



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Tuesday 23 March 2010

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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE
5th Meeting 2010, Session 3

CONVENER

*Irene Oldfather (Cunninghame South) (Lab)

DEPUTY CONVENER

*Michael Matheson (Falkirk West) (SNP)

COMMITTEE MEMBERS

*Rhona Brankin (Midlothian) (Lab)

*Ted Brocklebank (Mid Scotland and Fife) (Con)

*Patricia Ferguson (Glasgow Maryhill) (Lab)

*Jamie Hepburn (Central Scotland) (SNP)

*Jim Hume (South of Scotland) (LD)

*Sandra White (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

*Jackson Carlaw (West of Scotland) (Con)

*Ken Macintosh (Eastwood) (Lab)

*Gil Paterson (West of Scotland) (SNP)

*Iain Smith (North East Fife) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Dr Ian Duncan (Scottish Parliament European Officer)

THE FOLLOWING GAVE EVIDENCE:

Chris Bryant MP (HM Government Minister for Europe)

Professor David Judge (University of Strathclyde)

Professor Michael Keating (University of Aberdeen)

Matthew Rycroft (HM Government Foreign and Commonwealth Office)

Professor Andrew Scott (University of Edinburgh)

John Swinney (Cabinet Secretary for Finance and Sustainable Growth)

Jim Watson (Scottish Government Strategy and Ministerial Support Directorate)

CLERK TO THE COMMITTEE

Lynn Tullis

Simon Watkins

LOCATION

Committee Room 1

Scottish Parliament

European and External Relations Committee

Tuesday 23 March 2010

[The Convener opened the meeting at 09:50]

Treaty of Lisbon Inquiry

The Convener (Irene Oldfather): Good morning, everyone, and welcome to the fifth meeting in 2010 of the European and External Relations Committee. No apologies have been received today.

Item 1 is our Treaty of Lisbon inquiry. I welcome from London via videoconference link Minister for Europe Chris Bryant MP, and Matthew Rycroft, who is the director of European Union affairs for Her Majesty's Government. Good morning. Can you hear us all right?

Chris Bryant MP (HM Government Minister for Europe): Yes—we can hear you.

The Convener: Thank you very much for joining us today. In this session, we would like to focus on some of the practical implications of the treaty, and explore various ways in which the Scottish perspective is incorporated into the United Kingdom position on EU issues. Normally, we invite witnesses to make an opening statement, but we are fairly tight for time and you are happy to go straight to questions.

I will start with a general question. The Lisbon treaty has extended significantly the range of EU competences and areas of devolved interest. Do you think that current mechanisms are adequate to ensure that there is a Scottish dimension to UK policy making?

Chris Bryant: In essence, the Scottishness of the British position is guaranteed on several different levels. The first is by the fact that there are Scottish members of Parliament sitting in Westminster, many of whom are in significant posts in Government and who play a key role in determining the UK's position. In particular, the Secretary of State for Scotland has a role in ensuring that other ministers are fully aware of Scottish interests.

In addition, we have formalised processes for consultation of the Scottish Executive through the joint ministerial committee on Europe and the joint ministerial committee on domestic affairs. Scottish Executive ministers sit on those committees alongside other ministers—that is why they are called the joint ministerial committees. From my experience of the JMCE, which met last week

before the European Council meets later this week, it is the key moment when all the devolved Administrations can have significant input into the British line that will be advanced in a meeting. It is also an opportunity to have some fairly broad-horizon discussions about the future and about any specific issues that might have arisen.

On top of that, I understand that individual ministers, such as justice and home affairs ministers, have a good relationship with all the devolved Administrations and want to ensure that, in putting forward the British line, they are informed by the Welsh, Scottish and Northern Irish positions.

The Convener: You mentioned the JMC on Europe. I have to say that, from the perspective of this committee, it is a little bit of a black box, because it is difficult to undertake parliamentary scrutiny of the discussions, which take place in private and which seem to be kept secret. We are trying to work out how we can ensure that there is a Scottish Parliament imprint on the UK position. Given that the JMC on Europe is one of the mechanisms for that, do you have any thoughts about how we might open up that black box a bit and find out more about the positions that are being taken at the JMC?

Chris Bryant: Do you mean which positions are being taken by the Scottish Executive? That is a matter for the committee, I guess, in scrutinising the Scottish Executive and holding it to account, just as the positions that I advance are scrutinised by the European Scrutiny Committee of the House of Commons and the European committees of the House of Lords.

I am not sure that Government-to-Government relations—that is, relations between the Scottish Executive and the UK Government—could be opened up as you suggest, not least because an important element of what the JMCE does is to talk about negotiating positions. As I have discussed with the European Scrutiny Committee of the House of Commons, one danger in revealing our hand on everything before European Council meetings is that our opponents—those who want to move us in a different direction—would likely take advantage of that.

The Convener: Whenever the committee has raised this issue with the relevant minister from the Scottish Executive—of whichever political party—we have been given to understand that there is a slight difficulty in that the memorandum of understanding requires that the agendas, minutes and so on of JMC meetings be kept secret, if you like, or out of the public domain. Could the agendas, or at least a minute of what was discussed and the general areas of agreement, be published in some way?

Chris Bryant: As I said, the biggest difficulty with doing that is that the JMCE talks about negotiating positions before meetings. Actually, my biggest criticism of the JMCE is that we tend to spend far too much time on process rather than on substance; indeed, that is my general criticism about all matters European. Everybody always wants to have a row about whether a particular meeting should be constructed in this or that particular way. For that matter, Europe itself spent eight years discussing its own rule book, which was not a very helpful time.

I am afraid that I am not offering much comfort, but I am not convinced of the argument. I can see a perfectly good argument why your committee should be able to scrutinise Scottish ministers just as the Westminster Parliament scrutinises me and my colleagues on a pretty constant basis, but I think that scrutinising the meetings between the two sets of ministers would be inappropriate.

The Convener: In the event of a conflict of interest arising over a matter that comes within the competence of the Scottish Parliament, how can we ensure that the Scottish perspective has been fully represented and addressed? What cognisance of that is taken in the UK's position?

Chris Bryant: We try to ensure in European negotiations that we are all—England, Wales, Scotland and Northern Ireland; all of the United Kingdom—singing as one from the same hymn sheet. Obviously, that is not always possible; there can be a conflict between the Welsh version and the Scottish version, or between the Scottish version and the Northern Irish version, or between Westminster and elsewhere. That is why I think that it is good that we have a memorandum of understanding that delineates how we will deal with problems.

I also think that it is good that it is very clear that foreign affairs is not a devolved responsibility. In the end, it is for the UK Government to take the seat and to advance the cause. However, although there may often be differences between views, that does not necessarily mean that any of the partners is undermining the interests of Scotland.

The Convener: Do further provisions need to be put in place to accommodate the Lisbon treaty's provisions on involving devolved Administrations and Parliaments? Certainly, some of the evidence that the committee has taken suggests that some sort of procedural mechanism would be helpful.

Chris Bryant: One area in which work probably still needs to be done, not by the Government but by the Scottish Parliament and the Westminster Parliament, is on the yellow and orange card system that the Lisbon treaty introduces. It is

important that material goes directly to this committee, just as it goes directly to the European Scrutiny Committee. What we then need is a process that would allow you to notify the UK Parliament that you have an issue. Of course, that would probably need to be brought into the standing orders of the Scottish and Westminster Parliaments, but it is a matter for the two Parliaments, not for the Scottish Executive and the UK Government.

10:00

Rhona Brankin (Midlothian) (Lab): I have a question on on-going preparations for EU council meetings. When I was a minister, I found that different departments had different approaches to the mechanism for seeking a joint UK position. Has any approach to preparing for different EU council meetings been formalised and, if so, is it the same across different departments?

Chris Bryant: The expectation is that all departments will work closely with the devolved Administrations to ensure that every policy element has been thoroughly explored. Things might happen more readily if the individuals in question get on better, but with regard to justice and home affairs—I should point out that it is not my responsibility—I understand that the arrangements work pretty effectively. I think that Jim Murphy has written to the House of Commons Scottish Affairs Committee and, I presume, to this committee laying out how often representatives from the devolved Administrations had taken the British seat at council meetings. After all, we share for the most part entirely the same set of issues and policy lines.

The Convener: You have mentioned freedom, justice and security issues a couple of times. Jamie Hepburn has a set of questions on those very matters.

Jamie Hepburn (Central Scotland) (SNP): Before I specifically explore the UK option to opt in—or, indeed, to opt out—under protocol 21, can you tell us whether there is any unique Scottish interest in freedom, security and justice and whether the existing mechanisms ensure that the Scottish dimension is adequately represented in any UK policy position?

Chris Bryant: The present system works pretty well. However, one of the real strengths of what we secured in the Lisbon treaty is the United Kingdom's opt-in, which I think is the interests of Scotland as well as those of the whole UK. The fact that for many centuries now Scotland has had a different legal system should be firmly recognised.

My understanding is that for the most part we are proceeding along similar tracks. Where there

is real benefit in dealing with international crime, migration issues and a range of other problems, the UK will mostly want to opt in, and the Scottish Executive has adopted the same position.

Jamie Hepburn: Given that Scotland's legal system is, as you mentioned, distinct from that in the rest of the UK, and given the unique Scottish dimension in freedom, security and justice, what steps are being taken to ensure that there is appropriate scrutiny by the Scottish Parliament—and I emphasise the word “Parliament”—and the Scottish Government of any opt-in decision that the UK Government might take?

Chris Bryant: I do not think that that is a job for the Westminster Government. The Scottish Executive needs to ensure, first, that it is accountable to the Parliament and, secondly, that it makes its case to the UK.

We are very pleased with the Stockholm programme and the various justice and home affairs issues that are coming up in the next 18 months, because they very much follow an agenda, particularly on child safety, that we have been keen to pursue.

Since March last year we have agreed that, where there are differing views between Scottish ministers and Westminster ministers, there will be a JMC domestic meeting to resolve the issue, which will be chaired by a senior Cabinet minister. So far, however, that process has not been needed.

The accountability of ministers in the Scottish Executive is a matter that you must resolve with them. I certainly feel that I am very closely scrutinised in the Westminster Parliament.

Jamie Hepburn: I hear what you are saying about the fact that the UK Government and Scottish Government positions have, by and large, been the same on freedom, security and justice. However, we have received evidence from Professor Michael Keating, a professor of politics at the University of Aberdeen, who has suggested that, at the end of the transition period in FSJ,

“there may be a clash with Scottish interests, should the UK want to opt out and Scotland to stay in.”

How would such a conflict be resolved? Would that just be done through the JMC?

Chris Bryant: I challenge that idea of a clash with the Scottish interest. There might be a difference of views between the Scottish Executive and the Westminster Government, but a view is not necessarily the same thing as the Scottish interest. I would argue that, in some areas, the Scottish Executive—certainly as it is presently composed—does not always represent the Scottish interest. I will leave that political point aside, however: the most important issue will arise

when we reach a significant clash. A memorandum of understanding was set out on 10 March last year, which makes it clear that if there is a difference of views there will be a JMC domestic meeting, chaired by a senior UK minister, at which the matter will be resolved.

