OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Affairs Committee

Thursday 24 September 2020

Session 5

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Pàrlamaid na h-Alba

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CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE
22nd Meeting 2020, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

DEPUTY CONVENER

*Claire Baker (Mid Scotland and Fife) (Lab)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (SNP)
*Kenneth Gibson (Cunninghame North) (SNP)
Ross Greer (West Scotland) (Green)
*Dean Lockhart (Mid Scotland and Fife) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)
*Beatrice Wishart (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Catherine Barnard (University of Cambridge)
Professor Michael Dougan (University of Liverpool)
Professor Michael Keating (Centre on Constitutional Change)

CLERK TO THE COMMITTEE

Stephen Herbert

LOCATION

Virtual Meeting

Scottish Parliament

Culture, Tourism, Europe and External Affairs Committee

Thursday 24 September 2020

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Joan McAlpine): Welcome to the 22nd meeting of the Culture, Tourism, Europe and External Affairs Committee. It is our 12th virtual meeting. The first item on the agenda is a decision on whether to take in private agenda item 4, which is on draft correspondence. Members who disagree should indicate that. No member disagrees.

European Union: Future Relationship Negotiations (Internal Market)

09:00

The Convener: Our next agenda item is evidence on the internal market, as part of our inquiry on negotiation of the future relationship between the European Union and the United Kingdom Government.

I welcome to the panel Catherine Barnard, who is a professor of European Union and labour law at the University of Cambridge; Michael Dougan, who is a professor of European law and Jean Monnet chair in EU law at the University of Liverpool; and Professor Michael Keating, who is director of the Centre on Constitutional Change.

I remind members to give broadcasting staff a few seconds to activate microphones before you begin your questions, and I ask witnesses to do the same when providing your answers. I would be grateful if questions and answers could be kept as succinct as possible.

We move straight to questions. I will begin, and I will be followed by Claire Baker, who is the deputy convener. I will begin by exploring with the panel the difference between the EU single market that we know and what the UK Government is proposing in the UK Internal Market Bill 2019-21.

I understand that the European single market is based on the principle of consent—the consent of a majority of member states and of the European Parliament. Does the UK Parliament's proposal for an internal market embody the same commitment to consent? Notwithstanding that, is the principle of majority consent different in the UK and EU contexts?

I would also like to explore with you the laws that govern the single market that ensure a level playing field, through agreements on mutual recognition, harmonisation, minimum standards and non-discrimination. I understand that the EU allows member states to derogate from those rules in a number of very complex ways. Will the UK legislation allow the same derogation and justifiable exceptions? If it does not, what will be the consequences for Scotland?

Professor Catherine Barnard (University of Cambridge): Thank you for that very rich question. I will answer part of it and leave my colleagues to answer other parts.

The EU single market was initially premised on the idea of negative integration. The relevant treaty provisions, particularly those on areas such as free movement of goods, are about removing

barriers to trade, but subject always to quite significant exceptions. However, the EU discovered quickly—indeed, it was envisaged in the treaty of Rome—that negative integration alone would not be enough and that there would be a need for harmonisation legislation; that is, centralised legislation at EU level on matters as diverse as what might go into a headlight on a car or the composition of a particular product.

That legislation goes through the EU legislative processes and, as the convener rightly said, the European Parliament has a significant role as co-legislator, under article 114 of the Treaty on the Functioning of the European Unions, which is the main legal basis for internal market measures.

The UK Internal Market Bill does not have a centralising component like the one that is envisaged in article 114. It is, ostensibly, much more about allowing traders in the four nations of the United Kingdom to be able to carry on trading across those nations' frontiers.

Therefore, in essence, the starting point is market access, which has two elements: mutual recognition and non-discrimination. The mutual recognition principle says that product requirements—which is jargon for things like the composition of a product or its packaging—that are laid under Scottish law would be deemed to be equivalent to those that were laid under Welsh law, and therefore that Scottish goods could be sold without restriction in Wales.

I will pause there, because I imagine that my colleagues would like to talk to you about the second part of your question, which was about exceptions and derogations.

Professor Michael Dougan (University of Liverpool): I will pick up on derogations. There are three main ways by which the European single market allows for its member states to protect the room, as it were. They are social choices that relate to issues such as environmental protection, consumer protection and labour protection.

The first relates to what Catherine Barnard spoke about—the application of treaty rules on free movement and negative integration, whereby there are principles of non-discrimination and mutual recognition that are directly applicable and directly enforceable by individual traders before the courts. EU law offers member states a wide range of public-interest justifications for apparent barriers to trade; for example, through a refusal of mutual recognition. As long as there is no direct discrimination against an incoming good or service provider, a member state can basically rely on any valid public-interest objective to justify its legislation, including on environmental protection, consumer protection, labour rights and so on.

Under the UK Internal Market Bill 2019-21, the system would be very different. There is a much more restricted range of public-interest justifications available for measures that would amount to a refusal of mutual recognition or some form of discrimination. The UK bill contains a much narrower range of justifications.

The second main vehicle that the EU uses is harmonisation legislation for the internal market: the measures that are adopted primarily under article 114 of Treaty on the Functioning of the European Union to harmonise standards across the EU. In the treaty, those standards are explicitly directed to be based on high levels of public-interest protection on the usual grounds of environmental protection, consumer protection and so on.

I should point out that, in the context of the UK bill, that is where the debate about common frameworks is taking place. We might come back to that later in the discussion. However, as we know, that is quite a complicated set of negotiations that has not yet reached a conclusion.

The third main vehicle by which the EU seeks to accommodate national preferences about public-interest standards is what we sometimes call "flanking legislation"—autonomous standards that are specifically directed at establishing minimum common grounds of environmental protection, consumer rights, labour rights and so on. The UK bill does not address that issue at all. The white paper that preceded the bill continued the UK Government's promise that it has no intention of lowering standards and wants to maintain high ones. However, the bill does not address that, and—as we all know—in the UK constitutional context there is, because of the principle of Parliamentary sovereignty, no such thing as an entrenched standard of environmental protection, social protection or labour protection. There could be a political commitment but no constitutionally enforceable minimum standard.

The Convener: Thank you very much.

Professor Keating, would you like to add to that?

Professor Michael Keating (Centre on Constitutional Change): I would like to add one or two things. The two have a lot in common: the UK internal market proposals are based on the EU concept of an internal market. The difference is that the EU internal market principle is a—[*Inaudible*.]—principle. Therefore, for many decades the EU has been trying to remove barriers to trade in order to create a more integrated market, whereas the idea of the UK bill is to preserve an internal market that supposedly already exists. That changes the dynamics.

The bill and the EU situation also have in common the idea that the internal market principle is a cross-cutting one that is not based on division of competences, as the Scotland Acts are. Therefore, the bill could potentially apply in any area; it will change the nature of the devolution settlement, depending on how far it is applied.

That is also true of EU legislation; however, there are a number of safeguards there. One is the decision-making process that Catherine Barnard alluded to: there is a procedure for qualified majority voting for adoption of new European laws and regulations of various sorts. The European Parliament is involved and the principles of proportionality and subsidiarity mean that rules must be no more detailed than is necessary and must be taken at the lowest level. That is enforced by the Court of Justice of the European Union. The European Commission does the technical work, which is independent of member states' Governments. There is nothing like that in the bill; the Competition and Markets Authority has an advisory role, not a regulatory role, in relation to the UK Government.

The Convener: I see. Professor Keating has answered my next question. I was going to note that Sir David Edward made the same observation on the absence of proportionality and subsidiarity from the UK's internal market proposals.

Professor Dougan's and Professor Keating's submissions both suggest that, under the UK Internal Market Bill, the size of England compared to other nations of the UK will mean that the internal market will be heavily influenced by decisions that are taken in England. That takes me back to the concept of a majority. How will that work in practice? What will the impact be in Scotland and how will it differ from how devolution has worked until now?

