OFFICIAL REPORT
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Constitution, Europe, External Affairs and Culture Committee

Thursday 6 March 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
8th Meeting 2025, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Alexander Stewart (Mid Scotland and Fife) (Con)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Neil Bibby (West Scotland) (Lab)
*Keith Brown (Clackmannanshire and Dunblane) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Stephen Kerr (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lloyd Austin (Scottish Environment LINK)
Dr Coree Brown Swan (University of Stirling)
Jonnie Hall (NFU Scotland)
Professor Thomas Horsley (University of Liverpool)
Professor Jo Hunt (Cardiff University)
Professor Aileen McHarg (Durham University)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 6 March 2025

[The Convener opened the meeting at 08:45]

United Kingdom Internal Market Act 2020 (Consultation and Review)

The Convener (Clare Adamson): Good morning, and welcome to the 8th meeting in 2025 of the Constitution, Europe, External Affairs and Culture Committee.

Our only agenda item this morning is to take evidence as part of our inquiry to feed into the consultation on the United Kingdom Government's review of the United Kingdom Internal Market Act 2020.

Before I introduce the witnesses, I state that there is an active court case, Biffa Waste Services Limited v Scottish Ministers, which is relevant to the committee's current inquiry. Given that the case is currently active, we have sought the Presiding Officer's permission to be able to refer to the deposit return scheme exclusion process today. The Presiding Officer has permitted discussion of the policy issues so as to enable scrutiny while avoiding direct comment on the specifics of the active case. Any reference by committee members and witnesses should be within those parameters, and direct discussion of the active court case is to be avoided.

We will hear from two panels of witnesses. On our first panel, we have with us in the room Professor Thomas Horsley, professor of law, University of Liverpool; Professor Jo Hunt, professor in law, Cardiff University; and Dr Coree Brown Swan, lecturer in British politics, University of Stirling. We are also joined online by Professor Aileen McHarg, professor of public law and human rights, Durham University. A warm welcome to you all.

I will start with a couple of questions before bringing in other members.

The committee has previously recognised that there is a significant challenge in managing the tensions that exist in any internal market between open trade and regulatory divergence. What opportunity does the review of UKIMA provide to address that tension?

I will go to Dr Coree Brown Swan.

Dr Coree Brown Swan (University of Stirling): Thank you so much for having me.

I worked alongside Professor Thomas Horsley, Professor Nicola McEwen and Lisa Claire Whitten on a review of the United Kingdom Internal Market Act 2020 that was published last year. To be perfectly frank, we did not expect to see significant movement on the idea of revisiting or reopening the terms or parameters of the internal market act so quickly, and so we should welcome that as an opportunity. There is a range of options, from maintaining the status quo, which looks unlikely, to a repeal and reform, which also looks unlikely. Every internal market needs some sort of umbrella legislation to allow trade to happen and we should take the opportunity to think about how, within the parameters, we ensure that that is consistent with devolved powers.

There are probably two main aspects. The first is focused on more legislative aspects that are about addressing the way that the market access principles work and ensuring that, if there is a policy area of legitimate public interest, devolved Parliaments are able to use their devolved powers to legislate there.

The other aspect is procedural. That is where we have seen the act come into difficulties thus far, because of the challenges around the exclusion process in relation to both the transparency and opacity of the process, and also the balance of power by which it is negotiated, which is unique to the UK internal market. When we look at other internal markets, such as in Australia or the European Union, which have their tensions, we do not see that concentration or centralisation of power.

Professor Jo Hunt (Cardiff University): We will probably all echo each other throughout the meeting. The issues were raised when the legislation was created and it was flagged then that we were not seeing continuity with the workings of the EU framework that was being replaced and that we were out of step with what we were seeing in terms of how other decentralised or multi-level states manage. There are many different experiences in coming to manage markets but, as we pointed out, every state or multi-level system has to find its own balance between respect for local democratic choices and the integrity of the market and to know what it values within that. The act put the centre of gravity on the integrity of the market and on free movement in a way that was a break with what we had seen before and with what we see in other multi-level systems.

The review gives us an opportunity to revisit some issues that were live then and are still live. As Coree Brown Swan said, it about looking at the mutual recognition principle that has, in this

legislation, become an absolute rule that affords very little scope for autonomy or local decision making to exist unaffected. It is important to build in an opportunity for that to be given more space within the legislation. That might be done by having an expanded set of justifications in the legislation or by carrying over greater respect for subsidiarity. As we have all been saying for some time, those sorts of issues are missing from the legislation.

Professor Thomas Horsley (University of Liverpool): Thank you for the invitation to contribute. I echo the comments by the other witnesses and agree with much of what has already been said. I will open by stressing a few issues.

We should always bear in mind that there is a functional problem with UKIMA itself and with the related common frameworks, so we are not tilting at windmills. That problem arose following the UK's exit from the European Union. The scaffolding of EU law has been removed and it is now necessary to manage the coexistence of devolved competencies within the UK constitution.

The review is an opportunity to revisit a number of options that I am sure we will go into in greater detail. There are sliding scales of ambition with some low-hanging fruit and some more ambitious plans. There is an opportunity to revisit three key imbalances in the current UKIMA framework. The first is that the framework itself is not consensual but was imposed on the devolved institutions. It is fair to say that a stable legal framework—if that is the option for managing diversity—should be based on co-design and consensus, which we can see is the starting point for other internal market structures around the world.

The second opportunity—I am echoing comments by other witnesses—is the opportunity to revisit the balance that UKIMA strikes between local regulatory diversity and uniformity or cross-border trade. Unlike the EU internal market, UKIMA is highly regulatory by default. As others have already said, there is scope to expand the justifications and to rebalance some of the principles of the act.

Finally, in my opinion, one of the significant flaws in the UKIMA as it stands is that it is highly asymmetrical. We have a system where one of the constituent players, the UK Government, has a dual role in which it regulates for England but also has a central function as the gatekeeper. I am sure we will get into the detail of that, but we effectively have a situation in which the UK Government can veto policy choices made here in the Scottish Parliament.

The review is an opportunity to revisit those three issues.

Professor Aileen McHarg (Durham University): Thank you for letting me join online. I agree with much of what has been said already, and I think you are going to find a lot of agreement between us this morning.

I just have one point to emphasise. The consequence of the imbalance in the act in favour of market access rather than regulatory divergence is that the process of balancing those two objectives has been pushed to the political process. It has been pushed to the exclusions process, and that is a discretionary process in which, as Thomas Horsley has said, there is an imbalance between the roles of the UK Government and the devolved Governments that has imported a high degree of uncertainty into the operation of the market access principles.

Because of this opportunity to make exclusions, the legislation itself is not the whole story. How it operates in its broader political context is really important. As I said in my written evidence, although there are several ways in which you can address those problems—Thomas referred to the low-hanging fruit and more ambitious reforms—a satisfactory solution to the problems that UKIMA poses is one that seeks to reduce the reliance on political discretion to strike that core balance between market access and regulatory divergence.

The Convener: In a report on the act that was published in 2022, the committee took the view that it would be

"regrettable if one of the consequences of the UK leaving the EU is any dilution in the regulatory autonomy and opportunities for policy innovation".

Professor Horsley, you have already touched on that. Could you expand on your view of that policy dilution and lack of possibility of innovation?

Professor Horsley: Yes. It is worth recalling that, during the UK's membership of the EU, devolved powers were exercised subject to compliance with EU internal market norms, but they applied equally across the UK, so there were restrictions. The bite there was different to what it is under UKIMA, but with that scaffolding removed, we have an opportunity for divergence and dilution.

We see that in two ways, and we can speak to some practical examples from Scotland and Wales, if necessary. The market access principles that are embedded in the act impact on the Scottish Parliament's capacity to legislate or apply its legislation to incoming goods and services. There are hard limits. As Aileen McHarg mentioned, you need to seek an exclusion that requires consent on the part of the UK Government. Knowing that you have to go through that process and that your policy choices are

subject to that veto power has a diluting or chilling effect.

We also see the navigation of the market access principles nudging the Scottish Government to work in a more intergovernmental space. If you are making policy choices, either bilaterally with the UK in the common frameworks or through the exclusion processes, or multilaterally with the Welsh Government, for example, you are inevitably going to be compromising. You are going to find your choices on the depth of policy and the timing of the introduction of those policies diluted.

We have examples on single-use plastics in Wales, the deposit return scheme, glue traps and so on. I have discussed all of those in my submission and also in the report that I co-authored with Coree Brown Swan and others. We have some pretty concrete examples of the ways in which this is affecting regulatory autonomy and policy ambition in Scotland.

The Convener: Thank you. Does anyone want to add to that?

Professor Hunt: Thomas Horsley alluded to single-use plastics and we are currently looking at the DRS in Wales. One of the things that we are seeing is, as was mentioned, the chilling effect that means that policy innovation is being frustrated through the concerns about the legislation's impact. In the shadow of the act, the four nations are perhaps pushed to co-operate, which, again, leads to lowest common denominator-type arrangements. For example, Wales has stated that it wants to go further with the DRS because it has already gone further on recycling—it is in a different position than some other parts of the UK, so it is ready to go further. The frustrations of working on a four-nations basis, which might bring lowest common denominator solutions, are very real.

09:00

The Convener: On what you have said about the dynamics and the Scottish Government having to work at that intergovernmental level, have there been any examples of co-operation between the Administrations of the other devolved nations, with the Governments coming together in a sort of united front against the UK?

Professor Horsley: That happened under the previous UK Administration and I expect it to continue, particularly with the narrative of resetting relations. To give some examples, we have had joint consultations—which I think that we can all agree form the early stage of a policy cycle—on the banning of wet wipes containing plastics and there has been co-operation on horticultural peat. Consultations on tobacco and vapes perhaps got the furthest. That there is co-operation is a kind of positive side, if you like.

I would stress, however—and I said this in my submission as well—that not only does the act impact on the scope of policy ambition for the Scottish Government, as we have heard, but it also has a very important impact on political processes. It is executive empowerment. Policy making happens and policy decisions are taken in the intergovernmental space, which requires us to think carefully about the impact on devolved legislative processes. As I said in my submission, we need to continue to consider the impact of that on the Scottish Parliament's ability to scrutinise and shape policy substantively.

Dr Brown Swan: I echo Thomas's remarks. I would like to offer a bit of a comparative example as well. One of the fundamental problems with the act as it stands is that it treats regulatory divergence as something to be avoided almost at all costs, at the expense of the quality and tenor of intergovernmental relations and of policy making and devolved competencies. I would like to encourage people to think that regulatory divergence can be a feature, rather than a flaw.

Let us look at the introduction of deposit return schemes in Australia, within the Australian internal market, and Denmark, within the EU single market. There are difficulties when schemes are introduced that restrict the flow of trade but, ultimately, those schemes have become models for others and have really pushed forward and led the way on environmental protection. Although there are tensions and difficulties and, often, quite a lot of mobilisation from industries that are concerned about how those schemes affect them, ultimately, the industries adapt and we see the expansion of recycling—Southern Australia and Denmark now lead their internal markets in recycling and return rates. We can see that there are opportunities for policy innovation. However, the threat of regulatory chill is really profound.

The Convener: I move to questions from the committee. I will bring in Alexander Stewart first.