Foreign affairs is not a devolved responsibility, so if there is no means of resolution, the UK Government wins, I am afraid. It is the UK Government that decides who it puts in the chair and who advances the argument. If it is a Scottish Executive minister who sits in the British chair at a Council meeting, that minister must advance the UK argument, not just their own personal or Scottish argument.

Jamie Hepburn: I will leave to one side my own political observation that I think that the UK Government sometimes does not reflect the Scottish interest. I suppose it is a matter of individual or political perspective.

Given that the legal system in Scotland is different to that of the rest of the United Kingdom, has there been any exploration of circumstances in which Scotland could opt in while the rest of the UK opts out of an FSJ area? Is that a possibility, or is that impossible, given that the UK is the member state?

Chris Bryant: That is absolutely right: it would not be possible, because the UK is the member state, for Scotland to opt in and the rest of the UK not to do so.

I want to return to this issue, however. I get really frustrated—verging on angry—with the fact that Europe is always about process, never substance. People come up with theoretical positions that never happen. I would much prefer to deal with the substance of an issue rather than with constant matters of process.

The Convener: I understand what you are saying about the conflict resolution process in relation to political differences or perceived interests, but what if there was a legal problem? How would a difference in law be resolved?

Chris Bryant: If somebody wishes to present such a case to me, I will look at it and we will see how we can resolve it. As I say, people keep coming up with “What if ...?” So far, I have not been aware of any major, material differences that it has not been possible to resolve.

The Convener: I will give a general example. Sir David Edward who was a judge in the European Court of Justice has suggested to the committee that the position of the European public prosecutor could present a difficulty in legal terms. He said that, although it might fit within the Scottish legal system, it may not fit within the UK legal system. Given the technical nature of the

question, you may be unable to respond today, but perhaps you will come back to us on the matter, given that it was raised with the committee.

Chris Bryant: I confess that I am not an expert on the Scottish legal system. I am happy to write to the committee on that.

As I said, the process would be the same. An initial discussion would take place between the justice and home affairs ministers at the point at which we had to make a decision on opting in. If a difference of view or legality were to emerge, ministers would try to iron it out among themselves. If that was not possible, a JMC domestic meeting would be held to try to reach a common position. In the end, coming to a common position is in the UK's interest.

The Convener: Thank you. We are running a little bit short of time and we have one further area of questioning, which is extension of EU competencies.

Ted Brocklebank (Mid Scotland and Fife) (Con): Good morning, minister. Under the relevant concordat, the UK Government is required to provide the devolved Administrations with full and comprehensive information, as early as possible, on all business within the framework of the European Union that is likely to be of interest to the devolved Administrations. What steps have been taken to alert Government departments of the extent to which the formal legal competence of the EU was extended in the Lisbon treaty?

Chris Bryant: I am sorry, but I do not quite understand the second half of the question. I am fully with the first half. We provide—

Ted Brocklebank: I am trying to get an outline of the steps that have been taken to alert Government departments of the extent to which the formal legal competence of the EU was extended in the Lisbon treaty.

Chris Bryant: Do you mean Government departments in Westminster?

Ted Brocklebank: Yes, indeed.

Chris Bryant: We have a wide range of different groupings through which civil servants in each of the departments that have a role in council meetings gather together. The legal structure of Government ensures that every department is fully aware of its responsibilities in relation to Europe. One difficulty is the number of ministers for various departments who relate to the European Union. One thing that we probably ought to do more effectively is to get together all those ministers. Thanks to codecision, the European Parliament will now play a much more important role. We probably need to co-ordinate our efforts better in lobbying the European Parliament.

Ted Brocklebank: Are there any standard procedures and timescales for seeking and reflecting views? How is any policy divergence resolved? Is anything laid out in regular guidance?

Chris Bryant: There is a very clear process in Government for how we arrive at a Government policy on a given issue. Let us take the external action service that is being proposed. The formal process is for all the different ministers who might have a responsibility in the area, or who might take an interest in it as a Cabinet sub-committee, to write around. If a common view is arrived at as a result, that becomes Government policy. If there is substantial disagreement, a physical meeting of the committee might be needed to establish the policy. If there is no agreement at the meeting, the Prime Minister has to broker a deal. That is the standard Government process for all policy in relation to the European Union or any other matter.

Ted Brocklebank: What about the people who are involved in preparing explanatory memoranda? Are they required to take into account the increased range of areas of EU intervention that are of devolved interest?

10:15

Chris Bryant: Any legislative act that is going through the European process has to come for scrutiny to the Westminster Parliament. We have an eight-week process, which we occasionally have to override, normally for matters of security. The process is pretty robust. The European Scrutiny Committee goes through a sifting process to decide which issues require a specific debate—that might lead to a vote in the House of Commons. The Government might decide to take specific issues to the floor of the House of Commons, too.

The Convener: We have nearly run out of time, but I would like clarification on a couple of points. You said that you will write to us about what happens when there is a legal difference, rather than just a political one, between the Scottish position and the UK one.

On the JMCE, on several occasions, we have had Scottish ministers at the committee and tried to exercise some scrutiny, but they keep telling us that they cannot tell us what they said at the JMCE because the meeting is Government to Government and therefore confidential. Can I take from what you have said that the UK Government does not have a difficulty with the committee asking a Scottish minister what position they adopted or what items they put on the agenda in relation to Scottish devolved matters? Would that be a problem? I really want to clarify that.

Chris Bryant: If I was a member of your committee, I would say that it is not good enough for a minister to blame the UK Government for somehow not allowing them to tell you what they said at the JMCE. The UK Government would be absolutely happy for Scottish Executive ministers, either in open session or in closed session if that is what you prefer, to talk about what they say in JMCE meetings. The European Scrutiny Committee would send me off having boxed my ears aggressively if I were to try to use an argument that was based on secrecy.

It is difficult to put draft Council decisions in the public arena because they change all the time. They are part of a negotiating process and we do not always want to reveal our hand in that process. Nonetheless, we have decided to provide draft Council decisions to the European Scrutiny Committee and the House of Lords European Union Select Committee on a confidential basis and on the understanding—which I am sure those committees will fully respect—that the information is not for public dissemination. We are doing that in order better to inform those committees' understanding of what we are up to.

The Convener: That has been a useful exchange of information. I thank you for giving evidence to the committee by videolink. I am sure that you will watch this space closely to see our final report.

Chris Bryant: Thanks very much.

10:18

Meeting suspended.

10:20

On resuming—

Europe 2020 Inquiry

The Convener: I am pleased to welcome John Swinney, the Cabinet Secretary for Finance and Sustainable Growth, and Jim Watson from the Scottish Government's strategy and economic policy division. Good morning and thank you for making the time to come along. Cabinet secretary, I know that you have a busy diary and that you need to be away by 11, so we will do our best to keep to that. I understand that, as we have such a tight agenda, you will waive making an opening statement, so we will move straight to questions.

The Scottish Government has made a submission to the Europe 2020 inquiry. In general, what are your views on the EU 2020 strategy? Is it a good thing with which to replace the Lisbon strategy? Does it go far enough? Should there be clearer targets? Will you give a general indication of the Government's views?

Cabinet Secretary for Finance and Sustainable Growth (John Swinney): Thank you, convener. I welcome the opportunity to take part in the committee's inquiry.

The Government's position in principle is that we are comfortable with the direction of the EU 2020 document. We believe that it represents a welcome development of the Lisbon agenda and that there is, by and large, compatibility and an alignment between our approach and the vision of the document. What I will say today is in no way intended to suggest that we are out of kilter. There is broad agreement, but there are some areas where the process could be strengthened.

We believe that EU 2020 lacks the necessary focus on climate change and the development of the low-carbon economy. One of the Government's major policy objectives is to move the climate change debate away from being viewed—as it often is—as a problem and a burden and towards being viewed as a way in which we can develop our economy in a different fashion to meet and address some of the challenges. The Government published a consultation paper on the low-carbon economy yesterday to try to advance some of those questions.

The second area in which the EU 2020 process could be strengthened is in relation to social cohesion. The document does not take sufficient account of the need to transform the economic opportunities that exist for people who are particularly isolated from the labour market. Unfortunately, we are going through an economic cycle at present that will put people back into that position. There is a significant challenge to

improve people's access to the labour market and tackle the obstacles to entry into it, but we believe that the document lacks impetus on that. Some of the issues have been addressed in the EU's recent output on the matter, however, so some progress has been made in that respect.

You asked about targets, convener. The principle of having significant targets at the heart of the process is welcome, but whether those that are enshrined in EU 2020 are all crystal clear and meaningful is a different matter. It is clear what the targets for participation, and research and development are about, but some of the other targets are perhaps a little less clear. I hope that that will be addressed in the process of dialogue.

The Convener: You mentioned that, since the Government made its submission, the European Commission has responded to some of the issues that you highlighted. Has there been sufficient movement? If you have had discussions with the UK Government about the Scottish position, what feedback have you received? My understanding is that the strategy is to be agreed at the European Council meeting in June. What are you feeding into the UK process and what response are you getting from the Commission?

John Swinney: There has been movement in the EU on the questions that we raised, which is welcome. Obviously, we want to ensure that everything is cemented in agreement and that there is understanding about the direction of change that we want.

We were not party to the original United Kingdom submission, simply because timing was far from ideal—there was a bit of a swift movement to submit everybody's views. Although we were not party to it, we agree with and have no issue with much of it. After the submissions were made to the Commission, there was a discussion about EU 2020 at the joint ministerial committee on Europe meeting on 16 March. The Minister for Culture and External Affairs, Fiona Hyslop, was involved in that discussion. The UK minister agreed that the JMC would return to the subject at a subsequent meeting, in advance of the strategy being finalised at the European Council meeting in June, although there will be a discussion about the matter at the European Council meeting later this week.

At the JMC meeting, Fiona Hyslop stressed the importance of removing regional disparities. She argued for greater emphasis on skills and climate change. She also raised issues about the approach to the EU 2020 targets, particularly the need to ensure that they do not result in the creation of a new and distinct set of targets. If possible, the EU 2020 targets should encompass the direction of targets from member-state level upwards, rather than create a new set of EU

targets from the top down. As the committee will be aware, the Government has formulated a number of targets that we are working towards to realise our economic strategy and they are the guides for our policy. We do not want to come out of the discussion with new targets that are at odds with the direction of thinking envisaged in our economic strategy targets.

The Convener: I do not want to hog all your time, but I have a final point before others ask questions. Three of the largest political groups in Europe have suggested that, along with targets, there should be incentives and sanctions—the idea being that there is no point in having targets if you do nothing when you do not meet them. What is your view on that?

John Swinney: That is an interesting suggestion. I suppose that it is worth exploring. It is a fair point that a lot of public policy is structured around achieving targets, although the mechanisms are perhaps not properly in place to say whether they have been achieved. I suppose that there is a welcome debate to be had about that.

The Convener: Since we are confident about meeting our targets, it sounds like a better idea.

Rhona Brankin: Evidence from Scottish Enterprise referred to insufficient recognition being given to regions in the Lisbon strategy and suggested that its focus was on member states at the expense of other actors. Does the Scottish Government agree that the Lisbon strategy was too focused on the role of member states and how will the Government seek to ensure that Europe 2020 better incorporates the regional dimension?