Professor Keating: Until now, although there have been some arguments, the division of competences—what is reserved and what is devolved—has been relatively clear. That gives us a transversal rule, which means that the situation could come up in just about any field, with the exception of fields that are exempted in the bill—health and social services and other matters. The bill will not prevent Scotland from making its own regulations, but it will mean that goods and services that meet English regulations will have to be marketable in Scotland. England is much bigger, so for manufacturers' product lines, it will be cheaper to follow English regulations for the big market than to run a separate product line for Scotland, because the goods will be allowed in. England's standard might become the default standard.

The UK Government is the Government of the UK and of England, so it is negotiating international trade deals and may accept standards that it can implement for England. Automatically, those goods would be allowed in Scotland.

Claire Baker (Mid Scotland and Fife) (Lab): I am interested in governance and how the UK Internal Market Bill proposes a model that is different from how the European Union operates. Professor Keating talked about the role of the European Commission being independent and regulatory and that a different model is being proposed for the UK internal market. Other papers have drawn the distinction that the UK internal market proposals are more political than those of the EU.

Could the witnesses comment on the differences between the governance arrangements? Have you concerns about how the UK is approaching that?

Professor Keating: A single, or internal, market it is not a legal category but an economic concept that can be interpreted in multiple ways. It is very often controversial—the famous decision on minimum unit pricing for alcohol in Scotland is one example of that. The concept of a single market cannot be considered as something that is purely technical and de-politicised. It is not in Europe, where the Court of Justice of the European Union makes a lot of decisions that are politically controversial. There is no getting away from that. The court has been criticised for putting too much emphasis on market competition, for example. The EU system is not perfect, but at least the rules are made in an intergovernmental way.

09:15

As for technical advice, the European Commission does a lot of the homework and has technical expertise. A lot of the work that comes out of Brussels is the result of technical committees and technical consultations. We will not have that function of the Commission, which is independent of government. Under the bill, the Competition and Markets Authority will be the adviser to the UK Government. Devolved Governments may consult the CMA, but it is appointed by and responsible to the UK Government.

Over the past few years, many of us have argued that there should, in our intergovernmental system in general, be a sort of secretariat body—an independent source of advice to do the technical work and the homework—that should be responsible to all the Governments of the United Kingdom and not just to the UK Government.

Professor Barnard: The European Commission is supranational and therefore does not act in the interests of any particular state,

although most of us accept that it has a strong political dimension—not least because it is headed by the commissioners, who are politicians, ultimately. The Commission does the heavy lifting in preparation of EU legislation, which has to go through all the committees to which Michael Keating referred. Such a process certainly does not exist in the United Kingdom Internal Market Bill.

I have a point to make that is perhaps less dramatic but that has been important in the EU. Under EU directives, there is an obligation that before draft technical standards are adopted, they must be notified to the Commission and to the member states. Member states then have an opportunity to raise objections about the technical standards. It is an ex ante approach to governance, rather than a post hoc challenge, which is what we have in the Internal Market Bill.

To smooth some of the difficulties that the committee is already alluding to, it would have helped to have had an equivalent process in the bill, so that, if Scotland were to propose to introduce a new technical standard—the minimum price per unit of alcohol being a case in point—it would be discussed. The problem with the minimum price per unit of alcohol is how it fits into the current framework, but the point is that there should be discussion in advance rather than a wait for the CMA or the proposed office for the internal market to look into things after they have happened.

Professor Dougan: I will make a couple of short comments, which are partly in response to Claire Baker's question but which also link to the previous question.

It is important to stress that the bill is not at all concerned with the process of what, in the EU context, would be called harmonisation—in other words, the adoption of legislation to establish common standards across the entire internal market. The bill is focused on the idea of negative integration and the application of direct principles to the exercise of competence by the individual territories, and on how that exercise should impact on trade relations.

From that point of view, the bill does not really have much to say about governance, because application of horizontal principles such as mutual recognition and non-discrimination do not require much governance for them to have dramatic effects in practice. Think of it this way: the principle of mutual recognition is about subjecting the exercise of regulatory competence to market forces. In a way, laws become a product that have to compete with one another within the internal market to attract businesses, consumers, service providers and producers. That is why the size of the English economy is such an important point to highlight in this context.

In the internal market of the EU, even the largest member state, Germany, is far less than 20 per cent of the entire EU population and economy. There are 27 members states of very different sizes and strengths, but in the UK context there are four territories, one of which makes up 85 per cent of the population and economy. Therefore, if you are going to have a system that is based on the operation of market forces—which is, in effect, what mutual recognition is—the system will be operating in a market that is entirely skewed in favour of one territory. That is why I endorse what Michael Keating said. The deregulatory pressures that are generated by the principle of mutual recognition—that is true—will operate entirely in favour of English standards. It is difficult to see how they could operate to the benefit of Scottish or Welsh standards.

However, I think that that issue is separate from questions about harmonisation and legislative procedures for establishing common UK standards, because the bill does not have anything to say about that at all.

Claire Baker: The UK Government bill does not make provision for the involvement of devolved Administrations in the development and governance of the internal market. The white paper has made clear that

"the evolution and overall shape of the UK's Internal Market will be overseen by the UK Parliament, and that key decisions will be put to the UK Parliament for approval".

There is no role in that process for devolved Governments or Parliaments. Are the joint ministerial committee and common frameworks adequate mechanisms to address that? Is it fair that the development of governance of the internal market is to be brought solely within the decision-making power of the UK Parliament and UK Government and that the role for devolved Administrations comes through common frameworks? As somebody has mentioned, there is still quite a bit of debate and discussion about what the internal market will look like—it is not yet finalised.

Professor Dougan, as you have just talked about that, do you want to pick that up again?

Professor Dougan: It is probably useful to draw the distinction between what the bill seeks to address, which are the horizontal principles of mutual recognition and non-discrimination, and what the bill does not seek to address, which is the question of common frameworks and harmonisation and so on. It does seem to address—

Claire Baker: I am sorry to interrupt, but what does horizontal alignment mean? Maybe that is just my ignorance.

Professor Dougan: It means the general principles of mutual recognition and non-discrimination. Sorry, we use the term "horizontal" to mean something that is generally applicable.

Claire Baker: Carry on. I just wanted to clarify that.

Professor Dougan: The main feature of the Government structures in the bill relating to those generally applicable principles of mutual recognition and non-discrimination is the ability of UK Government ministers to change the rules using delegated powers, in most cases without even having to consult the devolved institutions. That is a pretty striking feature of the bill.

Mutual recognition is a system that is essentially based on market forces that are imposed on the exercise of competence, and the UK market is dominated by England as an economic and population centre. Not only that, but the UK Government would have the power to change the rules by which the market operates because of the extensive powers under the bill—for example, those to change the derogations that are available for mutual recognition and the scope of the rules that are subject to mutual recognition or non-discrimination principles. From a governance point of view, that is a striking feature of the bill; it gives extensive delegated powers to the UK Government to change the rules of the game when it comes to mutual recognition and non-discrimination.

The bill does not have much to say about the separate process of common frameworks and harmonisation and whether there should be centralised intervention in the operation of the UK internal market. The real issue is that, if you feel satisfied with how the governance of the UK operates at the moment and the experience of negotiating the common frameworks, you will probably be satisfied with the bill, because it does not do anything, but if you do not feel satisfied with how the process of common frameworks has operated so far, you will probably be dissatisfied, for the same reasons.

Claire Baker: We need to have confidence in the common frameworks. If you have confidence in the common frameworks, you could live with the bill—is that right?

Professor Dougan: If you have confidence in the process by which the common frameworks are being negotiated and finalised, you can probably think that the governance of the UK internal market overall will operate along similar lines. However, the bill itself does not have any real impact on that.

Again, from an EU perspective, you might say that that is striking, because there is no attempt to reform the governance structures of the UK with a view to doing what the EU tries to do, which is to create a sense of confidence and mutual trust among all the participating territories and a sense that legislation is being adopted in a way that represents all their interests on a footing that is at least roughly equal.

Professor Barnard: I will add a limited point to that and make a point about the bigger picture.

The limited point is that, if there are to be changes to the regulatory framework as proposed in the bill—for example, if the number of things to be covered by the term "relevant requirements" is to be expanded, or exceptions to those requirements are to be expanded—there is a provision in the bill on consulting Scottish, Welsh and Northern Ireland ministers. Clause 3(9) is an example of that. The trouble is that it looks as though that has been added as an afterthought. Although the bill is detailed in certain areas, there is no detail about a time period for such consultation or what happens if it breaks down or a different view is expressed by the Scottish or Welsh ministers—Westminster does not take that into account. That is my narrower point.