Alexander Stewart (Mid Scotland and Fife) (Con): I would like to touch on the reprioritising of the common frameworks. There is an understanding that the UK Government now appears to be prioritising the common frameworks for the four Governments to discuss and collaborate on the new policy areas that they might wish to cover. It would be good to get a flavour of how realistic it is to bring all that together to create the new frameworks that are being potentially looked at or discussed. Do you want to come in first, Dr Brown Swan?

Dr Brown Swan: Sure. What was perhaps a bit surprising in the announcement of the review was

the reference to common frameworks because, when we look back at the origins of the internal market, we see an emphasis on such frameworks to provide the solution. Therefore, we seem to be going back to an older solution. Common frameworks remain important but, as Thomas Horsley has said, there are issues of transparency with regard to how those intergovernmental processes take place.

I am happy to hand over to colleagues who are much more expert on common frameworks than I am.

Alexander Stewart: Thomas, do you want to come in?

Professor Horsley: Yes—if I may. I am conscious that Aileen McHarg is here, too, so I will be brief. In fact, as I have already set this out in full in my written submission, I will be very brief.

The reprioritisation addresses at least one of the primary concerns. The advantage of common frameworks over UKIMA is that they are consensual and co-designed, which is very important. It means that there is a good platform there. However, they need work in order to function. To pick up on Aileen McHarg's remarks, one of the interesting things is that common frameworks are very light on substantive detail. UKIMA is very clear on the market access principles, but the question is: how do we manage divergence in the common frameworks space? That issue has been kind of left to politics and is considered on a case-by-case basis. Therefore, it will be something of a challenge to fix them.

There is also the issue of taking policy making into governmental space, which I have mentioned, and a final issue that the committee should be alert to is that, although there are advantages to prioritising common frameworks, if UKIMA is still in the background, the legal framework will still bite. You are relying on the present UK Government making a political commitment to operate through common frameworks. That might change, and if UKIMA remains in its current or some fundamentally unamended form, it will remain in the background as a very potent challenge to devolution, for the reasons that we have already discussed.

Alexander Stewart: What if it changed and the decision was taken to re-manage the whole process, instead of just having it in the background, or to have a different process? How would a divergence on the process affect where we might be going?

Professor Horsley: Are you talking about changes to UKIMA?

Alexander Stewart: Yes—if UKIMA changed.

Professor Horsley: Assuming that the UK Government does not move on its ambition not to repeal, I think that a good landing space would be to work with common frameworks, subject to some of the issues that I have raised being addressed, while making some changes to the UKIMA framework, at a minimum. That would ensure that, if the levers were pulled, there would be sufficient space for the devolved institutions to defend their policy preferences in a relative way—or in a way that they cannot do at the moment.

Professor Hunt: Reverting to intergovernmental interaction is not some panacea. That interaction is perhaps operating more positively at the moment than it has done for some time, but it would be useful to have some guarantees to underpin things moving forward.

Something that could very usefully be done—and which connects to things that we have already been discussing—relates to the exclusion process. Given that the legislation was introduced very quickly, we have been left to work out the various procedural implications. For example, how does it connect to common frameworks?

As we have highlighted, the frameworks themselves are very different in different policy areas when it comes to how they engage with the idea of regulatory divergence. For some, that seems to be okay, and the issue is finding a space for that, whereas with others, the issue is more about how we move forward together in that respect. Therefore, they take different approaches depending on the policy sector and the particular issues that are being addressed.

However, if we reach the point at which there is an agreement to diverge, the question is how that will connect with the legislation and how the exclusions process will operate. Given how it operates at the moment, the answer is "Highly problematically", so we will want to build into the system as much as possible clear processes, clear timelines and understandings about what is possible within that exclusions process.

Alexander Stewart: Professor McHarg, do you want to add anything?

Professor McHarg: Yes. First, though, I want to make a quick comment on the previous question on the dilution of regulatory autonomy, if I may. Although one way that autonomy can be diluted is through a push for co-operation, that can also come about through unilateral action. The best example of that is the Genetic Technology (Precision Breeding) Act 2023, which was adopted by the Westminster Parliament for England only and has implications for Wales and Scotland's ability to effectively maintain a different approach to gene edited products.

On common frameworks, I agree that the key issue is about how agreements that are reached under them translate into UKIMA exclusions. The exclusion process was included in the legislation in order to facilitate that, but that remains discretionary. There is no obligation to turn a common framework agreement into a UKIMA exclusion, which needs to be looked at. The other problematic aspect of the common frameworks process, which we alluded to earlier, is the fact that they are intergovernmental processes that are not transparent and can pose problems for legislative scrutiny, stakeholder involvement and so on. An improved common frameworks process would also address stakeholder participation and democratic scrutiny.

Stephen Kerr (Central Scotland) (Con): You all share the same paradigm: you know each other, have worked together and are pretty much on the same page. Is that a fair comment?

Professor Horsley: I am sure that members all work together, too.

Stephen Kerr: Yes, but do you disagree with one another?

Professor Horsley: Oh yes, I would say that we do.

Stephen Kerr: What difference of opinion do you have with your colleagues about UKIMA? What point would you make that is distinctive to your evidence?

Professor Horsley: I am probably more sympathetic than many to the idea of having a legal framework that underpins the regulatory system. As I said before, with UKIMA, we are not tilting at windmills: there is a functional problem and the law provides a solution. Many of our internal market systems rely on the application of market access principles and judicial enforcement. Dealing with the balance between regulatory diversity and uniformity is the primary issue. Comparatively, the system is highly deregulatory, and I am not sure that it is necessarily optimal. There is reasonable space for adjustments, although that would not necessarily mean abandoning the frameworks or UKIMA—I am perfectly comfortable with them.

Stephen Kerr: Your take is that we need something such as UKIMA, but that it needs to be amended in order to define process at the fore?

Professor Horsley: I am not fundamentally against the idea of having a legal framework for or underpinning of the operation of the single market. It is all about calibration. Of course, there is another layer that I do not think will be addressed. Managing the duality of the UK Government's role is a challenge, but that is not unique to UKIMA—it is the nature of our constitutional settlement.

Stephen Kerr: Yes, it is a constitutional issue. I understand your point of view.

Professor Hunt, what is your point of difference?

Professor Hunt: I perhaps remain less convinced that the horizontal rule that UKIMA provides is necessary.

Stephen Kerr: So you do not think that UKIMA is necessary.

Professor Hunt: There could have been other ways to manage the market issues.

Stephen Kerr: What are those other ways?

Professor Hunt: UKIMA acts as a backstop—

Stephen Kerr: As a legal framework.

Professor Hunt: It acts as a legal backstop with a strong and absolute mutual recognition role, with the idea that, in some way, it is protecting devolution, because it does not prevent the devolved legislatures from adopting laws. However, in fact, it hollows out the effect of those laws if they cannot be enforced. For example, imports can still come into the UK externally—as long as they have gone to another part of the UK first, they can come into Scotland and Wales and into England and Northern Ireland. We have the hard backstop of the legislation but, because it is in such absolute terms, the shadow that it casts has potential for a chilling effect on what can be done and what remains.

09:15

Stephen Kerr: How does trying to protect the playing field, in terms of the freedom of the market, have a chilling effect? Several of you have used the term "chilling effect". How is that a chilling effect, compared with what we had when we were members of the European Union, when we were in receipt of 12,000 directives and regulations every year, none of which was given proper democratic scrutiny? How does it have a chilling effect? I do not follow the argument.

Professor Hunt: Previously, within the EU, there was scope for harmonisation—for legislation to be made in common and together through the processes in the EU institutions—but, equally, there was space for local divergence, and that could happen—

Stephen Kerr: Within a tolerance.

Professor Hunt: Within a tolerance.

Stephen Kerr: Yes, as is the case in the current set-up—no?

Professor Hunt: No—not within the same tolerances, by any means. We have raised the issues of the exceptions and exclusions and how very limited they are in UKIMA. What was not read

over from the EU legislation was the range of justifications that are available to the local regulator to protect their regulatory choices. Those include protection of the environment, protection of the consumer and a whole host of issues that have not been read into this piece of legislation. The UK, Scotland and Wales will have made use of those justifications—

Stephen Kerr: Those are nuances, though, are they not? Professor Horsley said that he fundamentally leans towards having the legal framework. You are saying that there is an alternative, which would create scope for nuances, but I am not sure that I understand what—

Professor Hunt: But what we already have is the fact that, in the devolution settlement—the devolution legislation for Scotland and for Wales—large areas are reserved. Those include areas relating to economic activity in relation to the management—

Stephen Kerr: Yes, because we are living in a devolved set-up.

Professor Hunt: Yes. There are things that were chosen to be reserved. We are now talking about those areas that have been devolved so, within those, the question is how deep the reach should be to limit the choices that can be made. Ultimately, the progression is an argument that says, "Reserve everything," because then everything—

Stephen Kerr: Well, not really, because what we had under the European Union were the legal underpinnings of the single market—

Professor Hunt: With commitments to subsidiarity—

Stephen Kerr: Some people say that it was the greatest achievement of the European Union. All that UKIMA sets out to do—the review is going to look at how well it does it—is the same. Is that not the case?

Professor Hunt: No.

Stephen Kerr: Why do you say no? It is all about the internal market. It is all about the ability of a Scottish business to make a product and to be able to sell it throughout the United Kingdom without any barriers. That was exactly, in large measure, the legal underpinning of the single market in the EU, which we had to comply with, and it was adjusted and changed every year. You talk about democratic scrutiny in the intergovernmental space and transparency, but there was very little transparency in relation to the EU. You said no, and I interrupted, so please tell me why you said no.

Professor Hunt: With regard to the overriding objectives and facilitating free movement, there is a common objective, but the EU system provided more opportunity for building in respect for local choices than this system does.

Stephen Kerr: However, at the end of the day, in the European Union, ultimately, the centre of power was the European Union's institutions—the Parliament and the Commission—and we had the same situation there. In fact, given the scale of the regulation that came in the direction of the United Kingdom as a member of the EU, we probably had less ability and less scope to do all this co-designing and consensus working. I think that that is the reality. I imagine that that is the reality that most businesspeople would see, although we do not have a voice from business in this evidence session. However, you disagree.

Professor Hunt: The legislation that we have does not afford the same scope for the effective operation of local choices as we had under the EU system.

Stephen Kerr: And—

The Convener: Mr Kerr, I am sorry, but you have brought up a lot of different questions.

Stephen Kerr: Yes, and I have not got to the other two.

The Convener: I am conscious that the other witnesses might want to contribute, so I am going to let them come in and, if there is time, we will come back to you.

Stephen Kerr: Oh. Am I finished? I did not hear the points of difference.

The Convener: I want to give the other witnesses the opportunity to respond to the many issues that you have raised.

Stephen Kerr: Okay. I misunderstood.

Dr Brown Swan: I come at the issue from a political science perspective, and you will know from the work that I have done with the committee on intergovernmental relations that I probably have more faith in the intergovernmental process and people sitting in a room together coming to a conclusion and making an agreement.

Your question was about how the internal market is any different from the EU or perhaps other internal markets. Jo Hunt's point was that it is about whether there is a legitimate public interest in public health or the environment. It is the same in Australia. We looked at the Australian internal market, which was in many ways cited as a model for the UK internal market, and we did not see those provisions built in.

