim Wallace's report to be a thorough, wide-ranging and accurate indication of relevant considerations, so we have no particular comments to make, but I would like to emphasise one or two points of specific interest to the Commission.

The report refers to the Commission's strategic report on better regulation, produced in November

last year. I draw particular attention to the latter part of the Commission's report, which concentrated on the application of Community law. It identified that our policy this year is expected to develop through increased follow-up on key directives. There will be increased member state provision of correlation tables and a new focus on general and sectoral problem-solving mechanisms, increased follow-up on priority problems and more systematic information provision by the Commission. As the strategic report indicates, there will be a new, specific communication from the Commission early this year.

15:30

I turn to the issues raised in Jim Wallace's report. Paragraph 11 refers to situations in which identical terminology is interpreted in different ways in different parts of the UK and is therefore applied differently. That confirms our central experience which is that we face deeper problems in the application of Community law than a simple assessment of the conformity of national or devolved texts. Indeed, more infringement proceedings are launched by Brussels on bad application of Community law than on textual non-conformity. We need a good exchange of information, common understanding, interpretation and application to make the law work properly.

Paragraph 17 of the report emphasises the importance to Scotland and to the UK of co-operation within the UK. Of course, the Commission is interested in such co-operation Community-wide.

On transposition, the Commission is thinking about introducing an online information system that would operate during the transposition period for every directive to allow flexible means by which questions and answers on specific points could flow between Brussels and national and devolved authorities at a moment convenient to the people involved when they are doing their work. The information would be made widely available to all participants in the network.

I emphasise the importance of correlation tables that identify the link between the directive and the provisions adopted in the member states. Jim Wallace's report refers to the UK's consistent practice of producing transposition notes. We understand that most member states produce correlation tables in one form or another in their internal processes. We have a strong policy of seeking for those to be consistently produced and communicated to the Commission. We have not yet achieved that, but it is fundamentally important. Between 40 and 350 measures are required to transpose any one directive in the EU, so identifying the relationship between different provisions is important for the verification of conformity. It is also important for all citizens and businesses to understand Community law. It is important for tribunals to be able to interpret Community law and it can also help to identify gold plating in the legislative process.

We are strongly supported by the European Parliament, but we are meeting resistance from some member states. We are interested to know whether producing correlation tables is a problem for any technical reason. We think that transposition work more or less requires the identification of related provisions and that the production of correlation tables must be relatively minor work compared to doing the transposition, so we are not sure that there is a real problem there.

One of the new policy aspects of the better regulation strategic report is the new programme that the Commission suggests that it will work on, with member states, on the administrative costs of regulation in the EU. That relates to the administrative costs of not only directives and regulations but transposition measures and all other national or regional measures that apply in a specific sector. The Commission suggests that there should be an extensive programme to try to measure those. Priority sectors could be identified. We expect member states to indicate their views at the spring European Council meeting in March, when the agenda will be defined.

Finally, I will make a point that I have added to my initial presentation following the earlier contributions to the meeting.

The NFUS mentioned the importance of intervening in the original phase of adopting legislation. For us, however, the original phase takes place much earlier than the transposition phase and we now attach increased importance to it. The original phase takes place not when the legislation is being adopted, nor even when the Commission is adopting its proposal for new legislation, but when the initial impact assessment is being done. That is the major new focus for the Commission and is when early input of information can influence the original design of the proposal. The subsequent stages involve adoption by the Commission, negotiation with the European Council and Parliament, and transposition. Critically, the Commission is now placing increased importance on the impact assessment, which is done before the proposal is even drafted.

The Convener: Thank you very much. That was interesting.

Mr Wallace: I want to pick up on that final point. How is it envisaged that information on forthcoming impact assessments will be transmitted to member states, devolved Parliaments and stakeholders?

Jonathon Stoodley: Traditionally, the mechanism that we use is that we publish a document that outlines what aspects of issues in different sectors are of interest to the Commission. Normally, member states and interested parties can make an input to that. There are no limits to the way in which such information can be provided, so we essentially have an open consultation. How Governments or administrative authorities provide an input to that is essentially a question for them to answer.

Mr Wallace: Therefore, as far as the Commission is concerned, there is no barrier to prevent the Scottish ministers or their officials from providing a direct input.