My bigger point is about the way that the EU single market operates. It does not operate just on the basis of principles such as mutual recognition and non-discrimination floating about; instead, those principles are bedded in a much wider governance structure. By that, I mean that they are embedded in a structure that is there to develop trust. The Commission can bring proceedings against a state that, for example, does not comply with article 34 of the TFEU, and individuals can bring cases. In either instance—an individual claim or the Commission bringing enforcement proceedings—the case is likely to end up before the European Court of Justice, which is an independent court that will adjudicate on what is going on between the individual nations.

Again, such a structure is not clearly set up in the bill; all it has is the Competition and Markets Authority and, within it, the office for the internal market. That will simply carry out investigations and write reports, but those reports can sit and collect dust on the shelves. It is a broader and very weak governance context compared with that in the EU.

Dean Lockhart (Mid Scotland and Fife) (Con): I want to take a step back and ask the witnesses whether some form of internal market regulation is required following the transition period, regardless of what concerns they might have with the current drafting of the bill.

A view has been expressed that the common frameworks alone might be sufficient. Would the common frameworks be enough to deal with the transfer of what is basically 45 years of EU regulation and EU case law, or is some form of regulation necessary for the internal market?

Professor Keating: Generally speaking, the framework process would be a preferable way of going about it, because it is not clear to me what will come up that might not be covered by frameworks.

Indeed, it is not clear to me what the scope of the bill is. There are all sorts of powers in it. It may just be seen as a back-up to be used in emergency cases where the frameworks do not work. In that case, I cannot see why we should give all those powers to UK ministers when we do not know how they will be used. There is a lack of philosophy in the bill or the accompanying documents as to what the single market or internal market is all about. I would give frameworks a go.

09:30

Another point, which I wanted to make in response to the previous discussion, although it is also relevant to this question, concerns the comparison between the frameworks process and the internal market process. It is the difference between consultation and consent, which are different principles. In relation to the devolution settlement, we have a consent mechanism—the Sewel convention—for primary legislation, but in other cases it is just consultation.

The Sewel convention can be overridden and is not very strong, but at least it is there and gives some protection for the devolved legislatures on primary legislation. However, it does not, generally speaking, apply to statutory instruments, except in the case of the European Union (Withdrawal) Act 2018, where there is some provision in that regard.

The bill works on the basis of statutory instruments with affirmative resolution, and it is striking that there is no consent mechanism; the best that we get is consultation. If the UK is going to get those powers—if they are needed as a fall-back, as you say, to cover things that are not covered by frameworks—it would seem normal for a consent principle to be built in.

So far, the frameworks process has been built on consent. No frameworks have been imposed and it seems that they probably will not be. Powers will not be taken. Therefore, the frameworks process shows that that approach can work and I would expect something like that to be built into the bill, rather than simply consultation that does not mean anything.

Dean Lockhart: I put the same question to Professor Barnard and Professor Dougan to get their brief views on whether some form of regulatory framework is required.

Professor Barnard: I do not have much to add to what Professor Keating said. What is striking about the bill is the absence of an equivalent to article 114, which is the legal base in the TFEU for the EU to legislate on an area—consumer protection or environmental protection, for example—in which the individual nations have until then had different standards. The bill does not have that sort of power or any thinking about how to develop that power, apart from through the common frameworks. It is striking how little there is in the bill and the white paper to join those dots together.

Professor Dougan: We should be careful to separate the question of whether a challenge or problem exists from whether the bill provides the most appropriate or right answer to that challenge or problem. There is a risk in the current debate that opposition to the bill leads some of us to question whether the underlying problem or challenge even exists.

It is important to acknowledge that the UK is far from unique and that, in any territory where a group of individual territories trade with one another but have divergent regulatory competences, there will be barriers to trade and distortions of competition and therefore a need for some sort of framework to address that. That is true in Canada, America, Australia and the EU, and in any situation where a group of territories have a strong and close relationship with one another but divergent regulatory competences.

The reason why it has not been much of a problem in the UK is that, during EU membership, when devolution was created, the EU did most of that stuff for us. It becomes an issue after the expiry of the transition period, because we will become a country not dissimilar to Canada, Australia or America, or a territory such as the EU, where there are individual territories with divergent regulatory competences that are capable of creating barriers to trade.

The problem is legitimate, and the question is whether the bill provides the correct or desirable answer to it. There is enormous room for discussion, opposition, reservations and improvement, but we need to be careful not to deny that the underlying challenge exists, because it clearly does.

Dean Lockhart: It was helpful to get your views on that.

I move to the question of how the transfer of EU legal principles will work when they carry over into UK law. According to the Scottish Parliament's

information centre—the Parliament's independent research team—a number of EU legal principles, including those of mutual recognition and non-discrimination, will be carried over into the internal market proposals. Professor Barnard, in the conclusion of your written submission, you say:

"the internal market bill simplifies some of the complexity of EU law."

Will you elaborate on that point? I presume that it will be impossible for the bill to take all the principles of EU law wholescale, so there has to be a point at which we take some or most of those principles but not all of them.

Professor Barnard: The European Court of Justice's jurisprudence, particularly on free movement of goods, has evolved over time, and not necessarily with the benefit of clarity. To put it crudely, the narrative goes as follows: in the early days, it was simply discrimination that was prohibited and then we had the major decision in the cassis de Dijon case, which anyone who has done EU law at law school will know and love, and which introduced the concept of mutual recognition. Some people see that as a permutation of indirect discrimination, but others do not.

The Court of Justice then went off on something of a frolic, with a line of case law about what are called certain selling arrangements, which are rules that regulate retailers rather than importers. The subsequent jurisprudence on that was a complete dog's breakfast—that is not really a technical term, but it is the truth. After that, the Court of Justice seemed to shift away from a discrimination model to a market access model.

I want to pause here, because the terminology is confusing. Under the bill, the umbrella term is "market access", which embraces mutual recognition and non-discrimination, but in the EU world market access means something else. It is about whether there is a rule that stops a trader doing what they want in another country, even though a domestic trader is subject to the same rule. In other words, the rule is non-discriminatory but it makes a trader's life difficult when they try to break into a new market.

That version of market access has been dropped from the bill. There has been a retreat to the principle of non-discrimination—in essence, it is the approach that the US Supreme Court adopts in respect of the dormant commerce clause—and mutual recognition is prominent.

The confusion about the frolic to which I referred in respect of certain selling arrangements has been dealt with rather sensibly in the bill's discrimination provisions. A rule that regulates the opening times of shops, such as one that says that shops should be shut on Sundays, is non-discriminatory and does not make life more difficult for out-of-state or in-state traders, because nobody's goods can be sold on a Sunday. Such rules that are not directly or indirectly discriminatory fall outside the scope of the prohibition in the bill.

That is probably more detail than you wanted, but I hope that it explains why I said that

"some of the complexity of EU law"

on free movement of goods has been removed.

Dean Lockhart: That is helpful. Professor Keating and Professor Dougan, do you have anything to add?

Professor Keating: I do not.

Professor Dougan: Maybe I will just put a slight gloss on the issue. We, in the UK, need to accept the idea that the internal market feels very new to us but it is not a new problem in the world at large. Trade law, as it has developed over the past many decades in various jurisdictions, including the EU, provides us with a set of concepts and tools. Although the terminologies might change, the concepts and the tools are pretty universal. Virtually every jurisdiction draws on the same ideas to address roughly the same problems.

We should therefore certainly look at the experience of other jurisdictions, including the EU, so as to learn valuable lessons about what works and how it works, why problems arise and how best to resolve them, although we certainly should not be tied to copying any other single market or internal market model, because the needs and the circumstances of every territory are unique. It is less important that we worry about copying the EU, Canada or Australia than that we use the toolbox of trade law to address the unique circumstances of the UK.