The argument that Brexit was to offer more power, and to offer this Parliament more power, has been challenged. The Scottish Parliament passed legislation to ban the sale and use of glue

traps, only for it essentially to be curtailed by a secretary of state. I appreciate that that is a relatively minor policy area and that we can say that it might not have that many consequences, but I am really uncomfortable with this Parliament's power being constrained in that way.

We have a devolution settlement that sets out the powers and the policy areas in which this Parliament should be able to legislate. Obviously, it legislates within the broader context of an internal market, but why should you be giving up your powers in this way, particularly when we look at the market impact of some of those policy areas?

Stephen Kerr: I suppose that it all comes down to your comment about reasonable people getting together and working through things in a process that creates proper intergovernmental relations, upon which I think we might agree.

Professor McHarg, how does your take differ uniquely from those of your colleagues?

Professor McHarg: I have worked with Jo Hunt on this topic right from the point at which an internal market bill was being proposed. Nevertheless, I have a much more sceptical view of intergovernmental processes than she does. As I said earlier, my view is that we should eliminate or reduce political discretion as far as possible.

One consequence of the different content of EU law that she talked about—you described it as a nuance, but nuance and context matter—in which you could balance on a case-by-case basis the value of free trade against the value of environmental protection or protection for public health or whatever the public interest objective was, is that, ultimately, there was an opportunity to test those balances in court. We saw that being tested in relation to the minimum unit price for alcohol, for instance. That would be one difference. I share Thomas Horsley's preference for more legal regulation and less reliance on intergovernmental processes.

My other concern is about how all of this affects your role as legislators and how UKIMA intersects with devolved competence. It is not just that the restrictions that UKIMA places on your powers is different compared to the previous EU law constraint; it is also the way in which the processes surrounding the enforcement of UKIMA intersect with devolved competence. Those are problematic in their uncertainty.

When the Scottish Parliament was legislating previously, it was bound by a hard limit—it could not legislate contrary to EU law. When a bill was introduced, that matter had to be addressed by the minister and the Presiding Officer, and there were procedures for making references to courts. None of that applies to UKIMA because, technically, it has no effect on the validity of devolved legislation, but it potentially severely affects the effectiveness of that legislation in practice. All those issues really matter, too.

Stephen Kerr: Do you agree with Professor Horsley that we should lean towards having a stronger legal framework? You do not have any faith in intergovernmental working, but the argument that you have made is one for intergovernmental working. You have described the Governments of this island—geographically speaking, we all live on a small island—working together in order to accommodate one another and agree on as much common policy as possible between them.

Professor McHarg: I do not think that I made that argument.

Stephen Kerr: You do not have any faith in intergovernmental relations.

Professor McHarg: I said that I have less faith in intergovernmental processes as an alternative to proper legal processes. Intergovernmental—

Stephen Kerr: You want a stronger legal framework. Am I right in picking that up?

Professor McHarg: Intergovernmental processes take place in a legal context, so the legal backstop is as important as the intergovernmental processes. If the legal backstop is out of line with the intergovernmental processes, you will come up against problems. For instance, if the intergovernmental processes break down, you will be forced back to rely on the legal rules, so it is important to get the legal rules right and not to suggest that, as long as we can all agree, everything will be fine, because that will not necessarily always be the case.

Stephen Kerr: We can have intergovernmental working with—

The Convener: Mr Kerr, I have to move on and bring in other members.

Stephen Kerr: Can I make one last point?

The Convener: Very quickly.

Stephen Kerr: We can have all that if we have a mediation process for resolving difficulties that arise that everyone buys into at the outset. It is very interesting that your point of view, Professor McHarg, is completely at odds with Dr Coree Brown Swan's.

The Convener: We will move on to Mr Brown's questions.

Keith Brown (Clackmannanshire and Dunblane) (SNP): It is interesting that the last point that Mr Kerr made is the complete opposite of what he said at the start of his questions about

there being unanimity and consensus among the four witnesses.

In my view—I am speaking as a politician, but I realise that you guys are not—UKIMA was introduced for reasons of sheer political vindictiveness. It was a power grab that involved the reverse engineering of devolution. If people do not believe that, they have to consider what the rationale was.

We have talked about the asymmetry. It is hard to believe that there are people in this Parliament who are happy that England is set above the rest of the UK in the way that it is. Gene editing was the example that was given. You would think that the fact that the UK can legislate for England without needing to get any exemptions would trouble people in this Parliament, but it does not trouble all of us, which is unfortunate.

The UK internal market also sets itself against classical market theory, because it depresses ambition, aspiration and innovation. That is the effect that it is having—the chilling effect has been mentioned.

Therefore, there is no rationale for what has been done. UKIMA is a power grab. It is like when, after Brexit, the money that had come to Scotland from the EU was taken back by the UK, and it has disappeared ever since. I realise that that is my point of view, but it is interesting to see Brexiteers trying to wrestle with the contradictions of what they have created.

I realise that UKIMA's repeal seems to be off the cards because the UK Government likes having power over Scotland that it did not have previously, and the new UK Government has gone back on the position of Welsh Labour and Scottish Labour, which advocated repeal. We can, however, do an exercise in our heads. If UKIMA were to be repealed—we have had indications that it might be replaced by a stronger legal framework—how would you envisage the so-called internal market within the UK working better? What would be the architecture if we were to do away with UKIMA? Is it just about building up legal structures that serve the same purpose? I ask Professor Horsley to answer first.

09:30

Professor Horsley: I agree. I said at the outset that we need a framework. As I said before, I am less uncomfortable with the idea of having a legal framework. The landing space that I would prefer would be a reformed UKIMA.

What I am about to say perhaps responds to Stephen Kerr's concerns. There are things that we cannot fix in the way that the current system operates, such as asymmetry being embedded in our constitution, but one of the key issues that strikes me as being very strange from a comparative perspective is that, under UKIMA, the devolved Governments have to ask for permission. It is a permission-based system. If you want to legislate within the UKIMA space you effectively have to ask the UK Government for permission to do so. That is strange. That veto-playing role is the reverse of the burden that we saw in the EU context; it is a direct point of difference to the EU legal system, in which the Scottish Parliament could legislate and the burden of proof to raise a case was on the centre, that is, on European institutions such as the European Commission. Scotland did not have to ask the Commission for permission to legislate in the first place. As I set out in my evidence, reversing the burden of proof could be integrated into a reformed UKIMA structure, alongside the other things.

I will give you one example: glue traps. There was a great song and dance—on what was, from what I can see, a very thin evidence base—about whether to create an exclusion. My view is that the burden of proof would ideally be on the UK Government, in the first instance, to adduce sufficient evidence that that particular point of divergence would create the obstacles to trade that the businesses that Dr Brown Swan referenced see as concerning. Then, if those businesses can demonstrate a significant impact, it would fall to the Scottish Government and the Scottish Parliament to make that application for an exclusion. So, reversing the burden of proof around exclusions seems entirely rational and logical to me. It is in line with principles that we see in other systems. That is key and UKIMA can be reformed in that context. That would be my most ambitious wish, alongside some of the low-hanging fruit, if we were to maintain that legal framework.

Keith Brown: Are there any views on structures that are different from the one outlined by Professor Horsley?

Professor Hunt: You mentioned the rationale for the act. UKIMA is a piece of legislation that was adopted at pace. If we go back to when that was taking place, it was at a point at which it looked as though the UK might fall out of the EU structures and would be moving to a position where it would be making its own international trade deals for the first time with a devolved set-up in place. Having UKIMA at least guaranteed to external partners that they could trade with the UK in the knowledge that products would have free movement within the UK—I think that that was a very strong driver in pushing the Government to introduce it.

The timing meant that the legislation was pushed through in a very absolute framework without space for justifications, exclusions or other things that we would expect to see. It was more than was necessary to achieve the objective. UKIMA coming in when it did meant that there had been no time to see whether the common frameworks could operate effectively. They were introduced from 2017; I think that that was when we first discussed them. The potential of the frameworks was shut down very quickly by the adoption of the legislation; they were not given the opportunity to live. Now, we are returning to the opportunity to give them the space to manage the market.

Were we to move away from having the UKIMA legislation, we would still need some sort of governance architecture. I think that the office for the internal market could continue to play a very useful role within the management of the market.

Keith Brown: When the OIM representatives were before the committee, it seemed to me that it does not have any real powers at all.

Professor Hunt: As yet, it does not. Its role is currently very limited and it is not equivalent to, for example, the role of the European Commission, which is an independent actor that arbitrates across the member states. There could be an enhanced role for the office for the internal market that gives it a different set of functions around the management of the market than it has at present.

At the moment, the organisation has quite limited powers. It appears to have the trust and confidence of the various parties, but that is within the limited terms of what it is able to do. It is perhaps looking for a future role that will allow it to offer more of a management role within the market.

Keith Brown: Does anyone want to add to that point?

Dr Brown Swan: There is an opportunity. The main challenge with the exclusion process is that, frankly, it is not really a process. There is no form or timeline set out to allow for certainty and that creates uncertainty and confusion within both the legislative space and for businesses.

I agree with Jo Hunt that there is a space for an impartial actor. I am very uncomfortable with the idea that the secretary of state can veto the Parliament's use of power. The UK Government's veto power in this instance feels very problematic to me.

I do not know whether there is much prospect for a full repeal of the act and going back to the drawing board. How would that process take place? Would that be an intergovernmental process? That seems like it would be a very long and difficult process, which the UK Government at this particular political moment might not want to engage in.

However, within the overarching framework of the act as it stands, there are legislative changes that can be made, including the introduction of the principles of proportionality and subsidiarity. As Thomas Horsley said, we could put the burden of proof on the UK Government to say, "This is an impediment to the internal market and it has a real effect on the economy of the UK as a whole."

That could be important, because, right now, it seems that the burden of proof is very much on the devolved Governments that are attempting to exercise their legitimate devolved powers. If they are prevented from doing so, there is a risk that they will say, "Well, we want to introduce really ambitious environmental legislation, but it will just be knocked back and that will be financially and politically costly, so we will not do that." That is where the regulatory chill comes in.

Professor McHarg: I remember giving evidence to your predecessor committee very early in the Brexit process about the management of the UK internal market. Jo Hunt is right that the concern was about not just internal trade, but facilitating trade deals. There was a recognition that the existing devolution legislation minus EU law might be inadequate. Some sort of internal market legal framework was identified as an option.

Without wanting to rehash it, Brexit, as you know, was a very difficult process. Internal issues were perhaps not given as much attention as they ideally should have been until fairly late in the process, at which point we got this rushed, out-of-the-blue piece of legislation.

If I had a blank piece of paper, I would agree with Thomas Horsley that it would be important to shift the burden of proof. At the moment, devolved legislation and, potentially, England-only legislation is automatically disapplied if the market access principles apply. I would rather see the removal of that automatic disapplication and for there to be some sort of process of having to prove that divergent regulation creates problems for the internal market.

Accompanying that, instead of a reliance on the exclusions process—in other words, a kind of all-or-nothing approach, because a market sector either is or is not subject to market access principles—I would rather see more of a case-by-case approach that, as a matter of law, balanced the market access principles against a wider range of public interests, with that balance subject to a proportionality test. Those would be my two major asks.