10:30

John Swinney: We accept that analysis. In response to one of the convener's earlier questions, I discussed the point that Fiona Hyslop advanced at the joint ministerial committee about the need to recognise regional disparities and ensure that the framework encompasses some of the distinctiveness that exists. Our colleagues in Northern Ireland would comfortably share that position and I imagine that it would also be borne out by the position in Wales. It is important that we ensure that we have an approach that acknowledges the distinctive circumstances and, in some cases, distinctive responses, although I would not seek to make too much of a distinction between the direction of thinking in EU 2020 and that in the Scottish Government's economic strategy because the thinking that underpins both is compatible. That is welcome for making progress on the agenda.

Rhona Brankin: Fiona Hyslop raised the issue of regional disparities at the JMC. What sort of things were discussed?

John Swinney: Issues on, for example, the low-carbon economy would be raised. We have a distinctive opportunity to develop low-carbon activity as an economic opportunity in Scotland. We have a significant proportion of European wave and tidal resource and, if we have that, the issue is, by its nature, not uniform throughout the European Union. We want to ensure that the opportunities that the strategy raises take due account of the significant shift that we want to make towards developing a low-carbon economy.

Access to the labour market, which is a completely different matter, would also be discussed. Some areas of our economy have a particular challenge in accessing economic opportunity. Sometimes, that is a product of economic dislocation and, sometimes, of geographical dislocation because of remoteness and other factors. We want that to be reflected in the development of the strategy.

A fine balance must be struck to ensure that the approaches that could be envisaged by an overall EU strategy do not constrain in any way the Scottish Government's ability to tackle some of the issues.

Rhona Brankin: It is perhaps unfair to ask you for more detail, but we are interested in what issues are raised at the JMC meetings. You mentioned two that particularly refer to your brief—the low-carbon economy and access to labour markets—but will you or somebody else give us information about the other regional disparities that were raised at that meeting?

John Swinney: I can certainly provide the committee with some further detail if that is possible. I noticed, in the exchanges that you had with the Europe minister earlier—

Rhona Brankin: A new openness, perhaps.

John Swinney: I had better be careful about how I answer Rhona Brankin's question because I sensed a certain frisson of concern about some of the issues. I will be as helpful as I possibly can be in writing.

The Convener: As you have been so brave, Mr Swinney—

John Swinney: Possibly even courageous, convener.

The Convener: Reducing regional disparities is clearly part of your cohesion response to the European Commission's consultation and your EU 2020 strategy. No one round the table would disagree with you on the importance of social cohesion, but is the Scottish Government of the

mind that EU funds should be directed towards all member states or directed only towards those in most need, as was the thinking in Barroso's first non-paper on the matter?

John Swinney: It would be nice to argue that everyone should get resources out of the EU as long as we are getting some—that is the nice, straightforward argument. I have much sympathy with the argument that funding should be focused on areas that are objectively shown to require assistance the most. However, we must be careful not to devise at member-state level a mechanism that, for example, completely removes the United Kingdom from access to funds. We all know that there are significant areas of economic challenge in the UK. We must be extremely careful about how we decide on the mechanisms for the distribution of European funds to ensure that need is addressed, as you said, which instinctively feels to me to be the correct way to proceed.

The Convener: I hope that a strong EU regional policy, which addressed disparities in the regions, would offer the way forward.

Jim Hume (South of Scotland) (LD): Scottish Enterprise said in its submission to the committee that small and medium-sized enterprises will play a large role in creating a new, innovative society. Does the cabinet secretary agree? What support is the Scottish Government providing to SMEs to help them to meet the 2020 targets?

John Swinney: I support Scottish Enterprise's analysis. SMEs must play a fundamental role in the Scottish economy. They are the backbone of the Scottish economy. We have taken measures, such as the business rate cut for small businesses, which were designed to enable smaller companies to retain more of their revenue, to support internal development.

There is a range of business support, for example through some of the European funding programmes. The Scottish co-investment fund and the Scottish seed fund are available to support SMEs in innovation. Other innovation grants are available through Scottish Enterprise, through different financial mechanisms. The Scottish investment bank is another device to try to assist smaller companies, particularly with debt finance. There is a range of interventions that try to support SME activity.

Another, more strategic question is whether companies consider that they have anything to contribute to innovation. I worry that innovation sounds like something that is the exclusive preserve of laboratories and high-tech environments. I think that we all appreciate that innovation is everywhere in our business sector. We must try to ensure that there is an appreciation of the contribution that SMEs can make in that

regard. A number of mechanisms to support the process are provided by Scottish Enterprise, the business gateway, local authority instruments and some of the European funding programmes. We seek to ensure that a broad and comprehensive offering is available and is tangible and accessible to the public.

Jim Hume: You have said that 60 per cent of businesses are benefiting from a rates cut. However, 40 per cent of businesses are struggling with quite high rates rises. A company in my area faces an increase of 140 per cent. What is your view on transitional rates relief?

Also, I understand that Wales has access to funding through the joint European resources for micro to medium enterprises—JEREMIE—initiative, whereas Scotland does not. Will you comment on that regional disparity?

John Swinney: I will not suggest that rates revaluation is anything other than a difficult issue. The business rates levels are assessed by independent assessors—they have a statutory obligation to do that. They have gone through the process independently, and it has resulted in a set of recommendations whereby 60 per cent of businesses will see their rates valuation fall and 40 per cent will see their valuation increase.

By pegging the Scottish business rate level to the poundage rate in the rest of the United Kingdom, the Government has already saved business about £220 million. That has been a significant assistance to the business community. If the business rates had been calculated on the same basis as they were calculated in England, businesses would have paid £220 million more. They are not doing that because of the decisions taken by the Government, which have helped the situation.

The second point is that, if we had had a transitional relief scheme, we would have denied 60 per cent of businesses the reductions in business rates to which they were entitled. They would have had to contribute towards offsetting the increases for other companies, which would have been a difficult position to sustain because the rates were arrived at by independent valuation that is provided for by statute.

The third point is that, if we had had a transitional relief scheme, there would have been a transfer from the private sector to the public sector. In a number of cases, the public sector has to pay higher business rates on new infrastructure. In this economic climate, when the private sector is under such acute pressure, I would have found it difficult to justify its subsidising the public sector.

In short, that is the reasoning why there is no transitional relief scheme. Of course, any individual business that is concerned by its

business rates valuation is free to appeal. I encourage any business that has such concerns to make that appeal in the normal fashion.

We have explored the question of JEREMIE funding in considerable depth. The Government and Scottish Enterprise have real appetite to take it forward. The issue that we have to overcome is the accounting treatment of the JEREMIE funding within the United Kingdom financial framework. In short, convener, without going into too much detail—

The Convener: Yes, because I was a little worried that, when we were talking about the rates, we were going to rerun last week's chamber debate on tourism.

John Swinney: The issue is that, under UK accounting rules, if we secure JEREMIE funding it is netted off our departmental expenditure limit. In short, getting JEREMIE funding would not have made Scotland any better off: we would have had no more money to spend.

Mr Hume asked the fair question of how Wales has managed it. He might like to ask it of my opposite numbers in the Treasury, because I do not understand how Wales has managed it under the accounting rules that I have to operate under—and the Welsh Assembly Government has to operate under the same accounting rules. I will leave that one hanging; I am perhaps in enough hot water already with my remarks on the JMC without going any further.

Sandra White (Glasgow) (SNP): Good morning, cabinet secretary. I will leave the Welsh alone too—I have asked a lot of questions about JEREMIE in the past.

You mentioned targets in reply to the convener's first question. We know that targets have been set—on climate change and various other issues—and we also know that Scotland is exceeding its climate change targets. Does the Scottish Government anticipate that the targets will be the same across the UK, or is there scope for differing targets in the UK that, combined, will allow the UK to meet its prescribed targets from 2020?

10:45

John Swinney: The Scottish Parliament has passed legislation that is more ambitious in its targets than the rest of the United Kingdom, although a process is going on that may see the climate change targets being levelled across the UK. The Parliament has taken those decisions, and the Government is taking steps to work to achieve the targets.

If Scotland is more aggressive in the level of achievement that we operate to, clearly that will

contribute to the achievement of targets by the United Kingdom overall. I do not detect any lack of enthusiasm in the rest of the UK to tackle such issues; the question is how fast other parts of the UK are moving in that respect.

There is a wider dimension as far as climate change across the EU is concerned. Part of the agenda is that where the EU will settle on its climate change targets is still a moveable feast, bearing in mind the disappointment at the Copenhagen summit in December. The first response of the EU has been not to move its position significantly. A debate is still taking place in the EU, and we are encouraging the EU to go much further in the target-setting process because such assistance from the EU will make our targets more achievable. The approach to target setting at European level is still being formulated. The Scottish Parliament has given us a clear framework in which to operate, but we need the EU to contribute to that process by developing and evolving some of its thinking.

Sandra White: If Scotland exceeds its climate change target, as it seems that it will, it will be interesting to see what contribution the rest of the UK makes. That leads me nicely on to my next question.

As you know, we have five targets. Along with the climate change target, there are targets on employment, gross domestic product and so on. Which of those four other targets will be the hardest for Scotland to achieve?

John Swinney: To go back to what I said to the convener, we still need to gain a full understanding and appreciation of the impact of some of the targets. For example, we need to explore in more detail what the target that says that the share of early school leavers should be under 10 per cent means and what would be required of us.

In my answer to the convener, I was trying to make the point that we would be in a better position if—this might be an impossible ask—we had a European framework that encompassed the targets that we are trying to achieve through our economic strategy, rather than suddenly finding ourselves facing a different set of targets from the EU. Some of the EU's targets are on the same wavelength; those on participation in the economy, R and D activity and climate change are compatible with ours. I just think that we must be careful to keep a close alignment between our domestic aspirations in regard to economic strategy and the input that we get from the EU.

Sandra White: I have one wee follow-up question. Will the Government continue to monitor Scotland's performance against the proposed Europe 2020 targets?

John Swinney: We would monitor performance against those targets. I come back to the fact that we monitor our own targets and publish live information on them—whenever the data change, we update our performance framework on the website. All the information is available to be looked at on any day of the week to find out how we are performing in relation to our targets. That is all in the public domain. If we had other targets to meet in relation to EU 2020, we would report on them accordingly.

The Convener: I think that we just have time for a few more questions.

In evidence to us, the Scottish Trades Union Congress raised the issue of procurement, which I guess relates to the EU's smart, sustainable and inclusive growth strategy and the Scottish Government's target of creating a supported business environment. Basically, the STUC said that the public sector procurement directive of 2006 was a "missed opportunity for Scotland". In addition, it said:

"All the procurement issues reside at the Scottish level. The European legislation already provides sufficient scope to procure".—[*Official Report, European and External Relations Committee*, 23 February 2010; c 1424.]

Do you have a view on whether we could make more and better use of local procurement? The STUC would certainly like to see that happening.