That brings us right back to where we started, which is that the feature of the UK internal market that distinguishes it from every other internal market on earth is the size of England compared to the size of the other territories. We simply do not see that in any other context. That means that there is a very basic choice to make on the UK internal market. Either you find a way to somehow tame English dominance—I use the term in a jovial way; in other words, I mean protect the prerogatives of the Scottish and Welsh institutions against the pure market power of England within the UK internal market—or you simply allow the English market power to dominate the UK internal market and you do not provide any particular safeguards for the exercise of competence by Scotland and Wales.

Obviously, those are two extreme positions, and the bill tends towards the latter. There are a few safeguards but, on the whole, the bill acts on the

basis that we simply accept English market dominance and let market forces play their role. If that is the solution, the bill does its job. If people do not find that solution desirable, the bill is problematic.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): At the outset, Michael Keating said that there is a UK internal market, so I am starting from that viewpoint. I want to test whether we need the legislation at all, and what the effect would be if we should find ourselves without it. I will use a very specific proposal that is actively being considered in Scotland, and that is the introduction of a deposit return scheme. Let me focus narrowly on the return of reusable bottles for soft drinks. In Europe, DRS schemes run in various countries, and they are quite different in different countries. Sweden is an example.

If we introduce a deposit return scheme in Scotland, we will require the labels on the bottles that are participating in the scheme to be specific to the Scottish deposit return scheme and different from those that are used elsewhere. However, that does not seem to prevent a company based in Barrhead or Basildon or Belfast or Bangor from having access to the Scottish market. No barriers are created by the existence of the scheme. Would the bill force us, in Scotland, to accept English-labelled bottles into the Scottish market and therefore bottles from markets that are actively participating in the English deposit return scheme, should England introduce one, which I think it probably will do? Would that be one of the effects? At the moment, it would work perfectly well if we did not legislate at all, so why do we need the legislation and how would it affect that narrow example?

I would probably want to go to Michael Dougan in the first instance, because of the remarks that he has just made.

09:45

Michael Dougan: That is a really good example. I start by highlighting again a point that I made earlier. We should distinguish between whether there is an actual challenge or problem that needs to be solved and whether the bill is the right solution or answer to such a problem.

There is most definitely a problem in the sense that, if Scotland decides to have different labelling requirements for goods from England and Wales, that will create a barrier to trade and you will have to decide what to do with that. The problem—

Stewart Stevenson: Sorry, but can I intervene, Professor Dougan? Is that barrier not equal for companies in Basildon, Barrhead, Belfast and Bangor? Is it not an equal barrier, whichever part of the UK a company is in?

Professor Dougan: However, the barrier exists, and you will have to decide how to deal with it.

Under EU law and cassis de Dijon, the answer would be that the Scottish institutions could justify the barrier to trade against an English importer by relying on the public interest of environmental protection. Under the bill, however, they could not do that, because there is no environmental protection justification for a refusal of mutual recognition in respect of a proprietary requirement such as a labelling requirement.

It is certainly possible to have an internal market rule that would allow Scotland to fully enforce its environmental labelling requirements against incoming goods from England and Wales, but the bill does not allow you to do that.

There are two points to make about that. First, we should distinguish the challenge from the solution. Is the bill the right solution? From the point of view of the exercise of Scottish devolved competences, it is definitely not. Secondly, why is that true? It is because, if Scotland enacted the labelling requirement but it could not actually enforce it against the 85 per cent of the economy that is English imports, there would be no point in having the labelling requirement at all, because it would be rendered completely inoperable in practice.

That is not to say that we could not have an internal market system that would produce the opposite result. Again, we should be careful to note that there is a challenge here that we need to find some sort of answer to. However, the bill provides a heavily skewed answer that is, in effect, about unleashing market forces on the exercise of devolved competences, with very little scope to justify the different preferences that Scotland might have compared with those of England.

Stewart Stevenson: Thank you. That sounded like a complete answer, but would Professor Keating and Professor Barnard like to briefly supplement it?

Professor Keating: Everybody in the debate agrees that there is an issue here, because all the Governments have bought into the frameworks process. The problem with the single market is that it is a very ill-defined concept. It is a highly political concept that relies on judgments about the proper balance between the scope of the market and public regulation, so it is not a purely neutral, technical matter. That has come up in the EU and in other jurisdictions as well.

We need to know what the scope is likely to be and how far the UK Government thinks the single market would be progressed. In the European Union, as I said, it is a continuing process. It has been going on for decades, with gradual building of the single market through a series of measures,

court judgments, political decisions and so on. Many of those things are highly political. Given that that is the case, we need to know what the scope of the power is and how the rules are going to be made.

That brings me back to a question that we have all been asking: what is the nature of decision making here? Who is going to decide and define what the single market means, let alone apply it? Those are intensely political decisions and they should be addressed in a political arena, with all the voices being brought to bear, including those of the devolved nations as well as that of the UK Parliament. The bill does not really provide for that.

Professor Barnard: I will add two points to what has just been said.

First, the fundamental problem with the legislation that you are proposing and how it fits with the UK Internal Market Bill is that the mutual recognition principle would apply and the only exceptions in the bill are about human, animal or plant health; environmental protection is not included. In my view, the exceptions in the bill are too narrow and expressly do not deal with the very valid legislation that you are talking about.

Secondly, assuming that the internal market legislation goes through as it is, Scotland is not going to be able to enforce its labelling requirement against English products. English products will be allowed to be sold in Scotland without the Scottish labelling. However, that ultimately gives consumers the choice of buying an English-labelled product or a Scottish-labelled product which has, in essence, Scottish branding. You may well find that, even though the requirement is not enforceable against English goods, Scottish goods get some sort of benefit from Scottish consumers exercising their purchasing decisions in how they choose.

Stewart Stevenson: Thank you for that. Before moving on to my next small question, I observe that, if Scotland introduces the deposit return scheme, that will increase the purchase price, differentially, compared to non-labelled products. That is why the problem is not trivial.

I want to explore briefly a couple of examples of equal decision making that are already in UK law. The first involves the UK Committee on Climate Change. Its governance arrangements and the appointment of people to it require the unanimous support of ministers in all four jurisdictions. As a former climate change minister, I experienced that. I was able to see off a proposal from the UK Government—that did not emerge into the public gaze, so it did not become political, and I was able to do it. It was quite interesting.

The other example is the British Waterways Board, for which all decisions were made jointly by Scottish and UK ministers. As a minister, I found myself, very strangely, having to give my consent to the sale of land in Birmingham. That was the legal environment.

Those are a couple of relatively modest examples of putting into UK law equality between the jurisdictions. Is that the kind of model that we sensibly should have for making important decisions about the operation of the market?

I expect that almost all three of our witnesses might simply say yes; I do not know. I ask Professor Barnard to comment.

Professor Barnard: At one level, the answer is yes, one would think that that would be the sensible way forward. That takes us back to the common frameworks and working together. In reality, though, would that go through in any Westminster legislation, given that the Conservatives have a majority of 80? At the moment, that majority puts England in a very strong position and most of those majority MPs are English. Intellectually and constitutionally, one might see that reasonable people working together would be the way forward, but it may just not be possible to get that through in the UK Internal Market Bill, which is already so political.

As a footnote, it strikes me very much that all the discussion about the internal market legislation, at least in England, has been about clauses 42, 43 and 45, and there has been no public discussion about the bits of the bill in which you are particularly interested. Maybe that will change, but I do not see any of the issues being flipped the other way round—because, in England, the boot is very firmly on the English foot.

Stewart Stevenson: Let me try to get brief answers from the other two professors, otherwise the convener will get grumpy with me. Will Professor Keating perhaps comment first?

Professor Keating: It goes to the heart of the devolution settlement. Over the past 20 years, I have made the point many times before the Parliament that, ultimately, we are not a federation and the UK Government—or rather the UK Parliament—has the last word. In this case, UK ministers have the last word. Unless we move to a federal system, which would then raise other issues, we must find some other mechanism.

Here, the principle of consent is important, although, when you ask for a Scottish veto on things, it will be said that that is not necessarily the case. However, an institutional mechanism, which is more than a statutory instrument—that requires the assent of only the Westminster Parliament—should be required for that kind of change, because changing the competences is a

constitutional change. If it is done by primary legislation, the Sewel convention is invoked; that option is not in this bill, so it is a particularly glaring example of Westminster always being able to have the last word.