Keith Brown: My only other question does not necessarily require a response from everybody. I think it unlikely that political parties thirled to a centralised unitary state in the UK will cede this power voluntarily—that is probably hoping for too much—but, to me, one of the issues seems to be a political one. A UK Government will not want to be overtaken on the outside by Wales or Scotland doing something that is innovative and which takes them ahead of the game. It will not want that for political reasons, and it will dampen it.

More crucial, though, is the point that has been made about business. The one thing that businesses always say, and would say if they were here today, is that they do not like uncertainty. Indeed, Professor Horsley made that point. It is a bit like the planning system; for years, I used to rail against planning officials in my council, because all they would do was wait until somebody put in a design for a house or a development and then say no. Instead of engaging with them and saying, "This is how you can get what you want", they would just say, "Try your best—and then we'll usually say no." That seems to be the space that we are in here, and if that is the space that we are in for businesses or anybody else who is trying to innovate, innovation and ambition will die. That uncertainty, given the sunk costs that one has to take on in order to develop something, is not going to be seen by people as a good prospect.

Is there any other change over and above those that you have already outlined that might help to address that uncertainty for business, even if we are stuck with this regressive legislation? Is there anything else that occurs to you, or have you covered everything already?

Professor Hunt: Perhaps we can again draw parallels with processes that we see elsewhere in the EU system. There is a process by which legislation that is in development needs to be flagged to an independent body—to the Commission—so that it can review whether it will be problematic from the market's perspective. There is a stand-still on that legislation until it has been approved and can move forward, and the Commission can then choose whether it should happen on an EU-wide basis. The whole process is very transparent, with notifications in the *Official Journal of the European Union*. It is open, transparent and available to all to see.

We do not have anything built into our system that does that sort of thing in an open and transparent way—intergovernmental activity might be taking place. Again, it is something that could be brought into our system, perhaps with the office for the internal market acting as a repository or a space for discussing those things. We could make the process transparent and it would be open to business interests so that they had a view of what might be coming down the line and could think about how they might respond to it. I am just drawing a parallel with something that we had and would have operated before.

Keith Brown: But it would, like the Commission, have to be something that was not an interested party. At the moment, the UK Government has both political and territorial reasons for advantaging one area over another, so that approach would not work. In the past, we all had a say in the Commission, the Council of Europe and the European Parliament—now we do not. This sort of thing is decided at the caprice of the UK Government.

The Convener: We move to questions from Mr Bibby.

Neil Bibby (West Scotland) (Lab): A lot of what I was going to ask about has already been covered, but following on from Mr Brown's point, I know that businesses definitely say that they want clarity and confidence. The challenge for the devolved Governments, as well as the UK Government, is ensuring that people have clarity on and confidence in the processes.

We talked about rodent glue traps earlier. Obviously, that exclusion has now been applied by the UK Government. We talked about where exclusions apply and where they do not, and about the real effect on the UK economy, proportionality tests and the burden of proof. With regard to providing clarity and certainty for businesses, organisations and Governments, clear and transparent thresholds seem to help. Do you have any further thoughts on what those could or should look like in practice? We have talked about a real effect on the UK economy, but what is a real effect on the UK economy? What is, and is not, proportionate?

09:45

Dr Brown Swan: I will start us off. We have heard that clarity and confidence are incredibly important—the OIM's work with businesses has suggested that. The reform of the exclusion process, with a set process and a timeline for making decisions known, could contribute to that. With the single-use plastics ban, there was a regulatory gap because the exclusion came through quite late. That creates uncertainty.

There is no reason why the exclusion process could not run in parallel with the legislative process that is happening here. If a ban on a product or a restriction on a certain chemical and so on is introduced, that exclusion process does not need to wait until the legislation is fully formulated or has passed. The evaluation process could run alongside. A process of data collection,

research and gathering, either by the OIM or by an intergovernmental body such as the intergovernmental relations secretariat, could take place after being triggered in the moment that a Government requested an exclusion. You should then expect to know, as you are legislating, that an exclusion decision will be made within 30, 60 or 90 days. That is really important.

Neil Bibby: That is really helpful. If an exclusion decision was based on there being no real effect on the UK economy, do you have any thoughts about what that could mean in monetary value or impact?

Dr Brown Swan: I am not sure. I do not think that I have a full answer.

Neil Bibby: I know that that is a difficult question for you to answer.

Dr Brown Swan: Yes. Those thresholds might need to be discussed or agreed through an intergovernmental process. If the OIM were given more robust powers, there might be an opportunity to say, "Well, if this is under a certain threshold, then it does not have a real effect."

Professor Hunt: We can draw a comparison with how things operate in an EU context. The justifications there recognise that a particular measure might have an impact on the economy but could nonetheless be saved and justified for public policy reasons. The OIM does a decent job of assessing the market and economic impacts, but it is explicit that it looks only at those things, not at wider policy objectives or, for example, at what the environmental consequences of a particular action might be.

It is about being clear about who is assessing what and where all those things are brought together. Simply saying that there is an impact on the economy does not mean that a measure cannot be allowed to continue. It is about recognising that although things might have a so-called negative impact on the economy, broader public policy objectives are given greater value in a particular case. It is about bringing those things together.

Professor Horsley: I want to add a bit to that. I have already said that my primary win would be a reversal of the burden of proof. That is key and that is how it operates in other systems. That would be not only a massive win for devolution but also one that would safeguard the integrity of the internal market, because it would provide a framework for the UK Government to say, "Yes, you need to pursue an exclusion."

There is, however, something missing. Aileen McHarg mentioned it at the beginning. We have a very heavy-handed legal framework. The market access principles are pretty undiluted, but we also have a political space that is perhaps too political. One thing that could address that is to push towards evidence-based decision making. My view is that the burden should be on the UK Government to adduce evidence that the ban on the supply of glue traps in Scotland will have a massive impact on inter-UK trade. If it can provide the data and the evidence, great—make the Scottish Government go through the process of an exclusion. However, if the evidence base is not there, there is your answer.

We need to move to a more evidence-based reasoning process. That would help business; business could feed in to that. The OIM is an obvious repository for that type of case-building. It already has powers to provide technical reports on prospective and past regulatory changes. It is mandated to act even-handedly. Whether it would want those responsibilities is a separate question, but that is an obvious way in which we could boost the evidence-based reasoning that is essential to making the framework function.

Neil Bibby: Professor McHarg, have you any further thoughts?

Professor McHarg: You are right to highlight the uncertainty in UKIMA. There are different types of uncertainty that operate but, unfortunately, they are mutually reinforcing. There is a lot of legal uncertainty about the meaning of the tests in the legislation. For instance, the line between mutual recognition and non-discrimination is not drawn in exactly the same way as it was under EU law. There is a degree of uncertainty around that.

There is also a huge practical uncertainty. Because the law operates not through the invalidation of legislation but through disapplication, it can be difficult to know how that disapplication process might affect a particular market. Often, it will depend on the particular circumstances of particular markets: the balance of local producers versus importers, whether regulation is going with the direction of market trends or against them, and so on. Then, as I have already talked about, there is political discretion.

Those things are mutually reinforcing. For instance, there have been no cases yet that test the meaning of the market access principles. There are various reasons for that—it is partly because it is still relatively early days; partly because businesses do not seem to be all that keen to rely on the market access principles; partly because, as has already been said, we rely so heavily on political exclusion.

The reforms that I talked about would help to reduce the level of all those types of uncertainty. Over time, we would get greater clarity about what the rules in the act mean; we would get more

guidance about the operation of the proportionality test and about what is considered a significant impact on trade.

We are in a situation in which there is lots of uncertainty and very few means of addressing it. I agree with some of the things that the other witnesses have said, but a stronger, clearer legal framework that encourages people into court occasionally—that is not a bad thing—and gives guidance on how the balance between different objectives might be struck, would be desirable.

The Convener: As no-one else wants to respond to Mr Bibby, I will hand over to Mr Harvie.

Patrick Harvie (Glasgow) (Green): I have one question on the principle and one that is more practical.

On the principle, there is still a concern that major constitutional change requires democratic legitimacy. When this Parliament was created and given authority over devolved policy areas, the public had been asked for consent for that major change to the constitutional framework of Scotland, and they said yes.

When the UK Government proposed to leave the European Union, much as I regret the fact that the question was answered as it was, at least the public were asked the question, and 52 per cent of people UK-wide and 38 per cent in Scotland said yes. Even at that time, the subsequent constitutional changes that are now represented in UKIMA were not proposals that were on the table. Nobody in any part of the UK or Scotland said yes to those major constitutional changes, and Scotland's Parliament said no to them.

Whatever changes emerge from the UK Government's review, how can we achieve democratic legitimacy, which is currently lacking, for the new constitutional framework, which will continue, on some level, to constrain the powers that were given to this Parliament by the public?

Dr Brown Swan: We have seen the challenge and the on-going fallout of legislation—such as the internal market legislation—being introduced at speed without the consent of the devolved Governments or Parliaments and, in recent years, we have seen the decline and hollowing of the Sewel principle. The UK Government has said that it will reaffirm and reassess the Sewel convention—there has not been a tonne of progress on that to date, but it is a real opportunity for the UK Government to say that if it is passing legislation that has consequences for the devolved Parliaments, those Parliaments should consent to it.

That might require significant intergovernmental negotiation and wrangling. It is a promising sign that the IMA review was brought forward from its original date. However, democratic legitimacy is a real concern: what happens if the UK Government proposes revisions to the legislation and the devolved Parliaments continually say, "No, this doesn't work for us because it is inconsistent with devolution," and you reach a crisis point in intergovernmental relations? I do not have any solutions to that, but we absolutely need to bear in mind that the devolved Parliaments' consent for the broader process and for the underpinning of such framework legislation are really important.

In comparative cases, there has never been an internal market that has been imposed as UKIMA has been imposed—overnight, all at once, without consent. Most internal markets are very iterative—they are challenged and tested by case law—but we have not had the opportunity to really test the UK internal market.

Patrick Harvie: Am I right that you are emphasising the consent of devolved Parliaments rather than the consent of governments, because common frameworks rest on governmental agreements?

Dr Brown Swan: Yes.

Patrick Harvie: Are there any other views on that question?

Professor Hunt: I want to reinforce that point, given the constitutional significance of the legislation and its reach into devolved competences.

One hopes that the review offers the opportunity to reset and renew intergovernmental relations and to fully reflect that in the process of reviewing and revising the legislation by taking a more consensual and co-operative approach and bringing in the Parliaments appropriately.

Professor Horsley: I will reinforce and add to that point by saying that consent and co-design are absolutely critical in any multilevel governance system. As Coree Brown Swann said, parties in other internal markets might disagree on particular outcomes and policy areas, but they fundamentally agree on their market's basic structures and principles. States voluntarily join such systems and can leave them.

UKIMA, as it is currently structured, is a system that was imposed. It is very difficult to see that approach as a lasting basis for stability. The act could be amended, which might impact on the strength of feeling that exists towards the legislation and the legal framework. However, we live and operate in a constitutional world in which the act is dealt with as part of a broader set of relationships between the UK and devolved Governments, and, as Coree Brown Swann said, the Sewel convention issues are connected to that.