John Swinney: We are doing a lot in procurement, and I am certainly open to hearing about how we can do more. On issues that affect procurement, there are, for example, mistaken views that European legislation somehow prohibits ensuring that local business enterprises can access Government procurement. That is not my view at all. If it is stipulated that produce for school catering contracts must be fresh, that rather restricts where it can come from, and that is perfectly permissible in a European regime.

There are also examples to do with community benefit clauses. I think that Mr Park asked me a question in Parliament last week about community benefit clauses in procurement; we are increasingly using them in procurement opportunities.

We have also published sustainable procurement guidelines, which are designed to ensure that carbon footprint considerations are implicit in some of our procurement decisions. I do not think that we need to speculate too much about the carbon footprint of goods that travel from Falkirk compared with goods travelling from Liverpool, to Edinburgh. It is clear that such issues can be factored into procurement.

The public contracts Scotland website is designed to open up contract tendering opportunities in the public sector much more

directly to local companies—I accept that it also opens them up to other companies around the globe. People and companies can go to that website to see the overwhelming majority of public contracts in Scotland. I often talk to companies' representatives who have lost the will to live while they have searched through the *Official Journal of the European Union* for tender opportunities. Everything is on the public contracts Scotland website, which is free to access and use, and is a helpful instrument for companies.

As I said, I am open to suggestions about how we can develop the procurement regime to ensure that there is more local purchasing. I would certainly be happy to hear about that from the committee or the STUC and to consider how we can respond positively to what is said.

The Convener: From what you say, there seems to be a gap between perception and reality. Unfortunately, there is a negative perception out there. The issue is how information is obtained and managed better. I know that the committee wanted to say a little bit about that in our report.

John Swinney: I would welcome that. I do not have the relevant data in front of me that show this, but the public contracts Scotland portal has gone from a standing start to having an extremely high level of participation as a result of public sector contracts being advertised on it and individual companies registering their interest in terms of whatever their specialism happens to be. They are notified when a relevant contract goes on to the portal, which they can examine to explore its relevance to their operation. The response rate has been tremendous, but participation is by no means at capacity—much more participation can be enlisted. Obviously, MSPs can actively promote such measures in their localities. The Government would certainly be delighted to furnish them with any relevant information. Indeed, I may do that to ensure that all MSPs are aware of the details of the portal so that they can promote it in their localities.

The Convener: That would be helpful. I hope that our committee report will assist in that.

I have one final point to raise on where we go from here. At the beginning of your comments, you said that the UK's position paper had not been influenced by the Scottish Government because of the very short timescale. Likewise, the committee has received quite forthright complaints about the timescale from stakeholders who feel that they have not been able to influence the Scottish Government's position. You raised the issue at the JMCE and subsequent discussions are coming up. How can you ensure that the Scottish Government's position is influenced by Scottish stakeholders, who may have to meet targets and who may be at the front end if we go down the

road of setting binding targets, incentives and sanctions? They are telling the committee that they have not been consulted and did not feel involved in the process until the committee invited them to give evidence. How do you respond to that?

John Swinney: Part of my response is to try to reassure stakeholders that some of the ground that we are on with the EU 2020 strategy is not new or distinctive ground but is encompassed by the contents of the Government's economic strategy and the updates of the economic recovery plan that we have undertaken over the past 18 months or so. In formulating both our economic strategy and our economic recovery plan, we have had pretty extensive discussion with stakeholders. For example, aside from the dialogue that I, other ministers and officials pursue, we had fairly lengthy discussions in advance of each Cabinet meeting in 2009. On one occasion, those discussions involved the third sector; on another occasion, they involved the STUC; on a third occasion, they involved the business organisations; and, on a fourth occasion, they involved the faith organisations. We wanted their input to our thinking on economic recovery, in addition to the material on the Government's economic strategy, and we are continuing that dialogue. My officials recently met the business organisations and the third sector—I, too met the third sector—to discuss current issues and concerns.

I reassure the committee that we are involved in an active dialogue with stakeholders that is clearly influencing the Scottish Government's submission to the European Commission. It will also influence our discussions with the United Kingdom Government. I am happy to explore whether we need to issue an invitation to particular stakeholders to contribute to that dialogue in advance of the finalisation of that work. After the European Council has met this week, we will enter a period of hiatus, from a UK perspective, because it is likely that April will be dominated by the general election. We will have to pick up the issues pretty quickly after the election, which I assume will take place in early May, to ensure that the concerns of stakeholders are taken fully into account. However, I will consider that point and decide whether we need to undertake a further round of consultation.

The Convener: That would be helpful. We took evidence from a range of stakeholders, including the Scottish Council for Voluntary Organisations, the STUC and the west of Scotland colleges partnership, and they all said the same thing—that they had no input to the process other than by giving evidence to the committee. We will ensure that the evidence that they gave us is taken into account in our report. They also mentioned silo

working: when targets are set, people go into silos to protect their own organisations. They want that to diminish in favour of a greater Scottish approach. They are looking for inspirational leadership and asked us to raise the issue in the context of how we can go forward. As you have been so inspirational in cracking the JMCE, we thought that we would ask you to take that away with you, minister.

11:00

John Swinney: I have possibly provided inspirational leadership and a breach of the Official Secrets Act—who knows?

I reassure the committee on the point about the silo mentality. We have worked hard to confront that within the Government, and our structures of decision making and the approach that we are taking are designed deliberately to attack that. I am not saying that it has been removed as an obstacle, but we are in a better position as far as cross-portfolio working on some of the big strategies that will affect performance is concerned. In the Government's economic strategy, the economic recovery plan, early-years intervention or our work in tackling poverty, we recognise across the board that there are different ways of tackling the questions that we face, and I hope that that will be built on in the work that we undertake.

The Convener: It is exactly 11 o'clock, cabinet secretary. Thank you for giving evidence to the committee. We look forward to working in partnership with you as we make progress on the matter over the coming months.

11:00

Meeting suspended.

11:04

On resuming—

Treaty of Lisbon Inquiry

The Convener: Item 3 is today's second evidence-taking session on our Treaty of Lisbon inquiry. I welcome to the meeting Professor Michael Keating from the University of Aberdeen; Professor Drew Scott from the University of Edinburgh; and Professor David Judge from the University of Strathclyde. We will explore with the panel the treaty's regional dimension, parliamentary scrutiny of ordinary legislative procedure and trialogues. I thank Professor Keating and Professor Judge for their written submissions, which I found to be very useful and interesting.

Given our tight timescale, there will be no opening statements. Instead, I will kick off with a general question. What changes might have to be made to the UK's constitutional machinery to allow the Scottish Parliament to engage fully and play its full part with regard to the Lisbon treaty?

Professor Michael Keating (University of Aberdeen): My answer to that question is the same that I have been giving for the past 10 years. In fact, earlier on, Drew Scott and I were saying that the points that we make this morning will probably be the same points that we have been making to the committee for quite a long time now. The arrangements for making Scottish views and interests known in Westminster, Whitehall and Brussels are really quite inadequate and need to be strengthened, and we need greater information and intelligence gathering in Scotland to anticipate things, to find out what is happening and what is on the agenda and to be able to intervene at the right time, in the right place and before it is too late.

Professor Andrew Scott (University of Edinburgh): If we are talking about the UK position, I entirely endorse Professor Keating's comments. You should certainly look again at the JMC machinery. The fact is, however, that you are caught between a rock and a hard place; in so far as it decides on the UK Government's negotiating position over legislative drafts, the JMC machinery is—and, indeed, has to be—inherently confidential, which for the Parliament and, in particular, this committee raises the difficult question of how to scrutinise the position that the Scottish Government feeds into the UK Government line. After wrestling with the issue for many years, I think that progress could be made: first, by clearly defining, before a JMC, part 1 business that might be considered non-confidential and part 2 business that is clearly confidential and secondly, by exploring the

possibility of, and the capacity for, making private briefings to the committee. That approach is taken in other jurisdictions, particularly in Denmark, which also has a minority Government.

The difficulty is inherent in the concordats that the Parliament endorsed in 1999. In other words, it is the parliamentary procedures that gag ministers in representing to Parliament their position to the UK Government. Under the concordats, certain information has to be treated as confidential and it is the UK Government, not the Scottish Government, that defines the parameters of confidentiality. As a result, if the Scottish Government wants to be part of the process, it must adhere to those confidentiality requirements. If it breaches those requirements, the UK Government is under no obligation to continue to listen to it. As I say, that is a difficulty.

The Convener: That is interesting. I do not know whether you heard his evidence, but earlier this morning Chris Bryant, the UK minister, blew that notion out of the water. According to him, what you have suggested pertains to negotiating positions; however, he seemed to make it clear that there is a kind of part 1 and part 2 approach, as you outlined, and that there is no reason why the committee could not question a Scottish minister on his or her position going into a JMC meeting or on what they said at a meeting about a devolved area of competence. As a member of this committee for 10 years, I found that to be a bit of a revelation. Chris Bryant said that that is what the House of Commons European Scrutiny Committee does with him and that he would not get away with saying, "Well, we're in a negotiating position and the memorandum of understanding doesn't allow us to report to you our position going into this."

Professor Scott: It would certainly mark an interesting change in the interpretation of the concordat if the UK Government is now saying that it is prepared to waive the inherent confidentiality conditions when it comes to the Scottish Government's reporting back on negotiations on the UK line. I would find that incredible, although not objectionable. If the minister has changed the UK Government's policy in that respect, it is possibly to be welcomed.

The Convener: It was not quite described as a change; it was more of a clarification. Moreover, it did not apply to actual negotiations. The minister made it quite clear that when you go into Council of Ministers meetings you must have a negotiating position that has not been disclosed ahead of time—which is, as you say, exactly the same position that is taken by all member states. However, there is no reason why ministers cannot discuss the part 1 business that they take into the JMC and their positions on other matters.

Rhona Brankin: I am interested in the process that happens before a position reaches the JMC. Obviously, most of the discussions between Scotland and the UK will be on-going and will take place a long time in advance. For example, I was involved for quite some time in working on how the Scottish position would fit in with and build up the UK position on fisheries negotiations. That actually worked very well. I am not sure how many disagreements have been referred to the JMC, although I am certain that few, if any, have been. To what extent are there common mechanisms that work across different areas of Government? In my experience, the system worked very well, but I do not think that there is necessarily a common framework that works across Government. Much of our discussion has been on the JMC, but should we perhaps consider the extent to which positions can be developed at UK level across the range of departments?

Professor Scott: That is entirely right. A well-developed official machinery had been established before devolution on issues such as agriculture, fisheries, regional funds and—I would argue—justice. The old Scottish Office established close working relations with Whitehall on those issues because those have always been areas of priority, both in the Scottish Government today and in the Scottish Office back then. There seems to be no doubt that, in those areas, relations are working extremely well.

Where difficulties might arise is with changing cultures, as the footprint of the European legislative process moves into new areas in which there is meaningful devolution in Scotland. In newer areas such as the environment, the old arrangements did not apply and the UK Government in Whitehall retained almost exclusive competence prior to 1999. Those are the areas in which, I guess, the more acute difficulties might arise.

However, I entirely endorse the point that most of these issues are resolved between officials. We do not know whether any disagreement has ever been resolved by, or at least referred to, the JMC on Europe in dispute resolution mode. My understanding is that that has never happened, but I am not close enough to know whether that is the case.