Jonathon Stoodley: There is none whatsoever. Our only problem is managing the volume of information, but dealing with that is our business. The more information we receive, the better the picture we have when we start the process.

Mr Wallace: There is a rich diversity of sub-national or sub-member-state Administrations in Europe. Do you have experience of, for example, German Länder or Spanish provinces being involved in that process at present?

Jonathon Stoodley: My experience in that area is limited to my previous activities, when I was involved in developing Community law and policy, and does not extend to my current activities dealing with the application of Community law. My experience is that such input tends to operate informally through direct contacts, although letters and other more formal means of communication are sometimes used. Informal networks are developing all the time. Official communication from member states must come to the Commission through those states' permanent representatives in Brussels. At the stage that we are talking about, we are dealing not with official negotiations with member states but with collecting information, so every channel can be used.

Neil Mitchison (European Commission Office in Scotland): It seems to me that the next item on the committee's agenda, which is on a Commission green paper, provides an example of such input. From the point of view of my office and of those who are responsible for the issue in Brussels, that sort of input is most welcome and we aim to help organise more of that sort of thing. It may be fair to say that that does not happen as much as the Commission and many stakeholders would like, but it is happening. As I may have said before, part of the Commission's plan D for democracy, dialogue and debate is to ensure that we get input in both directions from all stakeholders early in the process.

Mr Wallace: Another point that was made by the NFUS was that the starting point should be whether a particular directive addresses an issue that is relevant in Scotland. The suggestion was that solutions are often applied even when there is no problem. Taking the nitrates directive as an example, have measures been implemented simply to meet Commission targets rather than to improve water-quality levels? Discuss. I am sure that the issue is not quite as straightforward as that.

Jonathon Stoodley: In one aspect or another, that issue arises across a wide range of, if not all, directives. There is huge variety in the issues that are regulated in some member states compared with others. For example, professional qualifications are regulated practically not at all in the Nordic countries, but very intensively in several other member states. The rules that the Community has adopted on the recognition of professional qualifications apply more widely—and require implementation more widely—in some member states than in others. Whether the Commission adopts a directive in that area will depend on the overall picture and on whether there are sufficient regulations and sufficient of an issue to require a Community approach.

Then we come to the other aspect, which is the enforcement and application of the directive. It will be important for those authorities that have less regulation to ensure that they have the flexibility to transpose and implement a directive in a way that is proportionate to their particular situation. Given that they will have to respond to the directive, that might require the directive to be framed in a way that allows them to do that. That point was raised by earlier witnesses.

Mr Wallace: One of the suggestions was that a directive could sometimes be implemented by guidance or codes of practice. Would I be right in thinking that there is an increasing tendency for the Commission to look to more formal legislation, be it primary or subordinate legislation, or is the Commission open to implementation via codes of practice?

Jonathon Stoodley: That is a key issue. It depends first on how far the directive goes and what the Community legislators say is the appropriate level of detail in the directive. The directive might stop at general principles, which member states can implement in different ways, or it might, as is the case with chemicals regulation, go into detail about the specific content of chemicals that can be marketed and specific control systems. It depends very much on the nature of the obligation in the directive, because those specific obligations have to be transposed.

In cases where there is regulation of certain activities in some member states but none in others, if the directive were just to apply mutual recognition that would not necessarily require

regulation where there is none. However, if the directive says that a certain minimum level of protection requires regulation, that will place an additional obligation on those member states that have not, until then, regulated such activity. Where there is an obligation in the directive, the European Court of Justice has ruled that it is inadequate transposition to have only an administrative measure that can be changed at the will of the Administration. Where there is a specific obligation, there has to be sufficiently clear law to transpose that specific obligation.

Mr Wallace: At the other extreme, we heard evidence from the Food Standards Agency Scotland that, for food hygiene, there is now a tendency to produce a regulation rather than a directive, to try to ensure some degree of conformity. Do you see that extending to other areas?