On the other hand, the common frameworks have consent and co-design, but as you alluded to correctly, we need the Parliaments to be involved in scrutiny of and to have input to those on-going processes, and they should be part of the efforts to finalise them.

It is key that we always focus on Scotland—the Parliament, and not necessarily the Government—as being the locus of political decision-making in devolved areas.

Patrick Harvie: Professor McHarg is looking to come in.

10:00

Professor McHarg: I agree that consent is important. Consent mechanisms will differ depending on the nature of the reforms that are being proposed. If the reforms are purely in the intergovernmental space—to try to make the exclusions process work a bit better, for instance—that will need to be agreed. There might be reforms that are implemented using delegated legislative powers under UKIMA and are subject to a consent mechanism. Other reforms might require primary legislation. I hope that the Sewel convention would be respected in that situation.

I will strike a slightly cynical note. It is not just consent at the end of the process that matters—the power of initiative also matters. Coree Brown Swan is right about the bringing forward of the review process and widening it beyond what is strictly required by statute. Those are positive things, but there is a risk that the reforms that are proposed will be fairly minimal and, unfortunately—there is no way around this—the UK Government holds the power of initiative. Devolved Governments and Parliaments will be in the position of having to consent to what is proposed. If the UK Government does not want to do something, it will be very difficult to change that.

Patrick Harvie: Professor McHarg has moved on to the more practical areas that I was going to follow up on—the changes that we might actually see as being politically realistic.

I am clearly going to lean towards the view that we do not need such a framework. For well over a decade, the Scottish Parliament and the UK Parliament made decisions and legislated on areas that impact on business interests and others, while consulting at the same time on charity law, planning law, water-quality regulations and a great many other issues. They heard from the same stakeholders, understood the consequences of divergence or of making different decisions, and made political judgments that were accountable to the electorate on whether areas of divergence were justified. I would prefer that we got back to that way of doing things. However, it seems to be likely that, even if the UK Government wants to put a bit more emphasis on common frameworks, UKIMA or something very like it will remain in the background, with a degree of change.

Professor Horsley talked about shifting the burden of proof. It seems to me that that would be a significant improvement, but I am not sure that it would deal with the question of uncertainty, either for business interests or for policy makers who are seeking to innovate, who would still not know what they are ultimately allowed to do.

In oral and written evidence, there has been discussion about the grounds for exclusion. Should there be a longer specific list of grounds for exclusion, or should there be something that is more open-ended? Could you explore the options and the tensions in having a specific list of policy areas or list of principles? For example, if a devolved Government is implementing a manifesto commitment, that should be protected: there would be a democratic argument for that, or for something that is more open-ended in the exclusions process and how it works. What are the tensions between the approaches?

Professor Horsley: Modifications could be made to UKIMA in a number of ways. As I say in my evidence, I think that the committee should turn its attention to that, even if there is a political move towards a common framework, because UKIMA will be in the background. We set out in our evidence some ways in which things could be modified.

I will highlight some examples. We should perhaps recognise at the outset that uncertainty is built into an internal market. There will be a degree of uncertainty unless and until certain rules are challenged or litigated. That is just a fact. Experience of the EU and the World Trade Organization shows that we have adjudication panels and courts so that things can be tested. The UKIMA is a new model. The internal market in the EU has been operating for decades using an incremental approach of building up the substance of the principles and what they mean, so that over time business gets a clearer set of ideas about the limits in relation to non-discrimination, mutual recognition and so on. Opening that up—reforming UKIMA to include space for the possible defence of proportionate non-market interests—should be considered, as a very important change.

Other things could be done at the stroke of a pen, with or without the consent of the Scottish Parliament. The UK Government could remove, in whole or in part, huge areas of devolved policy making from the scope of application, but the problem with that is that a future Government, or the present Government, could undo that with the

stroke of a pen. You would, ultimately, be relying on the suggestion that we have raised, but justifications could be expanded, things removed from scope and new principles introduced.

Those things should be encouraged and would help to make the framework more effective, but that will operate only if some of the big structural changes are made and you shift the burden of proof and demand evidence. That is how you could operationalise those ideas.

As I said in my written evidence, I have a wish list of things that I would ask for if I were in that position, in the knowledge that UKIMA exists, as we have said, whatever happens in the political space with the common frameworks. It is a nuclear instrument and it can be used to allow the Government to be a veto player in the system without it necessarily providing evidence of an actual impact on intra-UK trade.

I come back to the glue traps. There was not much evidence, but what do we have now? We have a new Government saying, "Well, you can have that." However, do you want to operate in a system in which one UK Government says, "No, you can't do that and we're not going to give you an evidence base on the impact", then another UK Government says, "You can have it"? It feels very discretionary and antagonistic to devolution and to whoever is in charge in the Senedd, here or in Northern Ireland, and it lacks an evidence base. The two things need to run together for the system to work more effectively.

Patrick Harvie: There are many aspects to the issue. If you are going to have a framework like this, you want to be able to cope regardless of whether there is a good or bad relationship between the Governments. You want to be able to cope with changes of Governments and changes of ideology. You want to be able to cope with an emergency situation. You want to be able to cope with the emergence of new policy areas that test the boundary between devolved and reserved areas. I find it difficult to see how a framework will be able to withstand all those pressures and those that we cannot predict.

Do other witnesses want to comment on the practical question, particularly around whether things such as the exclusions list is more likely to change? If that is where we are likely to see willingness to move, how should we implement such changes?

Professor Hunt: I will draw back to reference the system that was previously in place. In the EU treaty provisions on the right to free movement, specified grounds are built in on which justifications and exclusions can be based. However, as the free movement provision came to be interpreted ever more broadly, outside of catching discriminatory measures, the court opened up a wider set of grounds that went beyond those that were set out in the treaty. A general public policy justification was opened up and there was space for matters to be presented and a case made for why the public policy reason was included.

If we look to expand the system, would we be tracking the exceptions under the treaty? That in itself is only part of the picture.

The mutual recognition principle applied in such a way that it was conditioned by a more general set of public policy justifications. It is capturing all that, and we have only taken parts of what was there before.

The Convener: Professor McHarg, do you want to come in?

Professor McHarg: No—I am fine, thanks.

Dr Brown Swan: I echo what my colleagues have said, but I worry that our emphasis on uncertainty can override some principles. Uncertainty is inherent in political systems, and there is uncertainty even in much more functional or mature internal markets. The Danish and South Australian deposit return schemes were both delayed because they were challenged by industry, so court processes had to take place: they responded and adapted their policies in the light of the challenges.

Industry adapts, as well. Multinational corporations are probably not waiting around to see what is going to be done here, or even at Westminster, on single-use plastics: they are looking to Europe and other major economies.

I would hate for us to get ourselves into a position in which we say that uncertainty has to be avoided at all costs. Obviously, we do not want businesses to go through prolonged periods of uncertainty, but when there is a direction of travel, if there are challenges and things need to be worked out in policies as they are implemented, that is natural.

There is a process of policy learning, and there are probably advantages for the UK as a whole for one of the constituent units to say, "We've tried this out. We've banned single-use plastics, made modifications and introduced environmental protections. This is what we've learned and what you might want to consider in your legislation." When we think about the devolved and UK-wide capacities, we see that there are opportunities.

The Convener: Thank you. We have a second panel coming in, so I am afraid that we have run out of time. I know that Stephen Kerr wanted to come back in, so would the witnesses welcome a follow-up letter from committee members with more questions?

Dr Brown Swan: Yes.

The Convener: Thank you. I appreciate that. Thank you all for your time this morning.

I suspend the meeting for a five-minute comfort break.

10:12

Meeting suspended.

10:16

On resuming—

The Convener: A warm welcome back. We move to our second panel for our inquiry on the UK Government's consultation on and review of the UK Internal Market Act 2020.

I refer to my earlier statement on the sub judice rule; I will not repeat what I said, but I know that our next witnesses have been briefed on the issue. I just remind everyone that any discussion on the exclusions process, including in relation to the deposit return scheme, is allowed for the purpose of our inquiry, but any direct discussion of the active case of Biffa Waste Services Ltd v the Scottish ministers is to be avoided.

We are joined by Jonnie Hall, director of policy, National Farmers Union Scotland, and Lloyd Austin, convener of the LINK governance group, Scottish Environmental LINK.

I will begin with a couple of questions. We have previously recognised the significant challenges in managing the tension that exists in the internal market between open trade and regulatory divergence. What opportunity does the review of UKIMA provide to address that tension? I will start with Mr Hall.

Jonnie Hall (NFU Scotland): From the point of view of NFU Scotland and, indeed, the agricultural industry—and perhaps speaking on behalf of the wider agrifood sector in Scotland, which, as we know, is fundamental to the Scottish economy—I would say that the review of UKIMA is very much overdue and welcome. It will probably come as no surprise to hear me say that.

This will be something of an opening statement from me, but UKIMA was clearly meant to act as some sort of backstop to ensure the free movement of goods and services within the UK single market—and, perhaps more practically, within the Great Britain single market, given the issues with Northern Ireland, the Windsor framework and so on. Nevertheless, instead of acting as that backstop, it has become more of a—well, I am not quite sure what the analogy is. A backstop is meant to be a safeguard, safety net or whatever, but it is almost driving things in the wrong direction. We will probably have some discussion around that.

We have always supported the development and implementation of common frameworks, and we are behind their principles of building consensus across devolved Administrations and working together with the UK Government to ensure that the UK single internal market operates as effectively as possible and that there is no competitive advantage or disadvantage, depending on where you produce food, sell food or whatever. Perhaps I can highlight the reasons for that.

EU exit created a fundamental opportunity in many ways. Notwithstanding our position as an organisation that we wanted to remain in the EU, our view of the benefit of EU exit was that devolved policy, particularly in an agricultural or rural context, could be developed even further. So much agricultural practice was governed not only by the common agricultural policy, but by EU directives such as the water framework directive, the habitats directive, the birds directive, the nitrates directive—you name it. There were lots and lots of regulatory frameworks that were applied to the UK as a member state, and on which Scotland had a wee bit—not an awful lot—of wiggle room. I would say, as a ballpark figure, that about 90 per cent of them were gifts from Europe that we just had to implement.

The benefit—if that is the right term—of EU exit was that it created an opportunity for Scotland to be far clearer in setting its own devolved policy not only on agricultural support, but on compliance issues and regulations on environmental management, animal health and welfare issues and all the devolved competencies that were part of the devolution settlement. That was very much welcomed.

Clearly, common frameworks were going to be critical in that. Along with other farming unions and other interests across the UK, we recognised that we wanted policy to be devolved to the different devolved Administrations, but we did not want that to interfere with or distort trade within the UK. Striking that balance was always going to be important, but that sort of thing is usually built on consensus instead of having some absolute backstop.

That is where the internal market act put us with the market access principles of non-discrimination and mutual recognition, and we have been on the back foot from day 1. I certainly remember the UK Government's consultation on the bill—and then the process of that bill becoming an act in 2020—and thinking, "Well, this is okay, just as long as the common frameworks work." Unfortunately, our experience, certainly since 2021 or 2022, is that they have not worked at all. There has been little

or no action in and around them with regard to various elements of devolved responsibility, and it feels that, ultimately, it is the UKIMA backstop that will rule instead of our ability to develop devolved policy. I have no doubt that we will get into more practical issues during the session.