Professor David Judge (University of Strathclyde): My comments relate to the relationship between this Parliament, the Westminster Parliament and, ultimately, the European Parliament, rather than to the broader constitutional arrangements to which Mike Keating's and Drew Scott's comments have pertained.

The basic issue is the step between this Parliament and the Westminster Parliament and

the UK Government. There is also the relationship between the Scottish Parliament and the Scottish Government in terms of the Scottish Government's discussions and negotiations in the JMC. Obviously, part of the committee's difficulties has been in finding out what happens in the JMC, so the statement from the UK Minister for Europe this morning was quite informative. However, to come back to where Mike Keating started, the crucial requirement in all those relationships is information. With the increase in the codecision procedure and through the ordinary legislative procedures of the European Parliament, the Lisbon treaty provides us with an opportunity for more information to be gathered and given to this committee and to Westminster through the European Parliament.

Professor Keating: On Rhona Brankin's question, it is true that in certain areas—notably, agriculture and fisheries—there are well-established procedures and cycles of meetings around the European Council of Ministers. However, in many other areas, the people in Whitehall just do not think about consulting the devolved Administrations. That is not because they do not want to do so but because the thought just never occurs to them. Whitehall needs to be sensitised to that, but the Scottish Government and the committee should not rely exclusively on Whitehall to be told what is happening. You should have your own source of intelligence, so that when something comes up you can take the lead and contact the relevant Whitehall department.

The Convener: Another issue that we want to explore concerns the explanatory memoranda, which now include a question about what, if any, impact a proposal might have on a devolved Administration. Those that do are sent to the Scottish Government and lodged in the Scottish Parliament information centre, but we do not know what happens to them after that. It is a little bit of a democratic deficit and our inquiry wants to look at how we in Scotland can get an overview of the EMs, as no one knows what happens to them other than a bit of personal contact between Whitehall and the Scottish Government. There is no overall co-ordination of the explanatory memoranda, so that might be an avenue to explore further.

11:15

Professor Judge: The problem with explanatory memoranda is the sheer volume of them—I think that 20 to 30 a week are lodged with SPICe. That then creates the issue of who is going to look at them—this committee or the functional and specialist committees. I will return to that point later, or I could deal with it now.

The Convener: I am quite interested to hear your views.

Professor Judge: It is not just about the explanatory memoranda. One of the issues with the ordinary legislative procedure is that the explanatory memoranda will outline the Commission's proposals. Down south, in addition to the EMs, as the proposals and dossiers advance, ministerial letters or supplementary memoranda are needed to explain and update them. There will be a whole series of EMs, supplementary EMs and letters from ministers that the Westminster Parliament and, if there is a Scottish dimension, this Parliament will have to deal with. One of the issues is the sheer volume of material that comes in this direction. In a sense, that is good news because you get more information. The bad news is that you then need processes and mechanisms to sift and deal with that information.

Professor Keating: The evidence from the Royal Society of Edinburgh—I can cite it directly because I contributed to it—suggested that there should be some kind of capacity unit in the Scottish Parliament, attached to this committee, to filter all that stuff and highlight the important things.

The Convener: Would that be at officer level?

Professor Keating: Yes.

The Convener: That would be interesting. We need a system that is robust enough to pick things up, but we have to recognise that, if we want to do it properly, we might have to allocate resources to it and I do not think that anyone has been prepared to do that until now.

There are some committee members who are incredibly interested in this subject and want to come in, but I am going to let Drew Scott speak first.

Professor Scott: I have a footnote to what David Judge says—he knows better than I do about European parliamentary procedures. We must recognise that when the legislation starts its journey through codecision, it is changed. What you see in round 1 of your scrutiny might or might not resemble what comes out at the other end of the process. The shelf-life of the explanatory memorandum is therefore short. That brings us to the role of the members of the European Parliament in all this, which is another issue that you might want to look at, although I know that you have considered it in the past. Their position has become more important over the years and Lisbon takes it one rung further up the importance ladder.

Sandra White: I am interested because I have said in committee before that I was astounded to find out that we get those documents but no one

ever gives us them. I am not saying that the clerks should take on the extra work, but someone should be there to filter the information; obviously, we have our officer in Brussels as well.

I have a question for David Judge. Under the Lisbon treaty, the European Commission can send proposals to a national Parliament, which has eight weeks to respond, and it is up to the national and regional Parliaments to decide between them. However, it also says that the devolved Administrations can contact the Commission directly. If we find out what proposals are coming from the European Commission, is one way of circumventing the problem for us to contact the Commission directly as a regional Parliament?

Professor Judge: Yes, that is the interpretation under the Lisbon treaty, but it then raises the intriguing question of the relationship between regional and national Parliaments and EU institutions. The established position in the UK is that you, as representatives of the Scottish people, should hold to account the Scottish Government. Therefore, your influence should be exerted through the Scottish Government, which in turn will seek to influence the UK, which in turn will seek to influence the EU institutions. There is a certain issue about a direct relationship, which is an avenue that is opened up in a sense but, as far as the Parliament and its relationship to the Scottish Government are concerned, the question arises whether any Executive—the Scottish Executive or the UK Executive—really wants a part of the UK to deal directly with the Commission.

Sandra White: If we feel that we are not getting enough information or enough time, the treaty gives us, Wales and Northern Ireland the opportunity to circumvent—

Professor Judge: Sorry—it is one thing to ask for information, but it then has to be asked what you want to do with the information, and that is the crucial issue.

Sandra White: But that is a step, anyway.

Professor Judge: Yes.

Professor Keating: The wording is wonderfully ambivalent. The treaty says:

“the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged.”

It was deliberately put that way, so as not to interfere with the distribution of power in federal and devolved systems. My interpretation is that there is nothing to stop the Scottish Parliament responding and lobbying Brussels directly. The treaty seems to be an invitation to do that—as long as you are well organised in doing so.

The Convener: The European Commission has been quite an open book for some time in that regard. I recall many occasions when the committee has submitted responses to consultations by the Commission, both directly and to the UK Government. One was on the future of Europe convention. When we made our submission to the UK Government, it adopted about 95 per cent of the committee's response into its submission to the Commission. The treaty puts that in writing, albeit ambiguously. In some ways, an informal system has been operating for quite some time. That is my own view—I do not know whether Drew Scott would agree with that.

Professor Scott: Absolutely. The invitations to consult are open. When it produces its work programme for the year ahead, the Commission places every prospective legislative measure in draft form, and the consultation is open to anybody. The Welsh Assembly Government certainly responds to such invitations to consult.

The Scottish Parliament has been hugely effective in some areas—and I put that point strongly. The work of the Justice Committee a few years ago was highly effective, for example. I do not think that the Scottish Parliament is not undertaking scrutiny across the board, but the difficulty is dealing with it in the appropriate subject committee. That did happen—dramatically and successfully—with justice. It also happens with agriculture and fisheries. It is not a question of getting back to fundamentals; it is more of a question of sifting and directing matters to the appropriate subject committees.

Rhona Brankin: That is the point that I was going to raise—how it might be possible to develop a mechanism that is not overly cumbersome. I am not sure whether I support the idea of having a particular unit, but there clearly needs to be somebody responsible for getting matters to the subject committees. It is a question of ensuring that the subject committees are covering the important bits of legislation that are coming through the process—but without the system becoming too cumbersome.

Professor Scott: We discussed that point some years ago in the context of this committee a couple of incarnations previously. One idea that got developed quite well at the time was a traffic light approach. One would rely on the Scottish Government to give a green light to indicate that there is no subsidiarity element and that it does not take a strong stance on the legislative proposal in question. Amber could mean that there might be an issue of subsidiarity and a significant devolved matter, which the Scottish Government could look into. Red could mean that there is definitely an area of devolved competence.

It is the Parliament that loses competence, not the Government. When Europe legislates, it squeezes out the legislative competence of this Parliament, but not that of the Government, because it is Parliament that enjoys the legislative position. That is why the Parliament should be alert to such incursions or intrusions into its legislative scope—however you might wish to put it—from European legislation. One idea would be to entrust Government with some kind of monitoring mechanism to flag up areas in which it felt that something should be scrutinised in detail because the Parliament could lose its legislative privileges in that area as a result of forthcoming EU legislation, and to ask whether the Parliament was happy with the EU legislative proposals in that regard.

Patricia Ferguson (Glasgow Maryhill) (Lab): Professor Scott, it is fair to say that, in the past, you have been somewhat critical of the insufficient regional dimension in EU policy making. Will the treaty make a difference to that concern?

Professor Scott: The stark reality, which I do not think is in any way controversial, is that the EU is a union of nation states, not of regions. In the past, the EU has tried, rather unsuccessfully—with no disrespect to institutions such as the Committee of the Regions—to bring a regional voice to the European top table. Its lack of success is probably for two reasons. The first relates to how you do that, because regions are widely divergent across the EU. The second reason—Michael Keating is much more of an expert on this than I am, and I am sure that he can comment on it—is that many regions see more profit in negotiating through the member state level than through collections of regions. Subsidiarity is the one idea that retains some kind of leverage. One has to applaud the enhancement of subsidiarity in the legal way, if in no other way. The Treaty of Lisbon has given subsidiarity standing before the court, and it has given national Parliaments the power to send out a yellow card, which—if enough Parliaments agree—requires the Commission to think again. In the extreme position, in which more than half of the national Parliaments think that a measure violates subsidiarity, it will be referred to the European Council and the European Parliament for them to positively accept the Commission draft; otherwise it falls. That is an improvement. The regional dimension of the European Union is problematic. I would see a key role for regional Governments and Parliament—I use the word regional in the broadest sense—to engage locally on those issues and to create some kind of democratic expectation in the public at large that Europe is what it is, which is an important legislative animal.

Patricia Ferguson: Is it fair to say, then, that there is an onus on those regions to make their

voice heard, and to look for opportunities and ways to use what is there to the best possible advantage?

Professor Scott: Absolutely. If you do not do that, you cede the ground to lobbyists and journalists. That is deeply undesirable. It is impossible to exaggerate the EU's importance as a regulator. If the democratic element of controlling or monitoring that regulator disappears, you cede the ground to narrower interest groups. One only has to visit Brussels to see the proliferation of lobbyists surrounding the European Parliament. That is to be expected in regulatory capitalism. It is not a bad thing, and it is what we expect to happen, but it should be tempered by a high level of democratic input.

Professor Keating: This has been an issue for a long time. There was a commitment under Danuta Hübner to the Leipzig agenda to try to strengthen the regional dimension of the EU as a whole, rather than just confining it to regional policy, which is what was intended in the past. The notion of a spatial perspective for Europe needs to be followed through. Central policies should also be seen in relation to their territorial impact.

There is also common agricultural policy reform, which has been going for a long time but is gradually becoming more of a spatial policy and less of a central policy. People say that eventually that will merge with structural funds—that would be the logical thing—and there will be one vehicle and one rather large amount of money available for spatial policy.