Jonathon Stoodley: It is Commission policy at the moment to review quite widely the potential use of regulations. In some areas, member states using devolved powers have a particular interest in the use of regulations, even to implement directives that have already been adopted. The main measures are adopted by the directive and the member state transposes it, but a regulation is used for technical updating or implementation because that relieves the burden of technical implementation. Belgium is an example of a member state that finds it difficult to keep up to speed with transposing the implementing measures. Given that the main political and policy lines have been set in the directive, the Belgians prefer to have the technical updating done by regulation.

The veterinary and phytosanitary area is a specific area in which, because of human health considerations, the Commission has decided that it is useful to have an inspectorate and to inspect national or devolved inspectorates—hence the visits that were referred to earlier. Community and national liaison is close in that area, and the on-the-ground controls between national and regional Administrations and Commission inspectors are tight, in order to ensure public health. In other sectors, we tend not to resort to Commission inspections in any way at all. We tend to report on the application of directives, and member states will make their own contributions on how they have controlled and applied the directive.

15:45

Neil Mitchison: There is also a considerable difference between sectors. There is a lot to be said for regulation in heavy technical areas, but perhaps not where, although there is agreement on what to do, there is less agreement on how to do it. For example, in the control of major accident hazards, there has been an evolution over the past 20 years from a more precise directive to a more general one. In that case, we say, "We know what we have agreed to do, but there are different ways to do it. We will let member states decide to do it in different ways." It is difficult to generalise because of the differences between sectors.

Jonathon Stoodley: I agree. I am not sure how logical it would be to generalise. We know that European industry likes to have specific and precise standards on the production of motor vehicles and tractors. Arguably, we do not necessarily need those, but the size of rear view mirrors on tractors is subject to a European Community directive and implementation measures. In practice, we never check in detail the transposition of those measures because the legal regime has been established for so long and is so well known by major operators in the industry that the slightest problem at a national level would be resolved immediately. In that sense, directives work as regulations without our doing anything. The industry seems to be committed to that approach and it wishes to continue with it. However, in other sectors, things can be different.

Dennis Canavan: Does the Commission publish league tables that show the relative performance of member states in the implementation and enforcement of European directives?

Jonathon Stoodley: Yes. We publish them every two months, but we can do that only in an overall way regarding the timeliness of the transposition of directives. We frequently produce information about member states that are late. We do not produce figures about bad transposition, partly because we cannot be sure that we have covered all the issues and partly because the information might be sporadic. The importance of the problems that we identify varies greatly. When we first identify issues, they are potential problems. We are not necessarily sure about them.

Dennis Canavan: Where do the UK—and Scotland in particular—normally come in the league tables? Are they in the top half, the bottom half or the middle?

Jonathon Stoodley: The UK is in the top half. We do not break down the figures within member states.

Dennis Canavan: If we asked you to break them down and produce the figures for Scotland, could you do that, or could you give us the information so that we could do it?

Jonathon Stoodley: Information on recently adopted directives and transposition dates is available on our website. I am not sure that we follow closely enough the separation of powers—

that is, the extent of reservation or devolution of powers—to be able to make the breakdown.

Mr Wallace: The Commission proposes a 25 per cent cut in the administrative burden by 2021. The cut would be made jointly with member states. It is yet to be formally adopted, but how would it work in practice? What sort of things is the Commission looking for?

Jonathon Stoodley: We are looking to make industry more competitive and to challenge the extent, scope and detail of regulation and the cost that it produces. We invite interested parties and businesses to tell us about the gold plating of which there has been much informal discussion in corridors but of which, as we heard earlier, there is less concrete evidence. We firmly believe that there can be substantial savings, but we do not want to say from a bureaucratic point of view where they might be found. We need to inquire into the matter and get input from others. We need those who feel the problem the most to shout the loudest about where it exists.

In our view, the issue is not just a Community issue. We will have to consider what a particular directive or regulation requires and, as was mentioned earlier, to consider whether all member states or only some of them charge for licensing or implementing aspects of it. We will also need to consider where lighter techniques exist that imply fewer reporting obligations on business and industry and are therefore less costly.

We do not want to do that with any predefined ideas. We have a lot of ideas, but we are waiting for the European Council to provide input on how we should organise the exercise. It could be huge, as at the moment we are not limiting it to particular sectors. Arguably, we should start with some priority areas, but industry and business, member states, devolved authorities and interested parties in those authorities should tell us where to start and identify the most important areas on which we should focus. We can then take forward the exercise. The target is essentially political, but it signals that we want this to be a real exercise that produces legislative results that reduce the burden of regulation.