Professor Dougan: The common message that is emerging from all three witnesses and from the discussions that I have been having—in a much broader context—with my colleagues across the UK, is that, from a devolved perspective, the bill is highly problematic. However, from a devolved perspective, there are two ways to deal with the highly problematic nature of the bill. The first is to take the bill as it stands and just live with its fundamental assumptions that there should be general principles to cover the UK internal market with legal enforceability before the courts. In that case, there are ways to improve the bill, but they are limited in nature. We have all hinted that we need a wider range of justifications to cover the environment, consumers and labour rights. Therefore, the first solution is to work with the bill and, by improving the terms, make it the best that we can.

The alternative is to go back to the drawing board and rethink how we approach the entire governance of the UK internal market. Again, the fairly clear message that everyone is giving is that we should try not to have those generally applicable principles, which are directly enforceable before the courts, and should instead have pre-legislative dialogue between equals, to find political solutions to those complex regulatory challenges. The problem is that that is effectively saying that we should rip up the bill and start again. Those are the two main options to work with. Either we improve the bill on its own terms—for example, by expanding the scope of justifications—or we rewrite the entire approach.

The Convener: Thank you, Professor Dougan. We move to questions from Beatrice Wishart.

Beatrice Wishart (Shetland Islands) (LD): Good morning. My question has probably been answered, but I will put it to each witness.

We were discussing trying to protect the existing differences in policy between the four Administrations, which probably follows on from Stewart Stevenson's question about labelling. If a devolved Administration wants to change or toughen its existing standards, the bill would appear to come into force against it. Peter Drummond—a senior member of the Royal Incorporation of Architects in Scotland—said that Scotland's more robust fire safety regulations could fall foul of the bill. He was speaking in the context of the Grenfell tower fire and was worried about whether, under the bill, our better safety regulations could ever be further improved. In response, the UK Government said to the BBC that the Scottish Parliament will continue to be able to set its own regulations. However, the white paper seems clear that the bill takes us in the opposite direction. Can you build more on what was already said in response to Stewart Stevenson's question? If we wanted to improve regulations, how would that work? Or would it not work?

Professor Dougan: The bill is based on a general proposition that, unless they are substantively revised, existing provisions do not fall within the scope of its mutual recognition or non-discrimination principles. The test involves something being "substantively changed", not substantially changed, so any amendment that would change, even in a relatively minor way, the substance of an existing provision, will become subject to the bill. On the one hand, in effect, that acts as a powerful disincentive to change the law because, if the existing rules are protected from scrutiny, any changes to those rules become fully subject to the internal market principles. However, if we change the rules and that falls within the scope of the mutual recognition principle for goods, the only justification that we can use to enforce those higher standards against imported goods from England is that we do so in order to prevent the spread of pests, diseases or unsafe foodstuffs. For example, the new amended rules could not be used to improve general standards of public health and safety or to protect the environment, consumers and so on.

10:00

On the one hand, the UK Government is technically correct. The Scottish Parliament could still enact new rules to provide higher fire safety standards for certain products, but that is, of course, a misleading representation of the bill's impact. The bill's impact is that those improved standards would be binding only on Scottish producers; they could not be enforced on English producers who sell their goods into Scotland.

Given the nature of the UK market, with England accounting for 85 per cent of the population and the economy, we may as well not have the rule at all. All that Scotland would be doing would be, in effect, imposing higher compliance costs on its own producers and putting them at a competitive disadvantage. The rule could not be enforced on the vast majority of products in the Scottish market, which are imported from England.

Technically speaking, the UK Government is correct, but only if we totally ignore the bill that we are talking about. The bill's impact is to render the exercise about Scottish competence nugatory in practice.

Professor Barnard: I agree entirely with Michael Dougan. While he was talking, I was reflecting on what would happen if a Scottish council specified in its procurement that building materials must comply with only Scottish fire safety standards. We do not know what will happen to the procurement regime. At the moment, Scotland applies the EU rules but with a rather distinctive flavour compared with the rules in England.

The problem is that I presume that an English manufacturer of cladding, for example, could make a challenge that the application of the tendering process that specified Scottish safety standards only was in breach of the mutual recognition principle. The question is whether the manufacturer could challenge that in England, or would flag it up as a problem to the Competition and Markets Authority.

There is also the question of what happens if a private landlord, a housing association or a charity says that it wants to procure according to Scottish fire safety standards only. To what extent does the bill bite on it, too? Under EU law, that is called the horizontal situation problem. I do not think that that issue has been sorted out in the bill. I do not know whether Michael has a view on that.

The Convener: Has Beatrice Wishart completed her questions?

Beatrice Wishart: I was waiting, because I thought that Professor Keating might have a response.

Professor Keating: I do not know whether Catherine was throwing the question to me or to the other Michael. I do not have anything to add.

Annabelle Ewing (Cowdenbeath) (SNP): Good morning. I am finding the conversation very interesting, not least because I practised EU law in Brussels for 10 years. I had not thought about the cassis de Dijon case for quite a while—it brings back fond memories.

I want to go back to mutual recognition and the comparison with the EU single market, which is quite marked, in that there are much wider public policy exceptions—if we can term them that—and there are remedies. I accept Professor Keating's point that everything in life can be regarded as political. However, in relation to the EU single market, there is a system of law, a lot of case law and a court to which individuals and businesses can go, so the contrast that the bill presents seems to be very marked.

I have two questions in that regard. One is on the controversial issue regarding any future US-UK trade deal of Scotland being required to import lower-quality food products such as chlorinated chicken and hormone-fed beef. Farmers in Scotland are obviously very concerned about that. Would Scotland be in any position whatsoever to prevent that and avoid the risk of a race to the bottom?

Secondly, assuming that that is not the case and leaving to one side the issue of EU membership, is it fair to say that farmers, traders, businesses and consumers in Scotland are more protected by being members of the EU single market than they would be by what the bill proposes? There has been talk of trust and having discussions, but we have heard that the UK Government does not need to consult. We can view that in the context of the most recent example of blatant disregard for the Scottish Government and Parliament, which is yesterday evening's news that the UK Chancellor of the Exchequer is unilaterally scrapping the UK budget, with no prior discussion of that announcement with the devolved Administrations, including the Scottish Government—that is breathtaking disregard. We can therefore park the idea of there being any trust, because there is clearly no trust agenda.

It would be interesting to hear both professors' comments on my two questions.

Professor Keating: I will say something about the role of the courts generally. In the UK devolution settlement, there has been an agreement to try to keep matters out of the courts. There has been little devolution jurisprudence and most of what there has been has concerned European issues: either EU law or European convention on human rights laws. Our courts therefore do not have a lot of experience in that regard. On the other hand, the Court of Justice of the European Union has a lot of experience as a rather specialised court, because it started out as a court of the common market and has expanded since then. It has been criticised, though, for taking insufficient account of social considerations alongside market considerations. If we are going to bring the courts in, we must think about what kind of things they will do and what expertise they will bring to bear. However, we must keep in mind that the preference so far has been not to involve the courts in the contentious issues that we are talking about.

On the issue of trade deals, it is clear in the bill that imported goods will also be subject to mutual recognition. That means that, if a product is imported into England, it can be sold in other parts of the United Kingdom. If hormone-fed beef, chlorinated chicken and so on are hazardous to health, they can be banned. However, it seems that they cannot be banned for ethical or other reasons. Another critical point is that Scotland can impose its own standards, but goods will be allowed to come into the market that might be

produced to lower standards and might be cheaper. That is a particular problem for Scottish agriculture, as has been mentioned, because it simply cannot compete on price; it competes on quality. That is why Scottish farmers are in favour of high regulatory standards, which are a burden but protect distinctive Scottish produce against competition from cheaper goods. That is the principal problem in relation to agriculture and the concerns that farmers have expressed.