11:30

Irene Oldfather knows a lot more about the Committee of the Regions than I do, but I wish that it would become more focused. I wish that, instead of passing long resolutions that are pretty much unreadable and which do not really tell us anything, it would select issues on which to focus for a period of time and produce some good policy analysis, because that is how one gets noticed—not by passing resolutions but by doing things to which the Commission has to pay attention because they are good ideas. If the Committee of the Regions did that, it would be more effective.

More generally, there could be a common interest between the Commission and devolved governance because the Commission is interested in learning more about the impact of its policies on the ground, and that happens not at the state level but at a local level. People around the Commission have been talking about that for two or three years, but it does not seem to have gone very far.

Patricia Ferguson: That is interesting. I am sure that the convener will take that back to the Committee of the Regions.

What are the main economic implications of the treaty for Scotland? Is there anything specific that this committee should consider?

Professor Scott: The Europe 2020 agenda, which you discussed earlier, is much more important to Scotland's economic future, but we must acknowledge that there are some new competences that have not been given the air play that they deserve. I am thinking of climate change and energy in particular. What we have is broad statements that simply create the basis for legislation to be introduced because, as you know, any EU legislative proposal has to have a basis in the treaty or it would be *ultra vires* and it could not go ahead. The inclusion in the new treaty of broad general statements on energy policy and climate change gives the Commission the legal basis on which to publish specific proposals for action.

Whether that is a good thing or a bad thing is a political judgment for individuals to make, but the point is that any legislative instrument that opens up a market or changes the conditions in which a market operates is bound to have an economic consequence. The two areas are of acute interest to the Scottish Government and, one assumes, to the people of Scotland. I am definitely not saying that it is a bad thing. The treaty's implications for economic integration are not sharply focused enough to cause us particular concerns, but they are worth highlighting because they relate to new areas of competence. Someone who looked at the articles in the CAP in 1958 could have said that they were fairly innocuous, but look at what they gave rise to. It is important that the appropriate committees recognise that there is an EU legislative dimension that is not at all defined but is covered very broadly in the treaty.

Patricia Ferguson: I am also interested in the fact that territorial cohesion is explicitly mentioned for the first time. Is that a good thing for Scotland? How should the UK and Scottish Governments go about ensuring that they are part of that discussion?

Professor Scott: Like many regions, Scotland has benefited financially from the idea of territorial cohesion for many years. It is highly likely that Scotland will no longer benefit from significant flows of funds in the economic development sense. The RSE's response to a previous consultation made the point that there will be opportunities for Scotland, particularly in the entrepreneurial sense, when the Commission identifies research and development targets. It is hugely important that the Scottish Government and the Parliament are alert to the opportunities that will arise from that aspect of cohesion, but the

broader issue is that Scotland will become a contributor to cohesion in the EU rather than a recipient. That is not a bad thing. If someone graduates out of poverty, they should be pleased about it. Also, the economic development opportunities that will pass to other parts of the EU will support Scotland through trade and other financial flows and we will benefit as those parts become stronger.

Michael Keating was also involved in the RSE report, so he might want to comment.

Professor Keating: In cohesion policy, we have moved away from the old redistributive logic—or we are at least trying to get away from the notion of simply moving money around and to think about development in a broader sense and about how sustainable development can be managed at a spatial level.

Cohesion was put in the treaty because the Committee of the Regions kept on banging on about it, but it had no particular meaning. However, as I said, it opens up the territorial dimension. We should not think of that just as structural funds. We have been blinded by structural funds, which have prevented us from thinking more intelligently about regional development and what cohesion means in a broader sense.

Patricia Ferguson: I presume that if we are coming out of poverty—as Professor Scott put it—that brings with it challenges. We need to be prepared to meet those challenges and to do the work to ensure that they do not suddenly come along and slap us in the face.

Professor Scott: Structural funds were always an irritant to Governments to an extent, because they hypothecated money to avenues that a Government might not want to prioritise. We found that national Governments were somewhat irritated by the Community initiatives that were important in the 1999 to 2006 budget framework, because jurisdictions in member states could draw on a proliferation of schemes, for which central Government had to give matched funding.

One can understand why a national Government—or any Government—is annoyed if such money is hypothecated, but for the Highlands of Scotland, for example, the attraction of structural funds was that they hypothecated money. When the Highlands stopped receiving the level of money that it had previously received—because it had moved into a different league of development, for which everyone should be glad—the challenge was not allowing it to slip back into economic relative underdevelopment because all the support had dried up.

Not only the Scottish Government but any Government that assigns regional development

resources faces a challenge. The problem, which will need to be engaged with at some point, is the way in which the EU's state aid map militates against such support. A tension exists with state aid legislation, which more or less prohibits Government support outside what we used to call the objective 1 regions. The Commission has a challenge in producing much more sensible state aid rules that do not preclude a Government from retaining support with a regional dimension for regions that are above the cut but whose economic development is not yet self-sustaining, secure and driving forward.

The challenges are ensuring that the resources from central Government do not dry up and meeting the Commission's preoccupation with and ferocious fixation on state aid—that is understandable to a point, but there are other considerations.

Patricia Ferguson: That is helpful—thank you.

Professor Keating: On state aid, the Lisbon treaty contains a clause that to a degree safeguards public services from the application of competition policy. That is important for Scotland, where ferry services and other services that have been seen as essential social services have been caught up in state aid rules.

Ted Brocklebank: I have a couple of questions for Professor Keating on the implications for Scotland of the changed decision procedures. Professor, you have referred to at least two procedures whose use the treaty extends. Will you expand on the potential implications for Scotland of the enhanced co-operation procedure?

Professor Keating: We are speculating, because we do not know how far enhanced co-operation will go. The procedure makes it possible for a group of member states to co-operate when not enough of them agree to create a Community initiative. Normally, the awkward state that does not want to co-operate is the UK. It is difficult to imagine the UK co-operating with others while the French do not join in, for example.

The most likely scenario is that Scotland will want to join enhanced co-operation but will not be able to because the UK has decided not to participate. We will be able to do nothing about that. If a member state opts out of enhanced co-operation, there is no way to become involved in it. Scotland might think of ingenious ways of shadowing the policy, but it could not become part of the enhanced co-operation mechanism.

Ted Brocklebank: Can you spell out how any potential conflict of interest between Scotland and the UK might be resolved?

Professor Keating: I do not think that there is a way of resolving that. We are not talking about a

normal negotiation between Scotland and the UK, such as that on the position that we take on agriculture; we are talking about a question of whether to go into a policy field. I cannot envisage the UK going into a policy field that the Westminster Government did not want to go into just because the devolved Administrations wanted to go into it. I cannot see a way out of that, although perhaps the other witnesses can.

Professor Scott: I agree entirely with Michael Keating, but one can imagine such a conflict arising in some instances. For example, on financial services legislation, there might be a different view in the city of London from the view in Edinburgh. I do not know whether that is the case, but one could hypothesise about something that looked like that. Enhanced co-operation has never been triggered, but if there was enhanced co-operation, it would be absolutely essential for Scotland to ensure that its rights under the internal market were not violated. That is the crucial thing and that is the issue on which there could be a conflict.

The enhanced co-operation provision says that nothing that falls under it should diminish the internal market in any sense, so it should not make it more difficult for Scottish businesses to do business in the European Union. However, it is an experimental lever and—let us be frank—it was introduced in the previous treaty to try to overcome the British veto, as Michael Keating alluded to. It was introduced for precisely and exclusively that reason, although it has never been used. I am sure that the Scottish Government and Parliament would recognise the importance of ensuring that any measure that was taken under enhanced co-operation that Scotland either wished to take part in but could not or did not want to take part in for the same reasons as the UK Government—which is perfectly feasible, too—did not affect the position in the internal market.

It is difficult to conjure up an enhanced co-operation issue that would not affect the internal market, which is one reason why it has not been used. Tax co-operation between member states would clearly raise questions. Corporation tax agreements between France and Germany have been proposed, for example. That would clearly affect the outsiders, because it would make their position less competitive. So enhanced co-operation is not ready to be rolled out in a raft of areas, but if it were to be rolled out, it should be studied carefully.

Ted Brocklebank: Yes. The other procedure whose extension we should ask about is the open method of co-ordination, which might raise concerns for the Scottish Government and the Parliament.

Professor Keating: Yes, indeed. That is not new under the Lisbon treaty, but it is important and is reiterated in it. It is critical that Scotland should become part of that. It is not clear that the various mechanisms that allow for Scottish participation in the Council of Ministers would necessarily apply to the open method of co-ordination. In the Committee of the Regions, regions have generally been suspicious of the OMC, precisely because it is so intergovernmental. They prefer the regular legislative process, because there is a place where they can get into that.

The method already exists for the Lisbon agenda and its social dimensions. There is a Scottish dimension and Scottish plans within it, so it has been piloted. If that goes further, it will be even more important that Scotland should be present and should know what the issues are well in advance so that, if it is not invited to the discussions, Scotland can knock on the door and insist on being invited.

Ted Brocklebank: As Chris Bryant said earlier, I suppose that we are perhaps slightly guilty of being far more interested in process than in actuality. He claimed that we keep on looking for all the things that might go wrong and things might never go wrong. However, I suppose that the counter to that is that if we do not look in advance for the things that might go wrong, we can land ourselves in a mess, such as the mess that the common fisheries policy turned out to be, as Professor Scott mentioned.

Professor Keating: It is possible to have far too many committees and co-ordinating mechanisms. People simply do not turn up, because they get bored and cannot see the point. You must have a mechanism that allows you to intervene when something important happens. You need to know where to concentrate your resources, because you cannot participate in everything.

11:45

Professor Scott: And that can matter—we need only look at the revision of the CFP to see that. The Scottish initiative of linking environmental measures and catch to the allocation of days at sea is being considered across the EU. Scotland can make a contribution through the actions that we take—you are absolutely right. The same was true in the old days when we had the graduation area for objective 1 regions, an initiative that was pursued by Scotland Europa in the 1990s. So, Scotland's voice can be heard at the highest level in the EU when Scotland has a good idea. There are clear examples of Scotland having had a good idea in the past—I hope that Scotland will continue to have good ideas in the future—and having been able to give that idea legs so that it could run at the EU level.

Ted Brocklebank: Thank you.

Jamie Hepburn: My questions follow on from Professor Keating's helpful written submission. Professor, you write of the importance of "upstream" and "downstream" engagement in the European policy process. Whom would you identify as key networking partners for the Scottish Parliament, and are there particular networks—formal or informal—that the Parliament should target?

Professor Keating: Networking is important because Brussels is a complex set of machinery and it is important to know the right person in the right place. If one does, one can get access and it is easy, but one needs to know where to go. Some of that is institutional, some of it is personal and some of it is just about knowing one's way around. At the institutional level, the Scottish Executive and then the Scottish Government, albeit in a slightly different way, have been fond—as all devolved Governments are—of signing partnership agreements with other Governments all over the place, most of which come to nothing as far as I can see. We need to ask ourselves why we are engaging in those strategic partnerships and be more selective about it, realising that it is all about exercising political influence. So, if we have a common interest with some other Government somewhere in Europe, we should focus on that common interest and have a common lobbying strategy. Such things need to be followed through.