The Convener: Thank you very much. I call Mr Austin.

Lloyd Austin (Scottish Environment LINK): Thank you for the invitation to give evidence.

Scottish Environment LINK welcomes the UK Government's review, and it is very welcome that the committee is undertaking this inquiry in order to input into it. Our concern is obviously with the environmental impacts—or rather the impacts on the development and implementation of environmental policy, particularly in the devolved Administrations.

One of the key ideas behind devolution was not just the development of policy appropriate to local circumstance, with local solutions to local problems and so forth, but the opportunity to innovate, do things differently from elsewhere, reflect local environmental or agricultural situations and so on. In that way, the different parts of the UK could do things in a different order, depending on local arrangements, or apply different priorities to the different environmental aspects and so on.

However, equally, it generated what we like to call a race to the top in terms of environmental standards, whereby one of the Administrations would go first in implementing an environmental policy. The carrier bag charge is a classic example of a measure that was implemented in one part of the UK before others took it on and learned the lessons from the one that went first, so there was a benefit in different areas taking different approaches, learning from one another and generating a race to the top.

However, since the UK internal market act, we have seen a kind of prevention of that approach, so that environmental policies that are proposed by devolved Administrations are constrained. As the previous panel of witnesses discussed, in some cases we see a chilling effect, with devolved Administrations becoming reluctant to bring forward an environmental proposal because of the potential challenges that will arise through the internal market act process.

Again, as Jonnie Hall described, we are supportive of the common frameworks principles and working together. We have a number of concerns about the way the system has worked. If you rely only on that, you end up with the lowest common denominator. Within devolved competences, the devolved Administrations and Parliaments must have the ability to do things differently, if they want. That is the purpose of devolution, as we understood it. The examples that were given by the previous panel in relation to multijurisdictional internal markets and the ability to have subsidiarity in relation to the different jurisdictions in that market—where each individual Administration wants to pursue a public policy objective, such as environmental protection—is the key thing. I am sure that that will bring the discussion on to the exclusion process in the internal market act. I will finish there.

The Convener: Thank you. We heard the phrase "lowest common denominator" from the previous witnesses, too.

Alexander Stewart: Mr Hall, I asked the previous witnesses some questions about the reprioritisation of the common frameworks, which you also touched on. You may not have heard all of that discussion, but, on behalf of the NFUS, you indicated that you support the principles of the common frameworks and that the common frameworks are integral to the internal market. You also believe that there are areas where that approach should ensure that there are opportunities for support and divergence. At the same time, you indicated that overriding the common frameworks could result in potential problems in relation to environmental standards, animal welfare standards and food. You think that that is a major omission from the process, so it would be good to hear about that. You raised concerns in your opening comments, but can the process progress if the common frameworks are redesigned in a way that is more advantageous to supporting your sector and the industry that you look after?

Jonnie Hall: That is a very valid question. I am no constitution expert, but, nevertheless, from a Scottish agricultural/agrifood perspective, the internal market is, in fact, England—if we are being really honest about it.

10:30

The fact that so much of what we produce heads south is fundamentally important to the prosperity of Scotland's agrifood sector. To be honest, an awful lot of what we produce is consumed within the M25. Although other markets are very important, that market is our bread and butter. That is not necessarily the case the other way round—Scotland is not entirely dependent on food flows coming north. Of course, Scotland has many imports, but the UK market, particularly England, is of significant value and importance to the Scottish economy.

On common frameworks, when all these issues were discussed in 2019-20, the clear intention was that there would be consensus and agreement and that some principles would be in place to

prevent any devolved Administration or the UK Government from having a veto over all the others. Things would be built on consensus. The need for devolved policy making and differences would be respected, but we would try to ensure that those differences would not undermine the functioning of the internal market.

We are now in a situation in which, in many ways, the common frameworks have been almost set aside and the backstop is at the forefront. We have mixed those things up. The situation has not really manifested properly yet, but we are starting to see divergence across the UK that could result in potential risks to the interests of Scotland and Scottish agricultural producers.

Alexander Stewart: How detrimental to the interests of Scotland would that divergence be?

Jonnie Hall: At the moment, it is difficult to predict what the economic, environmental or social impacts might be, but I will throw in a particularly controversial issue. In England, the Department for Environment, Food and Rural Affairs is advancing work on precision breeding or gene editing—whatever we want to call it—very quickly, but Scotland is not, because the Scottish Government and the Scottish Parliament have been clear that, if anything, Scotland will keep pace with developments on such issues at a European level, rather than going out on its own as a devolved Administration.

As things stand in relation to the near horizon, there will be a difference, in that producers in England will be able to utilise gene editing techniques, whereas producers in Scotland will not be able to do that. However, Scotland will still be reliant on imports from England of significant things such as grain, which underpins whisky production, distilling and other things. That immediately shows that there is potential for a competitive disadvantage or advantage, even if we set aside the issue of whether we believe that gene editing is appropriate. All of a sudden, an uneven playing field—to use that cliché—will be created.

There was no real discussion with the devolved Administrations about the legislation on plant breeding techniques in England, because there did not need to be. There was no common conversation, engagement or consultation on that legislation. England was able to do that unilaterally, as it knew that it had the backstop of UKIMA in relation to the market access principles. For example, somebody growing grain using gene editing techniques in Northumberland could literally send a truckload up the road and across the border to Simpsons Malt in Haddington—no distance whatsoever—to have it malted. That would be perfectly legitimate.

Alexander Stewart: Mr Austin, do any of the issues that we have been discussing relate to Scottish Environment LINK? Are there things that could be problematic? Are there concerns in your sector? Have safeguards been omitted?

Lloyd Austin: I will make two comments. First, common frameworks are good in principle. The system whereby Governments talk together and agree things is a good thing, but there has to be an agreement to be able to be different if that is what the respective Governments wish to do.

Our experience of common frameworks to date is that there has not been much substance to them. They have established procedures and processes by which policies and substance are discussed, but the policy and substance are not in the framework; the framework is the process, if you see what I mean. As external stakeholders, we do not see what the discussion of substance is. Therefore, the second issue with the way in which the existing common frameworks work is the lack of transparency and stakeholder engagement in those processes. It is a case of four Governments having an interesting chat behind closed doors. If they agree, they publish the agreement but, if they do not agree, nobody knows what happened or did not happen.

That is an external stakeholder's perspective of common frameworks. There is nothing inherently wrong with the desire to have agreements and, equally, to agree to differ if you wish. That is an important aspect. In that way, common frameworks are different from the internal market act, under which an agreement to differ relies on the process of having an exclusion. That exclusion is, in effect, in the gift of only one of the four parties to the internal market act. That has an impact on the issues.

The DRS is a big, controversial and significant environmental policy that was affected by that. If the act had been in place when the carrier bag charge was introduced, that would have been subject to the same discussion. However, it was not because, when it was introduced, we were under the EU single market rules. That is an example of how the subsidiarity provisions in the UK internal market act are tighter than the previous EU single market provisions.

That is the key to the environmental concern. The environment is one of the public policy objectives on which there should be greater flexibility in the form of the way in which subsidiarity was applied in the European Union or, indeed, as one of the previous witnesses said, Australia.

Jonnie Hall: It has very much felt that the common framework was about four Governments. Mr Harvie made the point to the previous panel of

witnesses that democratic process seems to have been overlooked and not even the devolved Parliaments have consented, but Lloyd Austin and I would ask: what about the stakeholder interest in the arrangement? We ultimately have a strong interest in the common frameworks but would be pretty much excluded from that approach. If one of the outcomes of the review is that we reignite common frameworks and improve how they work, that involvement—how not only Governments and Parliaments but stakeholders engage—will be critical.

Keith Brown: I have a question for Mr Hall first and then one for both witnesses. Mr Austin mentioned the limited examples of how people have chosen to do things differently. I wonder whether, because such choices—the DRS or the ban on glue traps—have been slapped down and people have been told, imperiously, that they will not do it, there is a feeling that there is no point in bothering to innovate or trying to do something different in future.

However, in the example of gene editing that you mentioned, Mr Hall, you rightly pointed out the asymmetry of the situation: the UK Government can just make the decision for England and does not have to answer to anybody but everyone else has to answer to the UK Government. I have no doubt that, had it been the other way round—had Scotland unilaterally chosen to go for gene editing and England had not—this outcome would not have happened. That is just the way that things go.

You made a comment in your opening statement that the system was designed to provide no competitive advantage or disadvantage. If that is the case, it is not really a market at all, is it? That is like going to a market where everyone is selling the same goods for the same price. Surely a market, by definition, has competition and elements to it that are more competitive and less competitive. Otherwise, it is not really a market.

Jonnie Hall: I can see the point that you are making. However, when we were a member state of the EU, the free movement of goods and services was one of the four main single market aspects. The cost differentials were relatively minimal in many ways, because we could not have such diverging policy in different parts of the EU, as we were governed by the common agricultural policy plus other environmental legislation.

Things such as the water framework directive, for example, applied across the EU. Scotland implemented that in its own way through things such as the Water Environment and Water Services (Scotland) Act 2003 and all the regulations that followed. That implementation of a piece of environmental legislation upheld standards and led to improvement that will continue in things such as water quality and other parts of the water environment.

However, that did not give any major disadvantage or advantage to Scottish agricultural producers. It was essentially done on a common framework approach, which meant that there was the devolved capacity to implement things to a certain degree but without breaking the tolerances of what everybody had to do—the minimum standard piece, if that makes sense.

What I am concerned about with regard to the other things that are now coming forward is that there will be a disparity within the UK on things such as agricultural support and regulatory requirements, and that that will put financial pressure on different businesses in different parts of the UK. They would therefore not be operating at the same competitive level. You could argue that that is a good thing or that it is a bad thing, but I think that the potential risks for Scotland are significant.

I go back to my comment that England is the single market. If you produce in England, you will, by and large, sell in England. If you produce in Scotland, a lot of what you produce will go to England. We must have a keen eye on how that would work in practice if it were to require different regulatory requirements or different levels of support—whatever that might be. If there were to be a disadvantage to Scottish producers or the agrifood sector, which is so important to the interests of the Scottish economy, we need to be very clear about what that would mean. If that were to be counterproductive to us, the single market would not be working as it should and it would not be a fair and transparent system.

Keith Brown: Thank you for that. This raises the question of why members in this Parliament would give away the opportunity to legislate in this area and would have others legislate on their behalf.

I am conscious, Mr Hall, that there are a number of things in your organisation's written statement that coincide with what was said by a witness on the previous panel. For example, you said:

> "It is the clear view of NFU Scotland that the principles embedded in the UK Internal Market Act (IMA) 2020 pose a significant threat to the development of Common Frameworks and to devolved policy."

You also said that the internal market act

> "appears to limit the devolved administrations' ability to act if any standards were lowered and give the UK Government a final say in areas of devolved policy."

We were told in 2014 that we were going to be the most powerful devolved Parliament in the world and that the Sewel convention was going to be enshrined in law. Within a couple of years, the

UK Government said that the Sewel convention was merely a "self-denying ordinance" and that it could choose whether or not to use it.