Professor Barnard: I have a couple of points. The first reflects the point about the cassis de Dijon court case—as you might know, it was 40 years old last year and there have been a couple of low-level celebrations of it—but feeds into a point that was raised before that. The principle of mutual recognition has been around for well over a century and, indeed, there are examples of recognition of qualifications that date back to the late 19th century.

That confirms that, as Professor Dougan said, mutual recognition is part of a well-established toolkit, but it is the way in which the toolkit is being operationalised in the bill that is the problem. It prevents Scotland from doing what Scotland clearly wants to do, because the exceptions are so narrow. The exceptions, which are in schedule, 1, can apply only when human, animal or plant health is affected. If we drill down into schedule 1, we see that it is not good enough just to say, "Well, actually, we have reservations about chlorinated chicken." The US will say that it is perfectly safe and that there is no track record of people falling ill from having eaten it. The conditions that are laid down in paragraph 2 of schedule 1 require the food to be "unsafe", but it is not clear that chlorinated chicken satisfies that test. The food also has to be a "serious threat" to human health but, of course, the US and England would argue that chlorinated chicken is not a serious threat. Furthermore, the Scottish Administration would have to provide an assessment, based on the available evidence, to show the serious threat.

The long and the short of it is that the mutual recognition principle will drive a coach and horses through any attempts by the Scottish Government to reflect local preferences for not having chlorinated chicken or genetically modified organism products, which are more about general health or general consumer choice than the ability to meet the very high thresholds that are set out in schedule 1.

Annabelle Ewing: Thank you for the technical clarification. It is helpful to be reminded that the bar is set very high and is, as a matter of practice, unlikely to be met.

My other question is for Professor Dougan. I take the point that mutual recognition is not a new legal concept, but in the context of the EU single market, and from looking at the bill and hearing what is being said, it seems to me that we have a mutual recognition Jonah and the whale. It is a one-way recognition—it will be London's way or the highway. Do you agree with the general thrust of that comment and do you feel that, in terms of opportunities and protections for Scottish business, farmers and consumers, there are more advantages in the structure of the EU single market than there are under the United Kingdom Internal Market Bill?

Professor Dougan: I agree completely with the thrust of the comment. I expressed the same point in slightly different terms to some of your colleagues on the Finance and Constitution Committee yesterday. I described the bill as cassis de Dijon on steroids. That is what it is in effect. It takes the principle of mutual recognition that was articulated by the European Court of Justice in the cassis de Dijon case and applies it with full force but stripped of all the safeguards relating to public interest and higher regulatory standards that were incorporated in the cassis de Dijon judgment and have since come to characterise the operation of the European single market. Therefore, the bill is very much mutual recognition on steroids.

The bill would be highly problematic in any internal market, because it is saying in effect, "We are going to let market forces determine regulatory standards in practice. You can all pick your own standards, but we are going to let the market decide which of those standards will prevail." That is the effect of the absolutist mutual recognition that is embodied in the bill. We have to come back to the idea that, if it would be problematic in any internal market, such as the EU, Canada, Australia or America, it is triply problematic in the UK, due to the size of England and the dominance of Westminster. It means that the market forces that are unleashed by the principle of mutual recognition will not be operating in a neutral manner among England, Scotland, Wales and Northern Ireland. The sheer market size of England means that market forces will lead English standards to be prevalent. Although Scotland and Wales might be able to enact their own regulatory standards, in many cases, all that they will be doing is penalising their own producers and undermining their ability to compete with English imports. In addition, they will not be achieving the public interest objectives that they set out to achieve in the legislation in the first place, because they are unenforceable against the English economy, which is, in effect, producing extraterritorial effects in Scotland and Wales.

10:15

I absolutely agree with your entire critique. The EU single market is, of course, designed to avoid all those problems. As a result of some of the previous questions, we have discussed some of the ways in which the EU single market tries to do that through the roles of the European Commission, the European Council and the European Parliament. The EU single market tries to avoid all the issues of market forces being unleashed on regulatory power in a distorted or unfair way. I think that I said in response to Dean Lockhart's question that that is not to say that we should simply copy and paste the EU single market over into the UK; it is about finding unique solutions for the UK context. However, the bill offers a very difficult solution from a devolved perspective.

Oliver Mundell (Dumfriesshire) (Con): I find some of the hypothetical explorations quite bizarre, given that there is already huge alignment on standards within the UK and that the UK Government has given a clear commitment time and again that it does not want to see a reduction in many standards as a result of leaving the EU. I just wanted to put that point on the record.

I get a bit depressed when I hear people questioning on the issue of English dominance and the size of England, because I see that as one of the strengths for Scotland of being part of the United Kingdom. The issue can be looked at from the other side, as well. Scottish producers and manufacturers and people who live in Scotland get the benefits of selling their products into a significantly larger market.

These questions are for Professor Keating in particular. Is the issue to do with the size of England new in constitutional terms, or has it been accommodated well within the United Kingdom's constitutional settlement? Is devolution an example of the considerable flexibility that our constitution allows? Will the internal market be just another part of that evolving picture?

Professor Keating: The asymmetry and the dominance of England are facts that have been present ever since the union and since the devolution settlement. We cannot get around the fact that the English Government and the British Government are the same thing, unless we federalise the United Kingdom, which will not happen. We just have to work with that.

The bill exacerbates that for the reasons that Michael Dougan has spelled out in that it unleashes market principles. It allows people to go to court to get access to Scottish markets for goods that have not been approved in Scotland. That dynamic—the ability of people to go to court to raise issues constantly—is a new principle that did not exist before and, as Michael says, the sheer weight of England will mean that Scottish standards will lose out in that race.

The UK Government has absolutely committed to maintaining standards, and I see no reason to doubt its sincerity on that. However, a Parliament cannot bind a future Parliament, and a Government cannot bind a future Government. In effect, constitutional legislation is being introduced that would give the UK Government and future UK Governments enormous powers. That requires some kind of justification, and it raises the question whether the constitutional balance of power is being shifted in a way that we might find difficult to reconcile with the spirit of devolution.

Oliver Mundell: It is hard to argue that English dominance will be a problem and at the same time argue that the main focus of all this will be that English producers will be desperate to get into the Scottish market. It works both ways. I think that, as there are already in-built protections, common frameworks will respect the right of devolved divergence and will mean that commonly agreed principles will have to be complied with across the UK. Is that not correct?

Professor Keating: That raises the question of frameworks, which we have not talked about. The bill and the accompanying documents make no reference to frameworks. I would like to see more detail on how the bill relates to frameworks. Is the bill a replacement for frameworks? Does it cut across frameworks? Is it simply intended as a backstop that will be used in the event that frameworks do not work or there are gaps in the coverage of frameworks?

Oliver Mundell: Would it be more palatable if the bill was intended as a backstop?

Professor Keating: Yes. Again, I emphasise the principle of consent. If the bill is a backstop, the issue is not as big as we might think, because one can identify and deal with issues as they come up in a political or intergovernmental process.

Everybody agrees with the principle that we should have free trade throughout the United Kingdom. That is not at stake; there are huge benefits from that. The difficulties will arise first in relation to what constitutes free trade and what restrictions are permissible on environmental, social, ethical or other grounds, and secondly in relation to the basis on which decisions will be made about the nature of the UK single market. Will those decisions simply be ones for Westminster, or will they be made jointly by the Governments?

Kenneth Gibson (Cunninghame North) (SNP): Good morning. It has been a fascinating discussion. I have a mountain of questions to ask,

but I will have to keep things brief because of the time, so I will get on with it.

Professor Keating, in section 9 of your submission, which is headed "Constitutional implications", you say:

> "the United Kingdom remains a unitary state in which Westminster has merely 'lent' powers to Scotland".

However, you go on to say:

> "The Internal Market Bill follows the ... logic ... that 'The UK is a unitary state with powerful devolved legislatures as well as increasing devolution across England.'"

Does the content of the bill deliver on that latter statement? I would also like to hear what the other witnesses have to say about that.

Professor Keating: There has always been a certain ambivalence written into the devolution settlement. It was a political compromise. Some people say that it is a quasi-federal system or that it is moving towards a federal-type system, if not a federation; other people say, "No, it's a devolved unitary state." Those are just words in an abstract argument. We need to ask what is meant by those words.