Jamie Hepburn: I will stop you there, if I may. You are talking about Government-to-Government interaction, whereas I am thinking more of engagement involving the committee and the Parliament.

Professor Keating: The same applies to the Parliament at the level of the Conference of European Regional Legislative Assemblies—the organisation of devolved Parliaments with legislative powers. Again, it is a matter of focus.

There is also a level of engagement that is about Scottish influence in Europe and the level of British influence in Europe generally, which has fallen calamitously in recent years because of a broader disengagement from Europe. Britain now has the lowest number of officials in the Commission of any member state, per capita—in fact, Britain is below Poland in that respect—because British people are just not going to Brussels. I understand that it is even difficult to get people to go to Scotland Europa and, last month, the British Government wanted to withdraw the UK's scholarships for the College of Europe. Fortunately, the Scottish Government is keeping them because that will get Scottish students into the College of Europe, which is where people go if they want to work in Brussels. That contrasts

hugely with the Irish, who know their way around and know how to network. They know the right people to contact when they pick up the phone.

We need engagement with the EU all the way from the institutional level down to the personal level of sending students around and getting civil servants to work in Brussels and come back again. Britain has been really bad at that, with the result that we are losing influence in Europe.

Jamie Hepburn: You mention Ireland in your written submission and talk about the federal arrangements in Belgium. Of course, Ireland and the component parts of Belgium have a different status from that of Scotland; nonetheless, the comparison may be helpful. Are there any other models of engagement with EU business elsewhere, particularly at the sub-state level, from which the Scottish Parliament could learn?

Professor Keating: Yes, there are different models. In the German model, the Länder are well plugged into the German federal Government and tend to engage through it. We keep talking about the need for such an arrangement in the UK, whereby Scotland could have guaranteed access and influence at the UK level.

On networking more generally, the Spanish autonomous communities—notably Catalonia and the Basque Country—have been active in promoting themselves in Europe, drawing on a strong pro-European consensus. It is not just Governments; the Patronat Català Pro Europa, which is a Catalan organisation, involves businesses in the private sector and civil society. We have something like that with Scotland Europa, in Scotland house, but the Spanish autonomous communities have a sophisticated operation and know their way around Brussels extremely well. We need to develop such skills and train people in them.

Our civil servants back here need to be sensitised to Europe, too, so that if something comes up they and the politicians can pick it up. We are less good at doing that than we were 20 years ago.

Jamie Hepburn: Is there a reason for that?

Professor Keating: Pervasive Euroscepticism. The fact that our students do not study foreign languages. The fact that the political class treats Europe as the enemy over there and fights battles with it the whole time. I have travelled around Europe a great deal and I lived in Italy for a long time. There is just not such an atmosphere elsewhere—it is a peculiarly British thing.

The Convener: I must press on, because we are short of time. We have not yet discussed qualified majority voting and David Judge's paper.

Sandra White: We have covered some of the issues. We talked about lobbying, for example. Professor Judge, as you know, the Lisbon treaty significantly strengthens the role of the European Parliament, particularly in relation to decision making. How might the Scottish Government and the Scottish Parliament adapt their practices in response to the new dynamic?

Professor Judge: A significant change for the Parliament is the move to make codecision the ordinary legislative procedure. The Council of Ministers and the European Parliament have been co-equal legislators for a long time in the context of processes that have been established for some time; the significant difference for the Scottish Parliament is the extension of competences under the ordinary legislative procedure to include matters that are of significance for this Parliament.

The issue is how the Scottish Parliament seeks to scrutinise the legislative process. In the past, the committee has rightly focused on the actions and priorities of the Scottish Government and has sought to identify and influence activity at an early stage. As Mike Keating said, you need to get in early and identify what I think you call "early intervention issues", on which the Scottish Government and the Scottish Parliament can have an impact. Then you can establish your reporting system and get evidence from ministers and stakeholders, which you feed into the European system. The issue is whether you then want to deal with legislative proposals in any great detail. That brings us back to the problem of who lodges explanatory memoranda and what you do with them. That takes you into the details of legislation, which are difficult for any Parliament.

One of the issues to do with the legislative process is that dossiers are often moving targets. An explanatory memorandum on a Commission proposal is the start of negotiations and discussions in the European Parliament with the Council and associated bodies. Often the text of documents that the European Parliament is considering moves on fairly rapidly.

Sandra White: Our involvement must be pretty timeous. As you said, it is important that we know as soon as possible about information that comes from Westminster to the Scottish ministers and the Scottish Parliament and its committees. In evidence in a previous meeting, we heard that the Scottish Parliament should engage systematically with Europe. We talked about lobbying and the involvement of various groups to get in there as early as possible. Professor Judge, what would be the best way to go about that to enable the Scottish Parliament not only to engage with but to influence the European Parliament?

Professor Judge: The European Parliament is a repository of knowledge and information. In a

sense, it provides you with often pre-digested information, which is one of the issues in respect of sifting and targeting information.

A crucial point is to engage with the European Parliament's rapporteurs when they are looking at reports and trying to discuss and agree amendments both in the Parliament and in their discussions with the Council. Simple things such as teleconferences, like the one that you had today, can be effective. It is helpful if the committee can engage directly with rapporteurs when they are producing reports. It is fair to say that parliamentary rapporteurs in the European Parliament are happy to receive and to listen to the views of national Parliaments and seek to engage in discussion with them. That was certainly the case in the last Parliament before 2009.

The European Parliament also welcomes reports from national Parliaments and regional Parliaments and feeds such reports and the information contained in them into specific discussions about legislative proposals. There are numerous examples of House of Lords reports, in particular, being used and cited in parliamentary discussions. Engagement with the important people, the European Parliament's rapporteurs, is of some significance.

Engagement with members of the European Parliament is also important. Belgium has eight MEPs on its federal European committee and the German Bundestag also has such representation. I know that in the past you have engaged with MEPs. Trying to develop a mechanism for reporting sessions with Scottish MEPs is an issue, but there is also a case for engaging with MEPs beyond Scotland to get a different perspective. I appreciate that it is a Scottish Parliament and a Scottish Government, but there are often significantly different perspectives in the rest of Europe, so such engagement can help you to identify and engage with issues as they emerge.

Another more technical issue, which also relates to information, is the use of the new interparliamentary EU information exchange, which will become of increasing significance because national Parliaments, certainly, make frequent updates in respect of their own inquiries. If you go on there now, you will see that there is a whole pile of submissions about EU 2020 inquiries. In fact, the Italian Chamber of Deputies published its report on EU 2020 last week. In a sense, it is an ideal source of information, as it is there precisely to inform national Parliaments and, in this case, regional Parliaments, about what is happening in other regional Parliaments. That is not joining committees, but it is putting the information out there. That is the good news. The bad news is that, although these submissions are

supposed to have summaries in French or English, you will find that the Lithuanian scrutiny document on the 2020 initiative is currently in Lithuanian, which might not be of much use. The Commission's replies to the comments that have been made by national Parliaments are also on IPEX. There is an IPEX forum on the Lisbon treaty, which I think is currently accessible only to national Parliaments. If that is the case, one issue that might be raised in that context is whether regional Parliaments can and should have access to the information.

The Convener: That is an interesting point, which I think we will take up.

12:00

Professor Judge: Again, it is about being informed about what is happening in Brussels. You have your Scottish Parliament representative in Brussels and most national Parliaments, and increasingly most regional Parliaments, have their representatives too. However, the representative has to be the eyes and ears of this committee and Parliament, particularly in gaining upstream information, which is vital. After a Commission proposal is tabled, it is late in the day to try to influence or change it, and that becomes even more difficult as the process continues. Mike Keating spoke about networking—the parliamentary officers in Brussels should be good at networking, should develop networks and should provide you with rapid and up-to-date information.

One source of freely available information is provided by the UK office of the European Parliament. In the past, such information was relatively sparse and focused on personalities—who UK and Scottish MEPs are—but there has been a significant change in recent times, which might be because Mike Shackleton, who was an official in the European Parliament and one of the authors of the leading text on the European Parliament, has now become head of the UK office of the European Parliament. The office provides lots of information and links about committees, what is coming up in the European Union and what is happening in the European Parliament. There is a range of practical issues that the committee can address.

The Convener: Thanks very much; that was interesting.

Jim Hume: My question is for Professor Judge. Both the House of Commons and the House of Lords have shown some concern about early scrutiny of the so-called first reading deals and informal dialogues between the Commission, Council of Ministers and European Parliament. How significant a problem is that and how might it

affect decisions and legislation in the Scottish Parliament?

Professor Judge: The extension of codecision and its framing as the ordinary legislative procedure is undoubtedly good news for parliamentary involvement in the legislative process. Perhaps less good news is the fact that although that has taken place, the codecision procedure was premised on three stages about which I do not need to tell you—the first reading, the second reading and the third reading. The significance of that is that there were lots of decision and discussion points at which national and regional Parliaments could gain information, be informed and inform the actions of the Government in an attempt to influence legislation.

With first reading and early reading agreements—a first reading agreement obviously finishes at first reading stage—those decision, information and access points for national and regional Parliaments disappear. The significance of informal trialogues and early agreements is that something like 72 per cent of codecision files in the last parliament finished at first reading stage. In the last parliamentary session, 80 per cent of codecision procedures finished at that stage because of the exigencies of trying to get legislation through before the parliamentary elections in May 2009. Even if legislation progresses beyond the first reading stage, something like 11 per cent of codecision procedures or OLP finish at second reading stage. Less than 5 per cent of procedures now proceed through the full three readings and that has an impact on your capacity to know what is happening as the files develop.

The significance of all that is that, originally, the early reading procedures and agreements were expected to be for relatively technical and uncontroversial dossiers. However, over time politically urgent files have also been adopted at an early stage. A good example of that was the climate action and renewable energy package. It was agreed by the co-legislators in December 2008 and became law in 2009, but it was fast-tracked; it finished at the first reading stage. Part of the reason for that was the urgency to agree it before the Copenhagen summit.

Jim Hume: That was a comprehensive answer. It shows that the problem is significant.

The Convener: We are running short of time and the witnesses have already answered some of the questions that we had. However, Rhona Brankin would like to put one or two concluding questions.

Rhona Brankin: My questions relate to the subsidiarity protocol, which requires the Scottish Parliament to act in conjunction with the

Westminster committees. We have not really touched on how we could do that. What mechanisms could we adopt to facilitate effective collaboration with those committees?

Professor Keating: The subsidiarity protocol is extremely important for Scotland because, in the past, European legislation may have been too detailed and encroached on the Scottish Government's discretion or may have had to be implemented uniformly throughout the UK because there was not enough flexibility within it. The protocol is a way of enabling Scotland to apply European legislation more flexibly, so it is very important that the Scottish Parliament should get some mechanism for making use of it. It is vital that that be taken advantage of. The Parliament cannot invoke the protocol directly itself; whether we are talking about the early warning procedure or the recourse to the Court of Justice, it must go through either the UK Parliament or the Committee of the Regions.

The problem with going through the UK Parliament is that it has a Government majority and the Government, by definition, has already agreed the position—we are talking about a redress against something that the Council of Ministers wants to do—so it is difficult to envisage the House of Commons taking up the matter. One possibility is that the House of Lords might take it up. That route might be more likely. However, some formal mechanism must be put in place to enable the Scottish Parliament to make its view known and Westminster to respond before the protocol is invoked.