Given that change, and that UKIMA has reversed-engineered devolution—that term has been used—as well as the fact that the current UK Government does not want to repeal it, is the exercise that we are involved in likely to effect the changes that you want to see? Given the massive changes in the devolved nature of the Parliament, should there be something bigger and wider than a very limited review of UKIMA to address your concerns? In 2015, we had the Smith commission. In my view, the public should be involved in deciding on the Parliament's powers.

10:45

Lloyd Austin: I will limit my comments to environmental matters, as I am speaking on behalf of the Scottish Environment LINK. UKIMA has created significant problems with the implementation of environmental legislation and policy and it has had a chilling effect on its development.

We think that there are benefits to devolved Administrations being innovative and seeking to be first or go further than other areas of the UK or, indeed, to their legislating and developing policies for environmental situations that are unique to their areas. Scotland has significantly more marine environment, islands and coastlines than other parts of the UK, so Scottish marine legislation has been designed with that in mind. The Marine (Scotland) Act 2010 includes provisions for regional marine planning, which is very important for areas such as the Moray Firth or Shetland, where very different issues need to be addressed. The creation of more specific legislation was one of the ideas behind devolution.

However, the internal market act places an additional constraint on the exercise of devolved competencies. I have spoken about carrier bags and the DRS. There have been situations in which the process of getting exclusions or small things passed, such as legislation on single-use plastics and glue traps, has been overly onerous for devolved Administrations.

The sale of horticultural peat, which I find interesting, was mentioned in passing by the first panel. Peatland protection is very important because of habitat, the emissions impact from damaged peatland and the sequestration that can happen on healthy peatlands. All four Governments across the UK have a policy of seeking to move towards eliminating the use of peat in horticultural practice, which is very welcome, but none of them has been able to legislate for it, because they are all caught up in the common frameworks and/or the internal market act. No one wants to go first and be caught out by those processes. We have four Governments of different political persuasions that all have good policy and good intent, but none of them has been able to deliver on that because of the procedures. To me, that seems to be absurd.

Jonnie Hall: I agree entirely with Lloyd Austin's comments. Scotland has something like 60 per cent of the UK's peatlands, and peatland protection, management and restoration is significant for our ambition to tackle climate change. Being able to legislate and create regulation and incentives in order to safeguard the interests of things such as peatland, and to have that in the gift of Scottish ministers, backed by the Scottish Parliament and the support of Scottish stakeholders, is significantly important. We could extend that to woodland creation, as an awful lot of that happens in Scotland vis-à-vis the rest of the UK.

It goes back to the UK internal market act chilling—to use the term that Lloyd Austin used—innovation in policy and almost holding devolved Administrations back from pursuing what would probably be a very sensible policy, supported by a swathe of interests that say that it is the right thing to do in Scotland.

Patrick Harvie: I will quote NFU Scotland's written evidence, but my question is for both of you. NFUS seems to have hit on the nub of the tension in paragraph 2:

> "NFU Scotland stresses the need for agricultural support policies to diverge where necessary to reflect different needs and objectives. However, the free movement of goods and services and the regulations ... must be aligned so there is no competitive (cost) advantage or disadvantage".

People might emphasise one or the other of those objectives, but there is a tension between them and there always will be a tension between them. The principle that we should be aiming for is not to be absolute about either but to understand that tension and, as you said, hear from the stakeholders who are affected by whatever divergence might emerge and whatever consequences might arise. A clear-eyed decision should be made in a democratically accountable manner about how to manage that tension and, within devolved policy areas, the default should be that that decision is made in the devolved Administration or jurisdiction.

First, do you agree that that tension will always continue to emerge in issues that we know about and in new ones that we have not encountered yet? Secondly, as well as those two priorities and objectives, is there an additional one? I think that you have both touched on it, using different language. I think that Lloyd Austin used the phrase

"race to the top", and Jonnie Hall talked about protecting standards or something of that nature. If, for example, a future trade agreement opened the Scottish and UK market to products that undercut your members in terms of environmental protection, animal welfare and a whole host of other areas that we might anticipate, your members—at least those whose principal market is domestic rather than international—would be deeply concerned. The direction of travel of the regulatory landscape is an additional objective that we need to keep in mind, beyond divergence for innovation's sake or for meeting local needs, or for the protection of the market itself. I wonder whether you could reflect on those issues.

Jonnie Hall: I will come in on that important latter point. The integrity—I use that word deliberately—of agricultural produce in Scotland and our agrifood production is fundamentally important to the success of the agrifood sector in Scotland.

We are not a significantly huge agricultural economy that is based on commodities where it is a case of stack it high, sell it low. Therefore, we must have standards that uphold that integrity, whether those standards are underpinned by regulation or are driven by the demands of the supply chain. Whatever the carbon footprint might be, the impact on nature, how we produce things and animal health and welfare standards are all fundamental to the future success of Scottish agriculture in the food and drink sector, so integrity is really important.

That is the potential flipside of what Lloyd Austin said earlier. We want a race to the top, so that we differentiate ourselves in many ways, rather than a race to the bottom. If we get into that situation through free trade agreements and imports of a different standard are being sucked in from elsewhere, although they might be perfectly safe in terms of consumer health and all that sort of thing, the standards of production behind them is a different matter. Things like that are still important not just for the UK trading with others but in a UK market context.

You made a point about the tensions, Mr Harvie. That is absolutely true—there will always be tensions, because there will always be differences of opinion. Lloyd Austin and I differ on many things, but, at the end of the day—

Patrick Harvie: You differ constructively, I hope.

Jonnie Hall: Yes, absolutely. At the end of the day, we usually end up at a point that works for the viability of agricultural businesses, farmers and crofters and delivers environmental outcomes. There will always be some tensions in and around that discussion, and maybe some things will not go far enough, but, at least at this level, we iron those out and think about how we get to an end point at which we all get the outcomes that we want. It feels to me a bit like the United Kingdom Internal Market Act 2020 almost disregards that.

I will move the example away from the level of the likes of Lloyd and I and put it on the level of the four devolved Administrations. They are seeking pretty much the same outcomes around, in our case, high-quality food production and so on, while delivering on climate obligations, nature ambitions and all the rest of it. We are going to do those things in different ways, because we are different. Different parts of the UK are pretty different—what happens in East Anglia is pretty different from what happens in Argyll. Therefore, we must have that difference in policy approach. However, at the same time, we should respect that we probably want to try to land in the same place.

Therefore, you will get tensions along the way, but how you overcome those tensions is clear. The market access principles of UKIMA kind of ride roughshod—I will use that phrase—over the approach to resolving tensions, which I would have thought would be better done through a properly functioning common frameworks approach. That has always been our argument.

Lloyd Austin: I agree with a lot of what Jonnie Hall said. The issue is that, in devolved competencies—whether that be environment, agriculture, planning, building standards or any of the wide range of devolved competencies—the devolved Administration has opportunities to make and implement policy, legislation and so on. In doing so, it takes the views of stakeholders. For example, let us say that it will take views on agriculture's impact on the environment and vice versa. Jonnie and I have sat together in lots of forums in which we have disagreed and put our perspectives to the Scottish Government and to the Scottish Parliament, and it is for the Government and the Parliament to decide where the appropriate balance lies.

However, the conversation with the various stakeholders is potentially—I cannot remember what word was just used in that regard—overwhelmed, in a sense, and trumped by the internal market act if the outcome that the Scottish Government, the Scottish Parliament and the respective stakeholders have agreed on is not approved for an exclusion. If what the Scottish Government and stakeholders developed as a proposal for Scotland in a devolved competency was something that needed an exclusion, that would be better agreed as a different way forward for Scotland within a common frameworks process—but that would have to be a properly functioning common frameworks process, not the one that we have at the moment.

From the environmental point of view, we have said that there are lots of arguments that we have heard before, from the previous panel of witnesses and from Keith Brown, about making more significant changes to the internal market act. If, for political, legal or other reasons, those things happen, it is not for us to say whether that is a good thing or a bad thing. However, with regard to the environment, our report, which we submitted as our evidence to the committee, recommends a sort of keyhole surgery approach to the exclusions process, so that it would allow flexibility for devolved Administrations in those areas of regulation for the public policy objectives that are in the public interest. We view that as similar to the EU subsidiarity principle.

With regard to the operation of the single market in the EU, there is a whole load of case law from the courts about how subsidiarity and the public interest in different regulatory systems can be balanced against the perfectly reasonable approach of free movement of goods and services in a unitary market. You are right that there is tension between those two things and that choices need to be made, but we think that the internal market act, in a sense, predetermines where those choices are and gives the predetermination to one of the four parties rather than to an independent body.

11:00

Patrick Harvie: And to a deregulatory pressure as well.

Lloyd Austin: Yes. The pressure to go for the lowest common denominator rather than to go for a race to the top leads to a deregulatory pressure.

Patrick Harvie: Thank you both very much. I would just maybe ask for a trigger warning in advance of anyone using the word “trumped” in future.

The Convener: I bring in Mr Kerr.

Stephen Kerr: On a matter of fact, the internal market act applies to the whole of the United Kingdom, not just Great Britain, as was suggested earlier.

I am interested in the NFUS’s evidence, and I would like to focus on it a bit and on some of the words that Jonnie Hall has used this morning. In your written evidence, you talk about the “threat” that the internal market act poses, which Keith Brown directly quoted. Is it the NFUS’s position that you would like to repeal the act? If so, what would be the likely effects of doing so?

Jonnie Hall: The UK Government has made clear that it is reviewing the internal market act, not repealing it. I do not think that it will be repealed, and we are not calling for it to be repealed.

Stephen Kerr: Are you not?

Jonnie Hall: No. As I said earlier, we are pleased that that review is taking place; our position is that the act needs to be reviewed and amended but not necessarily repealed.

Stephen Kerr: Will you drill down on that a bit? I ask that you to add to your written evidence and be very specific. Is it either that you do not want the act repealed or that you accept that it will not be repealed?

Jonnie Hall: We accept that it will not be repealed at this time.

Stephen Kerr: Is the position of the NFUS that you would like it to be repealed, though? You are accepting that it will not be—and I think that that is correct—but I am trying to understand the undercurrent of the evidence.

Jonnie Hall: The position of the NFUS is that the act is in place and that it is being reviewed. We view the review as an opportunity to reiterate our concerns about the act and its market access principles, but, equally, to move on the debate as to how best to ensure that the common frameworks concept works far more effectively for all interests.

Stephen Kerr: You want UKIMA to be amended. That is your proposition.

Jonnie Hall: Almost certainly, yes—depending on the outcome of the review, of course.

Stephen Kerr: Give me your views, rather than saying that things are dependant on the outcome of the review. What is the NFUS’s proposition in respect of the specific amendments that you would like to see?

Jonnie Hall: I am not sure that I can answer that just yet, because we still have not concluded our submission to the review—we have until April or whenever to do that. However, we will definitely be questioning—

Stephen Kerr: You have in mind definite amendments, though.

Jonnie Hall: I have them in mind, yes, but I still have to go through a process with my board to ratify that position and so on, to ensure that, as an organisation, we are comfortable with the outcome that we will be seeking from the review and with what our submission to it will say.

Stephen Kerr: We cannot get into the details.

Jonnie Hall: Not at this time. The consultation has been open only for three weeks—something of that order—and we have eight weeks in total. I

have not yet had an opportunity to talk with my board.