I was struck by the fact that the UK Government used the term "unitary state" in the white paper. That suggests not only that Westminster has the ultimate sovereignty but that it feels free to intervene across a wide range of policy areas, and that the powers that are devolved to Scotland, Wales and Northern Ireland are in no way entrenched. There are other aspects of the United Kingdom Internal Market Bill that back that up, such as the state aid provisions and the provisions about spending in devolved areas. I wondered why the UK Government used that phrase and then followed through with it.

That has always been there. Following the 2014 referendum, we heard a lot about getting close to a federal system and entrenching the Sewel convention or putting it in legislation and so on. That all seemed to be about providing some degree of entrenchment for devolution. The United Kingdom Internal Market Bill, on the other hand, provides no institutional safeguards for the devolved Governments and Parliaments. It merely says that the UK Government will exercise the powers with restraint and in consultation with the devolved Administrations. That exposes something that has been in the devolution project for a long time, but it seems to represent a slightly different direction of travel, which involves heading back to the notion of a unitary state rather than towards a kind of federal state.

As Michael Dougan said, single market principles are elaborated in other jurisdictions, but I do not know of another case in which the single market rules are set and implemented unilaterally by the central Government rather than through some intergovernmental process.

Professor Dougan: I will make three quick points to follow up Professor Keating's comments.

First, we have to distinguish between devolution as it will exist on paper as opposed to devolution in practice under the influence of the bill, if it is enacted in its current form. The UK Government is correct to say that the devolved powers will continue to exist on paper and that, thanks to Brexit, they may even increase in certain areas. However, in practice, it is an entirely different proposition to say, "By the way, if you exercise some of those devolved competences, you will be able to enforce them only against your own producers and traders, and you cannot enforce them against imported goods coming from the rest of the UK." For all the reasons that we have discussed, there will be a significant difference between what devolution looks like on paper and how devolution operates in practice, thanks to the bill.

Secondly, the issues are not purely hypothetical. I take issue with Oliver Mundell's point. Internal markets are not end states whereby we agree the rules and we can then forget about it because they just administer themselves. The common experience of pretty much every jurisdiction across the world is that internal markets are processes of market management. Laws change, social problems arise, technology throws up new products and services, and consumer preferences change. The whole point of an internal market is to find solutions to constantly evolving problems. To dismiss those issues as hypothetical examples is to fundamentally miss the point of what an internal market is. It is not a set of rules that are agreed once and are then set in tablets of stone; it is about finding constant ways of managing trade relations between territories on an on-going basis.

Thirdly, the key point is that the fundamental assumption that underpins the bill is that the exercise of devolved competences creates a problem. Although the bill does not say that directly in words, that is the fundamental assumption that underpins the entire design of the bill. The fundamental assumption is that devolved competences are capable of creating trade barriers, and trade barriers are a problem that needs to be managed. That is a perfectly legitimate fundamental assumption to make from a particular political perspective, but it is not the fundamental starting point that I would assume, and I suspect that many other people, particularly in Scotland and Wales, would not share that assumption. However, the clear assumption that underpins the bill is that the exercise of devolved competences is a problem that needs to be managed. That starting assumption underpins

many of the problems and issues in the technical detail of the bill that we are talking about.

Professor Barnard: I have just one point, which builds on what Michael Dougan has said. The distinction between existence and exercise is a well-known divide that is also found in EU law. The devolved competences exist and, on paper, it is shown that all of those have gone to Scotland and Wales. However, the bill significantly constrains the exercise of those competences and, because of the absence of a robust and well-rounded range of exceptions, particularly in the application of the mutual recognition principle, exercise essentially undermines existence.

Kenneth Gibson: Professor Dougan, in your paper you say:

"Unlike the EU system: there are no guarantees that the UKIM will operate according to certain minimum common standards in fields such as health, environment, consumer and employment protection. Indeed, the Bill is explicit that a good marketed in England *even in the total absence* of any relevant public interest regulation, is still entitled to benefit from the principle of mutual recognition when it comes to sale or supply in Scotland."

Europe and the UK might digress in terms of standards, and Scottish exports will have to be produced at least to a high standard. In your view, Professor Dougan, does that mean that there is likely to be a move to the high standards across the board in Scotland, or will standards for products that are exported to the EU, for example, be higher than those that are enjoyed at home?

10:30

Professor Dougan: The answer to that question is partly to do with how individual Scottish producers and traders decide to orientate their market behaviour. If Scottish producers and traders want to trade with the EU, they have to meet EU regulatory standards. If they want to focus purely on the Scottish market, they will have to meet Scottish standards. If they want to focus on the UK market, they will have particular problems with Northern Ireland, because they will have to satisfy the particular standards that are applicable in Northern Ireland under the protocol agreed under the withdrawal agreement. The bill really is about the trade of Scottish producers or traders with England and Wales under the terms of the bill.

I think that the answer to your question is that the choices that have to be made by individual Scottish traders are about complying with the regulatory standards that are applicable to the market that they want to sell into. That is different from the question whether Scotland, as a set of institutions, wants, for example, to track and match EU standards on a continuous basis voluntarily in the exercise of Scottish competences. If that is what Scottish institutions wish to do, that will help Scottish exporters when it comes to accessing the EU market. However, as we have said before, the operation of the bill will not stop English imports that satisfy the requirements in the bill entering the Scottish market. I think that there are—[*Inaudible*.]—relationships at work there.

Kenneth Gibson: You also said:

"the UK's rejection of any close future relationship with the EU means that there will be no coherent external reference point for the future evolution of internal UK trade."

Will you expand on that and the implications thereof?

Professor Dougan: One of the main reasons why the UK internal market has not been such an issue in political or legal terms until now is that, during the period of EU membership and after the creation of devolution in the late 1990s, EU standards effectively solved many of those problems. We were members of the single market, we were involved in the adoption of harmonisation legislation by the EU, and we applied that legislation across the UK. Many of the trade barriers that we might have worried about if that framework did not exist were handled through the EU processes.

That is not to say that particular problems did not arise. One of the main examples that we always give is university tuition fees in Scotland. Because of the scope of EU law, tuition fees had to be paid by English students in Scotland. There were little gaps in the EU system, but the EU effectively provided a solution to many of those problems.

Once the transition period expires and we are no longer members of the single market and no longer following EU standards, we need to have a replacement. Much of our discussion has been about whether the bill is the right replacement, but we need to have some sort of replacement. Without a clear external reference point such as the EU single market, we will need to come up with a new reference point of our own.

The point about the lack of a clear commitment to minimum standards in the UK is really just about parliamentary sovereignty. It is a basic constitutional proposition. The UK Government can promise not to lower standards, but of course there is never any constitutional guarantee that a future UK Government will maintain that promise if it has a stable working majority in the House of Commons. Those are political promises, but they are not constitutionally enforceable promises.

Kenneth Gibson: You also said in your paper that the "basic effect" of the United Kingdom Internal Market Bill

"would be to act as a powerful disincentive for Scotland to change its existing rules on minimum alcohol pricing".

Will you expand on that a wee bit?

Professor Dougan: Sure. In the written paper that I submitted, I worked through that example in a bit more detail, but I will give a brief summary now.

The first question is whether a change to minimum alcohol pricing is a substantive change to existing legislation. I think that the answer to that question is almost certainly yes. If you are going to change the rule that applies to minimum alcohol pricing, you will substantively change existing laws, and therefore that falls within the scope of the bill.

The next question is whether you categorise minimum pricing as a product requirement governed by mutual recognition or as a selling arrangement governed by non-discrimination. The bill does not give an explicit answer to that, but it would be completely orthodox in trade law terms to categorise minimum pricing as a product requirement that is subject to mutual recognition. In that case, Scotland could make changes to its minimum alcohol pricing, but it could not enforce those prices on imported English alcohol, because the only exception available is to prevent the spread of a pest, a disease or an unsafe foodstuff. It is clear that that does not apply to the consumption of beer or wine.

The worked-out example of minimum alcohol pricing shows how the operation of the bill means that Scotland could insist that its own domestically produced alcohol has a revised minimum price, but that would be unenforceable on imported English alcohol. In that case, what would be the point of having the rule? All you would be doing is penalising your own producers by raising the price of their good while not being able to enforce the public interest objective that the rule exists to serve in the first place.