Similarly, if the Scottish Parliament wished to go to the Court of Justice on the ground that subsidiarity has been violated—this is less likely than the previous scenario—there must be some formal mechanism whereby it goes to one House of Parliament in London or both and the UK Parliament has to give some formal response. It would not have to agree with the Scottish Parliament, but it would have to reply. If we had a proper territorial second chamber, that would be the obvious place to go but I suspect that, at the moment, the House of Lords might be a better route.

Then there is the Committee of the Regions. It must also set up some mechanism so that it can respond to requests from devolved Parliaments that it invoke the protocol.

Formal mechanisms become important under the protocol. In the past, my emphasis has been on informal mechanisms, but the protocol is formal and you need to have a procedure for it.

Professor Judge: One of the issues is the eight-week deadline for the transmission of reasoned opinion about the principle of

subsidiarity. That creates significant timetabling issues for national Parliaments, but the timetable for any statement that regional, devolved Parliaments might want to make is even narrower, which is a significant issue. If the Scottish Parliament wanted to co-ordinate its response with that of the National Assembly for Wales or the Northern Ireland Assembly, it would have serious problems.

I am not an expert on subsidiarity by any means, but my understanding is that many of the concerns about dealing with it are not necessarily about infringement of the principle, but are points of specific detail of how it impacts on Scotland or the Scottish Government. The Commission, the Council and the European Parliament have a pile of lawyers who check proposals. The Commission certainly does—it has experience of subsidiarity, and there are statements in protocols about conforming to subsidiarity. I would expect, therefore, that it will not necessarily be a major issue in terms of yellow or orange cards, but I might be wrong.

Professor Scott: On Michael Keating's points, we are talking about things that are not yet laws. There is a way of getting to Governments, and the European Scrutiny Committee in the House of Commons is an important lever. The subsidiarity protocol empowers national Parliaments more than any other stakeholder in the legislative process, so there is a new job for that committee to take on. We know that scrutiny is far from perfect in any of the national Parliaments—far less the sub-national Parliaments—and the problems that you are having are mirrored in national Parliaments and other sub-national Parliaments across the EU.

There is an important point that the subsidiarity protocol could become part of the scrutiny reserve of the UK Parliament. The crucial point is then how this Parliament links in with that. The eight-week deadline is incredibly narrow, which means that you have to get in long before it. In other words, long before the legislative draft arrives in Parliament in London, you have to know about it and to be looking for the subsidiarity element.

You also have to define what subsidiarity is. The treaty is clear that the EU should act only when there is an added value of collective action—when member states acting individually cannot achieve the same outcome. That is an extraordinarily wide definition and open to interpretation, so you have to sit down and say, “How do we interpret subsidiarity?” Within that broad statement, you have to work out your own criteria as to when subsidiarity is being violated. If you run and say, “Everything violates subsidiarity”, that will become ineffective as a lever.

You have to be clear what this Parliament means by subsidiarity and what criteria it will use when it interrogates a legislative proposal for violations of it and of proportionality, which is its first cousin. Indeed, please do not ignore proportionality because it and subsidiarity are now almost two sides of the same coin.

Subsidiarity has never been rigorously defined by the ECJ. It has existed since 1993, and the court has never sent back a piece of legislation because it violates subsidiarity even when it has been referred to the court on that basis. The court will now have to take up the challenge of defining what a violation of subsidiarity looks like. Clearly, the one third yellow card provision will be an important part in its deliberations. In the past, if one member state said that something violated subsidiarity and the other 26 said that it did not, where would the court fall? Now, we have a clear procedure that says that if X national Parliaments hold up a yellow card, something is justiciable in a way that it never would have been before.

The Convener: We have had some interesting informal discussions with the House of Commons European Scrutiny Committee. It pointed out that it has been doing subsidiarity checks for years but that, in a four-year period, it may raise only a handful of issues to the UK Government. It is interesting that we have to be proportionate in how we approach the system. Some horizon scanning may be the first way in.

Drew, you said that the situation will be mirrored in other regional Parliaments and Governments across Europe. Michael, you specifically mentioned, in relation to article 6, that a provision in the UK to give effect to the expectation in the treaty is necessary. Do you have an idea of what that might look like? Is there any experience of what other regional Governments, for example the Catalans or the Basques in Spain, might do to give effect to that?

Professor Keating: The strongest arrangements are in Germany and Belgium as part of their federal structures. In Germany, the Länder are represented in the Bundesrat and can, in effect, get the Bundesrat to invoke the subsidiarity protocol. As such, the Länder can make that happen. In Belgium, there is a provision so that if any of the devolved Parliaments—the community or regional Parliaments—wants to invoke the protocol, the Belgian Parliament is obliged to take it up. I cannot imagine Westminster conceding that, but that is the strongest example. In other countries where the subsidiarity protocol applies, such as Spain and Italy—it hardly applies in France—a solution is still being worked out; one has not been come up with yet.

12:15

The Convener: Our system would be more comparable to the Spanish or the Italian system than it would be to the federal system.

Professor Keating: The difficulty in the UK is always the asymmetrical nature of arrangements. In Spain, the approach could be taken whereby a majority of autonomous communities could invoke the subsidiarity protocol. That has not happened yet, but that would be one way of doing it. We could not think of an equivalent approach in the UK.

The Convener: That is interesting.

I think that that covers everything—colleagues do not seem to have any further questions. Is there anything that you feel we have not raised that you would like to bring to our attention?

Professor Keating: In my submission, I mentioned the justice and home affairs issue of freedom and security. That area is a complete mess. The UK has opted in and opted out of the new arrangements in a bewildering way. The issue is of interest to Scotland in a way that it is to no other devolved Parliament because of our legal system. I think that there will be no end of trouble, given that, after a transitional period, the UK must decide whether to opt in or opt out altogether. I can see all sorts of differences arising between opinion in Scotland and opinion in the UK on how to handle the matter. If an increasingly Eurosceptic attitude takes hold at Westminster, it is probable that the UK will opt out of the arrangements altogether, whereas we might want to continue to be involved in them. That will be extremely difficult to handle, politically.

The Convener: That is interesting. We raised some of those issues with the UK Government minister earlier in the meeting. He will look into one or two of the legal aspects a little further and get back to us.

I thank you all for coming along and for your written evidence. That was a useful session. It was great for us to be able to pick your brains. We will certainly take substantial account of your comments in our inquiry report.

“Brussels Bulletin”

12:17

The Convener: That takes us to item 4, which is on the “Brussels Bulletin”. We usually suspend the meeting to allow our witnesses to depart, but as it is the only remaining item that we will take in public, we will push on. We are joined by Ian Duncan, who will be happy to answer any questions. It was quite a short bulletin, so I do not know whether colleagues have any issues that they want to raise.

Jamie Hepburn: I was very concerned to read on page 4 the headline, “Lady Ashton’s No 2s”, which I thought was verging on too much information. It came as an immense relief to me—if you will pardon the pun—to read on and find out that it related only to her deputies in the Commission.

The Convener: I will not ask Ian Duncan to comment further on that.

Sandra White: I was interested to read, on the same page, about Catherine Stihler raising the case of the Eritrean girl who faces deportation. There are similar cases in the area that I cover and I am sure that the same is true of other MSPs’ areas. It is interesting that the issue was raised at question time. Perhaps I could contact one of my party’s MEPs, although Catherine is very good—I have spoken to her on numerous occasions. It might be the case that MSPs could contact an MEP to find out whether they could raise a particular case in the European Parliament.

The Convener: I am sure that MEPs would be quite happy to do that if there was an interest in a case.

Ian Duncan might have information to add.

Dr Ian Duncan (Scottish Parliament European Officer): That happened at a themed question time, which the President of the Commission regularly attends. The case that Sandra White mentioned fell within the theme that was being dealt with. The themes are announced well in advance. If members had an issue that they wanted to explore and which fell within one of the themes, I am sure that any number of MEPs would be happy to facilitate a question. However, MEPs do not have much time to ask their question. As you can imagine, they have very tight time—

The Convener: A bit like we do.

Dr Duncan: The situation is a bit like it is here, although the time pressure is even greater. MEPs sometimes have only 30 seconds to ask their question. It can be very tight.

Sandra White: How can we find out what the themes are going to be? I ask because MSPs have been told by the Home Office, “Butt out. Asylum is nothing to do with you.” It is difficult when the Westminster MP will have nothing to do with a case—we have to take it up. That would be a way of taking a case up if I could not do so through Westminster. How can we find out which themes will be asked about?

The Convener: The information is available on the European Parliament website. You could perhaps register an interest with the MEPs about human rights for when that topic comes up again in future.

Sandra White: If any issue that is coming up is of interest, I suppose that we can ask an MEP about it. I just wanted to know how we can find out what is coming up.

Dr Duncan: I should emphasise that, obviously, the MEPs will probably want to ask their own questions, so it might be difficult for them to be a carrier of your question. However, if you liaise directly with the MEPs in your party, they might well be happy to take forward any issues that chime with the questions that they want to explore.

Ted Brocklebank: On the item about bluefin tuna on page 4, I do not know whether Ian Duncan or others saw the recent film “The End of the Line”, which highlights the pillaging of the seas in many places and focuses on bluefin tuna specifically. Of course, whereas the EU has always been extremely diligent in hammering down on our people for allegedly fishing out cod stocks, it seems to have been dilatory in dealing with bluefin tuna, which is set to become virtually extinct. There is still talk of providing an extra year’s delay for the implementation of the ban.

Dr Duncan: That issue is quite interesting. The vote that took place on the Convention on International Trade in Endangered Species of Wild Fauna and Flora—CITES—was not to support the ban. There will now be no ban on fishing for bluefin tuna. In effect, that was the first time that the EU Council of Ministers had advocated a total ban on the fishing of a particular fish species, although the fisheries council has attempted to apply various bans on the fishing of cod. As members can imagine, a lot of politics was involved in the decision making on the bluefin tuna. The vote was by no means unanimous. However, the lobbying that took place within CITES was far more blatant than would have been the case even within the EU. The reality is that something like CITES is very open to abuse—although that might be the wrong word. One tends to find that perverse decisions can often be taken because, for example, land-locked countries have a very powerful voice in sea matters.

The Convener: The bulletin goes on to say:

“EU ambassadors also confirmed their opposition to lifting the ban on international trade in ivory.”

Dr Duncan: Yes, that is also true. Issues were raised about how trade should function. Another issue that was looked at was to do with polar bears. Again, a ban was blocked by the Inuit people because they hunt for polar bears.

An important point is that, although the EU is often criticised for being biased, its bias can be far less than in some other international fora. I always found it amusing that the International Whaling Commission has a delegate from Monaco, who has quite a powerful voice. I always thought that that would be a great job to have.

The Convener: Are we content to agree to forward the “Brussels Bulletin” to the relevant subject committees for their information?

Members indicated agreement.

The Convener: That brings the public part of today’s meeting to a close. I thank members of the public for their attendance.

12:23

Meeting continued in private until 12:48.

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