Mr Wallace: You stress the importance of transposition tables, which would be useful from a parliamentary perspective. However, when I was in Brussels I discussed with you or others the reluctance on the part of Governments to produce them, because doing so might flag up opportunities for infraction proceedings. We heard Mr Robertson from the NFUS say that the difference between being an Executive official and a representative of the NFUS is that Executive officials are slightly reluctant to engage with the Commission in case they give the game away on something. Are you really such a bogeyperson to officials and Governments?

Jonathon Stoodley: The issue was raised in two contexts, one of which was the negotiation of a new directive. In that situation, people always have a bit of a strategy and do not show all their cards at the start, which is a problem. The Commission will say that it cannot be blamed for coming up with a misguided proposal if everyone has been keeping their cards close to their chests and we have no information on what anyone thinks about what we might propose. Our producing an accurate and well-balanced initial proposal depends on the information that we get. We are not closest to markets; we are in the centre, so we need information and get it from where we can.

The second context in which the issue was raised was that of the enforcement of legal obligations that are already in place. Correlation tables help us to go through the legislation. They make the exercise quicker and enable us to prioritise by focusing initially on the main provisions. I will give members one extreme and exceptional example. A decision that involved some elements of criminal law was adopted in the justice and home affairs area. One member state notified all 500 pages of its criminal code as the transposition of that decision, with no indication of where the relevant provisions were. We sometimes have a problem in identifying the key issues. Correlation tables improve transparency. If we want the Community system to work, we cannot maintain as much secrecy and confidentiality as possible about what is happening.

The Convener: Thank you for coming along to give evidence. I planned to ask a lot of questions, but Jonathon Stoodley answered them all before I got to them. I think that he has been taking lessons from Neil Mitchison.

European Maritime Policy

15:54

The Convener: We now come on to item 2 on our agenda, which is consideration of a paper reporting on the European maritime policy conference that was held here on 4 December last year. For various reasons, I was the only member of the committee able to attend that day, although others tried hard.

It was extremely worth while and everyone who was involved felt that it was enjoyable and of great use. Members will have read the papers that came with the report. Does anyone have any comments?

Gordon Jackson: I have no particular interest in or understanding of the subject. I read the paper as an outsider, and it seemed to read as if the conference had been hugely successful and high-powered. I thought that it looked as if, for those who are interested, it worked really well.

The Convener: There was a general feeling of satisfaction—I do not know if that is the word—among those who attended that they were being asked to take part early on in discussion of a major issue with a view to contributing to future policy. That is something that this committee has striven for of late. It was very worth while.

Although he had to leave early, before he did Dennis Canavan asked me to mention his interest in the research and development aspect of what came out of the conference. He thinks that we should emphasise our country's skills and capabilities in marine research and development. He particularly mentioned the University of Aberdeen and the University of St Andrews. If anyone else has anything particular that they would like me to raise in relation to the policy, I am more than happy to do so.

Gordon Jackson: When are you going, convener? Is it next month?

The Convener: Emma Berry and I will be out there on 6 February for the dissemination event, now that the Conveners Group has agreed. The dissemination event is a day-long seminar with people from Schleswig-Holstein and Finland, who have carefully considered the legislation and how it will affect them.

I ask members to agree that we consider a formal response to the Commission's consultation following the report from the dissemination event.

Gordon Jackson: Very good.

The Convener: The National Assembly of Wales has also launched a consultation on the Commission's maritime policy green paper. I thought that it might be useful if we submitted our conference transcript as a contribution to that process.

Members *indicated agreement*.

Sift

15:57

The Convener: The sift is one of Phil Gallie's favourite parts of the agenda. I do not know whether Derek Brownlee feels the same.

Gordon Jackson: Do not even think about it.

Derek Brownlee: I am afraid that I will have to disappoint members.

The Convener: The sift of EC and EU documents and draft legislation is all fairly straightforward. If members have no comments, will we agree to refer the papers to the committees indicated?

Members *indicated agreement*.

Meeting closed at 15:58.

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