The Convener: Dean Lockhart has a brief supplementary question on that subject.

Dean Lockhart: I will keep it brief, convener. I want to clarify the operation of the common frameworks, which both Governments want to apply to, potentially, the vast majority of trade in the internal market. The common frameworks, many of which will be enshrined in legislation, will recognise regulatory divergence across the UK and will provide that devolved standards must be complied with by producers from all parts of the UK. If common frameworks will be in place and they will provide for devolved regulation and require producers across the UK to comply with devolved standards, will that not deal with a number of the concerns?

A single-sentence response would be good. Perhaps Professor Barnard could answer first.

Professor Barnard: It will if they work, but they are not enshrined in legislation. The only thing that we will have in legislative form, assuming that the bill becomes law, is the legislative framework that we have been discussing this morning. Therefore, the basic principle that we have articulated, which is that English goods that might be made to a lower standard must be sold in Scotland unless the very high thresholds laid down in the schedule are met, will apply.

Dean Lockhart: The common frameworks are a bit of a moving feast, but my understanding is that some of them will be enshrined in legislation. Assuming that some of them are, will that not embed regulatory divergence?

Professor Barnard: One would assume that, if other bills are passed later, parliamentary sovereignty would mean that they would trump the United Kingdom Internal Market Bill. However, one would like to think that some thought would be given to how the common frameworks in legislative form would fit with the bill.

Professor Keating: To pick up on Catherine Barnard's last point, it is surprising that those are two separate processes. The frameworks process has been worked out through intergovernmental negotiations, but the internal market process has not. The Scottish Government did not participate, and the Welsh Government participated until the end of last year. Following that, the UK Government proceeded unilaterally. That might explain the lack of articulation between the two processes.

Some of the common frameworks will be legislative, but the idea is that as few as possible will be legislative and that other mechanisms will be used. If they are legislative, they will be subject to the Sewel convention. Again, the UK Government could override that, although there is no evidence that it would do so.

It seems to me that they will cover most issues. If something arises that is not covered by the common frameworks, there should be a mechanism for dealing with that. The bill seems to be far too drastic in giving the UK Government enormous powers to address what might just be a marginal problem that arises in unstipulated circumstances. There should be a mechanism that is linked to the common frameworks to deal with issues that were not anticipated at the time when the frameworks were created as they come up, and that should be subject to the same principles of negotiation and consent.

Professor Dougan: I essentially agree with Michael Keating, with a slight qualification. The common frameworks will capture a moment in

time. They will capture it well and they will solve problems at that moment in time, but they have to be capable of evolving dynamically in response to changes in society, the economy, science, consumers, public health threats and so on. My preference would be for the common frameworks to provide the primary forum for dealing with those changes in society, law, regulation, consumers, science and so on. However, the bill will provide the default solution if there is no common framework.

I agree that common frameworks will solve many of those problems. In my ideal world, they would provide the primary forum for continuing to solve them into the future. However, the bill will have a role to play because it will apply by default to future issues, changes and problems as they arise.

The Convener: Stewart Stevenson has a very important question to ask about eels.

Stewart Stevenson: I am looking at the Eels (England and Wales) Regulations 2009. Regulation 5 states:

"Any person who imports live eels into England or Wales must—".

There is then a list of administrative requirements that are quite onerous. That is followed by:

"Failure to comply ... is an offence."

Would it be possible for us, in Scotland, to fish for eels without imposing those extensive administrative requirements while meeting the same health and environmental requirements, and therefore have a lower cost for the production of eels, and then export them into England? Provisions on issues that are particularly English apply in quite a lot of different areas of law.

I will give another example. Currently, a drink cannot be described as being an alcoholic drink unless it has a minimum of 0.5 per cent alcohol in it. It is clear that there is a growing market for low-alcohol drinks. If we lowered the minimum to 0.4 per cent in Scotland and could therefore describe a 0.4 per cent alcohol beer as being "beer" and have a competitive advantage over English beer producers, would that be valid under the legislation?

I pick on beer and eels as they are two iconic English issues. I feel that an *Evening Standard* article contribution might be forming in my mind.

Perhaps Professor Dougan, who talked about imported English alcohol, could answer first. I have turned that issue on its head.

Professor Dougan: I am afraid that I am not intimately familiar with the 2009 eels regulations. However, the answer is that, in so far as the requirements in those regulations relate to the physical characteristics of the product and the other issues that are identified in the bill as being subject to mutual recognition, Scottish eels could be imported into England unless England could demonstrate that they would spread a disease, pest or unsafe foodstuff.

The English requirements under the 2009 regulations relate more to the manner of sale of the eels rather than to the physical characteristics of the goods or how they were produced or harvested. Therefore, if there were direct discrimination, which sounds unlikely, it would be due only to a public health emergency. Indirect discrimination would apply if there were a threat to public safety or security—which also seems unlikely with the eels—or if there was a general threat to animal health. There are limited grounds on which England could stop Scottish eels entering the English market on Scottish terms, but it really depends on the detail of the regulations. However, in principle, it works the other way round.

The same would be true with the labelling requirements. Labelling requirements are very clear. They are part of the physical characteristic of the product and would be subject to the mutual recognition rule. Therefore, the only ground on which a product with a labelling difference could be excluded from the English market is to stop the spread of a pest, disease or unsafe foodstuff.

However, we are still talking hypothetically because the existing rules would have to be amended substantively to be caught by the bill. If they remain, the 2009 regulations in their unamended form would not be caught by the bill anyway.

10:45

The Convener: If our other two professors have anything different to say, they may comment, but we are quite tight for time.

Professor Barnard: I have nothing to add.

Professor Keating: I have nothing to add.

The Convener: Okay—thank you. That was the definitive view on eels from Professor Dougan.

I will finish by going back to something that Professor Dougan said earlier, which was that the bill really suggests that the exercise of devolved competency is itself a problem. One thing that has perplexed me about the UK Government's white paper is that it says in paragraph 85:

"While currently the costs of trading between the different constituent parts of the UK are low, an increase would be likely to have a significant impact on GDP. In a modelled scenario where intra-UK trade costs increased to the level seen between German states, UK GDP would reduce by £7.3 billion."

I am perplexed about why the UK Government would choose German states as an example of trade barriers. I have always believed that the German economy works extremely smoothly. Germany is obviously a very prosperous place and there are lots of checks and balances in the German Länder. Do any of you have views on why the UK Government would use that particular example if it was not in some way ideologically opposed to all devolved systems?

Professor Keating: That really struck me. There are, in fact, quite a number of regulatory differences between the German Länder. They tend to go together on big policy issues, but there are a lot of differences when it comes to regulation.

In Germany, of course, the EU single market rules apply. The suggestion in the white paper is that the EU internal market rules are too liberal for Germany and that, in spite of the internal market, it has too much divergence. That suggests that the UK Government wants something tighter than the existing EU regime, whereas we had understood that it was just replacing the EU regime and giving Scotland the same degree of discretion that it has under the EU. That is what struck me.

As for the costs, regulation costs money, but for that money we get environmental benefits, social benefits and so on that meet other goals. The question is not whether there is a cost but whether it is worth paying that cost to achieve the non-monetary objectives.

Professor Dougan: I have nothing to add.

Professor Barnard: There are a number of oddities in the white paper, not least that the principle of mutual recognition, which is well known under EU law from the cassis de Dijon decision, is mentioned only once, in a footnote on page 99. There is clearly some politics going on here, but Lord only knows what.

The Convener: Okay. I thank our witnesses very much for coming to give evidence to us today and for their written submissions, which are extremely helpful to the committee.

I should have said at the beginning of the meeting that we have received apologies from Ross Greer. He is now back on the committee full time, but he had a family issue that meant that he could not come today.

Next, we will consider in private session the evidence that we have heard today. That concludes the public part of the meeting. I will allow a couple of minutes for members to have a comfort break before we continue in private session. Once again, I thank our three witnesses.

10:49

Meeting continued in private until 11:31.

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