Stephen Kerr: Can you talk about specific areas, without getting into the specifics of those specific areas? Can you mention the areas in which you think that the NFUS will want to see change?

Jonnie Hall: We still have concerns about the market access principles in relation to non-discrimination and mutual recognition because, in a sense, they have the capacity to ignore regulatory frameworks in different parts of the UK, That is because, essentially, something that is produced to a different standard in one part of the UK can legitimately be bought, sold and used in another part of the UK.

Therefore, if we have diverging policy in issues that I have touched on—there are, potentially, more in the pipeline—and that divergence goes too far, will it put Scottish farmers, growers and the agrifood sector at a disadvantage? That is the question.

There is reason to believe that, at that moment, such issues could cause Scottish producers to be disadvantaged in the UK internal market because of the advantages that would be afforded to growers and producers in other parts. That might add production costs for Scottish producers that they cannot recover from the marketplace.

Stephen Kerr: So, are you talking about divergence in Scotland that would add to production costs?

Jonnie Hall: It might be divergence in the UK that adds to production costs because that divergence might reduce the cost of production in another part of the UK and so create a competitive advantage for somebody in England, for example. It might not be because of anything that the Scottish Government or the Scottish Parliament does, but if it changes the playing field—

Stephen Kerr: But it could happen in any part of the United Kingdom.

Jonnie Hall: Yes, it could happen both ways. It might be that the Scottish Government implements policy here in Scotland that actually affords Scottish producers an advantage.

Stephen Kerr: You would be in favour of that.

Jonnie Hall: Of course.

Stephen Kerr: So, we cannot have one without the other.

Jonnie Hall: Exactly. That is why we have to walk a very fine line between wanting a very clearly level playing field in many ways and respecting the fact that we want a devolved approach to a policy.

Stephen Kerr: That might involve divergence.

Jonnie Hall: Yes, you will have divergence, but that is where the concept and the principle of common frameworks that respect and reflect divergence come in. The frameworks say that divergence is acceptable and tolerable because it is not creating such a distortion as to have an impact on the operation of the internal market. That is the consensus element.

Stephen Kerr: However, you know well that even within the unamended UKIMA, we already have devolved policy making for agriculture, so why—

Jonnie Hall: We have devolved policy making, but does the operation of UKIMA respect that differentiated approach?

Stephen Kerr: Well, let me ask you this. We are a long way down the line on all kinds of devolved aspects of post-Brexit agricultural policy, so within the time span of the act, have you had experiences where consideration of UKIMA has presented an obstacle in discussing policy implementation in Scotland?

Jonnie Hall: Internally, we have, but not with the Scottish Government.

Stephen Kerr: Internally?

Jonnie Hall: I mean within NFU Scotland and in conversations with our colleagues in other farming unions across the United Kingdom.

Stephen Kerr: Will you say a bit more about that, to help us to understand the issues?

Jonnie Hall: I would rather not, because those discussions involve what various other unions think. I can tell you right now that some of our colleagues in the National Farmers Union in England are sensitive about the fact that we continue to have significant direct support payments in Scotland, vis-à-vis what is happening in England.

Stephen Kerr: So, an issue has been raised within the NFU about you having an unfair advantage, as it were, in the minds of—

Jonnie Hall: I do not think that it has been raised as an unfair advantage, but as a divergence that is raising a question about what the justification for that divergence is. Those are the conversations that we are having. There is a total agreement—

Stephen Kerr: That divergence is happening under the current UKIMA.

Jonnie Hall: There is total agreement that, because of devolved capacity, there should be different approaches to agricultural policy in different parts of the United Kingdom—

Stephen Kerr: Yes, agriculture is devolved.

Jonnie Hall: That is completely understood.

Stephen Kerr: However, it is under UKIMA that we currently have that divergence, is it not?

Jonnie Hall: Yes, we have it.

Stephen Kerr: So, there has been no legal challenge.

Jonnie Hall: Not yet.

Stephen Kerr: Are you expecting something?

Jonnie Hall: No.

Stephen Kerr: Well, there is not going to be a legal challenge. In your written evidence and in your oral evidence this morning, you talk about some things that have not happened at all.

Jonnie Hall: Yes, but they will potentially happen.

Stephen Kerr: Why do you say that, if they have not happened?

Jonnie Hall: If there is significant divergence in certain regulatory areas and in the ways in which we support farmers and crofters across the United Kingdom, and we create an imbalance, the market access principles of UKIMA will, in effect, be irrelevant. There will be no way to counter the imbalances because something that is produced to one standard in one part of the UK can be sold in other parts.

Stephen Kerr: We all agree that agriculture policy should be devolved.

Jonnie Hall: Yes.

Stephen Kerr: Your argument leads in a different direction.

Jonnie Hall: No.

Stephen Kerr: It suggests that there should be a—

Jonnie Hall: How does it suggest that?

Stephen Kerr: You are raising the concern that different regulatory—

Jonnie Hall: I do not think that I have ever said that agriculture policy should not be devolved. It absolutely should be devolved, but you want it to be devolved—

Stephen Kerr: How do you mitigate the divergence, in that case? You cannot mitigate the divergence that is built into the policy.

Jonnie Hall: You do it through common frameworks, with what is called consensus.

Stephen Kerr: Right. Fine. That is fair enough. However, the evidence of the first five years of the operation of UKIMA is that none of the things are—

Jonnie Hall: That is because the regulatory framework in which UK agriculture and the environmental sector operate is still very much a cut-and-paste from what it was when we were in the European Union. We have not yet extracted ourselves particularly from the framework that we moved across into UK and Scots law. I do not think that we have had that regulatory divergence to any significant degree yet—

Stephen Kerr: None of the things are sufficiently divergent that they cover the concerns that NFU members in England have privately raised about the disparities.

Jonnie Hall: Yes, but we have raised concerns about what is happening down there and what it means for the competitive advantage, or disadvantage, of farmers in England over Scottish producers.

Stephen Kerr: That addresses the concern that Keith Brown raised about what a market is. Just as we all agree that agricultural policy is devolved, we have agreed and accepted that there will therefore be different set-ups, regimes and farm payment schemes. That comes with devolution.

I make the point again that none of the things that are in your written and oral evidence appear to have actually happened. They are about potential.

The conclusion of your written evidence, in paragraph 11, says:

"NFU Scotland remains concerned that the UK IMA 2020 could potentially override"—

Jonnie Hall: There is nothing wrong with me making a statement about what we believe might be an implication.

Stephen Kerr: That is fair enough.

The Convener: Do members have any further questions?

Keith Brown: I want to come in on that last point. I know that it is difficult, and I understand that you do not want to talk up or to give more oxygen to a potential challenge—maybe I am wrong, but that is my impression—but is it not at least hypothetically possible that, in this so-called internal market, one area might object to what it sees as greater Government support being given to another area? It is a viable concern that the current support for Scottish farmers—or, indeed, the support for farmers in any part of the UK in the same situation—could be undermined on that basis.

Jonnie Hall: That is a significant concern for me and for our organisation. Nobody has mentioned

the Subsidy Control Act 2022, which exists alongside UKIMA. The way in which Scottish farmers and crofters are supported today is significantly different from how farmers are being supported in England and from the direction of travel there. There is a risk that English farmers could object to or raise a concern about that.

However, the landscape of UK agriculture is such that, without direct support payments we would not have farming and crofting in many parts of Scotland. That would have a catastrophic impact on many rural communities and economies, as well as on the viability of the agrifood sector in Scotland. The agrifood sector in Scotland is far more important to Scotland than it is to the UK: relatively, it is far more important to our economic growth and prosperity.

As we move forward with agricultural policy in Scotland—working with the Scottish Government and our colleagues who have environmental interests—putting more conditions on the payments will justify them, as they will deliver an outcome that will underpin not just agricultural production. As the Agriculture and Rural Communities Act 2024 says, this is about agricultural production, food production and delivering on climate and biodiversity goals and for rural communities. That must be our direction of travel.

Keith Brown: Thank you.

11:15

The Convener: As members have no more questions, I want to thank you both for your attendance this morning.

I have just one final question. I do not have a lot of experience in this area, but I remember that the EU pillar funding that was meant for hill farmers in Scotland was delivered to the UK Government then distributed across the UK. Given where we are at the moment, and given the localised issues affecting farmers in the different parts of the UK, do you think that the market-access principles are limiting animal welfare, diversity and innovation in hill-farming areas?

Jonnie Hall: There is a lot in that question. [*Laughter.*]

I can give you a potted history of the allocation of funding across the UK, going all the way back to a certain Owen Paterson, who was secretary of state at DEFRA back in 2013-14, right up to the Labour Party Government's budget of October 2024, when all that was severed. Basically, agricultural and fisheries funding was put into, and is now part of, the block grant. It is not now a ring-fenced pot that is then allocated in different ways across the UK. That history of what did and did not happen is, I argue, now irrelevant, because there is no longer a UK agriculture budget that is allocated to England, Scotland, Wales and Northern Ireland. It is all part of the respective block grants.

As for driving innovation in, say, animal health and welfare and the environment, one of the drivers in that respect—or the race to the top, if I can use Lloyd Austin's expression—would be our having the devolved capacity to do those things. As I have said, one of the most important things that the agriculture and food sectors of Scotland can do is set the highest possible standards, because it is all about product integrity. We do not produce a lot, but what we do produce is of a very high standard. That high-quality aspect is, I think, absolutely paramount in respect of the future prosperity of Scottish agriculture. It is all about the quality, the provenance and the story behind all that, evidenced by standards and backed up by regulation. Aspects such as animal health and welfare are paramount, and we lose them at our peril.

Lloyd Austin: I put agriculture within the ambit of the wider environment, because of its impact on the environment, the fact that farmers and crofters are essential to delivering land use policy, and the fact that land management itself has an impact on biodiversity, climate emissions and so on. I will just repeat that, when it comes to environmental policy making, land use policies and environmental policy are devolved. We have seen the benefits of different approaches being taken in different countries in the UK—the benefit of going first and innovating, and the benefit of learning from what others have done and following suit. There is, in a sense, competition between the countries, which is generating that race to the top.

The application of UKIMA has restricted those benefits. The proposal in our report for what we describe as "keyhole surgery" to the exclusions process could, in our view, improve the situation without the need for more significant repeal or changes to the act. Indeed, UK ministers could do it through secondary legislation, under a provision that is already in the act, and we have set out how that could be done.

In relation to environmental objectives, we think that the review should, at the very least, support that kind of small but significant change to the exclusions process. There might be arguments from a political, legal or other point of view for more significant reforms, and we will assess them if they are proposed, but we specifically want change to be made to the exclusions process.

The Convener: Thank you very much. My thoughts on this—if I am allowed to give them—are that things to do with the environment, food standards and welfare and so on are political

decisions. If the market overrides everything, that is a political decision and it is an additional tension.

In any case, thank you both for attending this morning.

I should have said this at our earlier briefing. There is a Scottish Parliament information centre briefing on Wednesday morning, which Alexander Stewart has agreed to chair. I am not sure whether I will be able to make it. It is on the global geopolitical impact of Russia's invasion of Ukraine. I thought that that would be of interest to committee members.

I thank everyone for their attendance this morning.

Meeting closed at 11:21.

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