The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Tuesday 25 October 2011

Session 4

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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE
5th Meeting 2011, Session 4

CONVENER

*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

DEPUTY CONVENER

*Hanzala Malik (Glasgow) (Lab)

COMMITTEE MEMBERS

Helen Eadie (Cowdenbeath) (Lab)
*Annabelle Ewing (Mid Scotland and Fife) (SNP)
*Bill Kidd (Glasgow Anniesland) (SNP)
*Jamie McGrigor (Highlands and Islands) (Con)
*Aileen McLeod (South Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Professor Laura Cram (University of Strathclyde)
David Crawley
Professor Sir David Edward
Professor Michael Keating (University of Aberdeen)

CLERK TO THE COMMITTEE

Ian Duncan

LOCATION

Committee Room 6

Scottish Parliament

European and External Relations Committee

Tuesday 25 October 2011

[The Convener *opened the meeting at 14:02*]

Decision on Taking Business in Private

The Convener (Christina McKelvie): I welcome everyone to the fifth meeting in 2011 of the European and External Relations Committee. I ask everyone to switch off any electronic devices, as they interfere with the sound system.

The first item on our agenda is a decision on taking item 5 in private. It is normal procedure to consider such issues in private at the end of a committee meeting. Is the committee content to take item 5 in private?

Members *indicated agreement.*

The Convener: I register apologies from Helen Eadie, who cannot be with us today because she has another commitment. We will ensure that she gets all the information that she needs for coming along next week.

Scotland Bill (European Dimension)

14:03

The Convener: Agenda item 2 is evidence on the committee's inquiry into the European Union dimension of the Scotland Bill. We will have two panels of witnesses today. I welcome the first panel: Professor Sir David Edward, who is a former judge of the Court of Justice of the European Communities; and David Crawley, who is a former Scottish Government Europe director and Brussels representative. I welcome them both to the committee.

Before I invite members to ask questions, I will kick off with an opener. The written evidence that we received from some of today's witnesses was very helpful. The main question is whether the current arrangements for Scottish representation at Council meetings serve Scotland's interests well. Maybe you can both give us your opinions on that.

Professor Sir David Edward: David Crawley knows much more about that than I do.

David Crawley: Thank you, David. The answer, broadly speaking, is yes. However, my evidence is based on my wide range of experience up to 2006, as I have not had practical experience of the circumstances following the 2007 election, which represented quite a change in the politics behind the arrangements.

Having said that, my own view is that, for a number of reasons, the arrangements have, in general terms, served Scotland very well. First, Scotland has been fully involved in Brussels as part of the United Kingdom's diplomatic representation. That has been a very important factor in getting us in to speak to the Commission informally—getting us in and out of buildings and all that. Secondly, although there has been no statutory backing and the arrangements have been informal in that sense, the concordats that were established in 1998 set things out in a relatively comprehensive way. The concordats anticipate that the UK Government will consult Scotland in areas where there is a significant devolved interest in negotiations in Europe.

In broad terms, those arrangements have worked well. Of course, the arrangements are, in a statutory sense, not formal, so they have depended on the relationships that ministers on both sides of the border have been able to establish between themselves. In many cases, that has gone well, although I can remember cases when it has not gone well. As I state in my written evidence, there can be rows and

disagreements even between ministers of the same political persuasion. Would we resolve such problems by changing the current arrangements? Frankly, I rather doubt it, but that is a further discussion.

My answer to the question is broadly yes, with some practical qualifications.

Sir David Edward: I entirely agree with David Crawley, and add only that it has to be remembered that a great deal of what goes on in Brussels is not formal. The formal activities are only the tip of a very large iceberg of informal relationships. The work done by the Scottish Executive office—I do not know what it is called now—at Rond-Point Schuman 6 is enormously valuable.

It is important not to get hung up on the formalities, because what matters is the informal relationships and how they work out. I do not know whether you need to strengthen the arrangements in the light of recent experience, but you have to see them in the context that that which goes on informally is extremely important. I refer to the informal relationships with the officials in the Commission, the Parliament and the Council secretariat—people tend to forget that the Council has its own secretariat and its own specialists in particular areas—and in the United Kingdom permanent representation to the European Union.

The Convener: Thank you. I invite questions from committee members.

Aileen McLeod (South Scotland) (SNP): I wish David Crawley and Professor Sir David Edward a good afternoon—it is really good to see them both.

My first question is for Professor Sir David Edward. Article 5 of the Lisbon treaty expands the definition of subsidiarity, so that it no longer refers to member states but refers instead to action at a central level or at a regional and local level. Protocol 2 of the Lisbon treaty also expands the role of sub-state Parliaments. If the Lisbon treaty provides a legislative extension to the role of regions and regional Parliaments that have legislative powers, and the EU is obviously legislating to strengthen the role of devolved Parliaments in European affairs via the treaties, do you agree that the Scotland Bill could also do that, as regards having a statutory right?

Sir David Edward: I do not disagree that that could be done, but let me first of all deal with the point about the Lisbon treaty and protocol 2. It imposes a duty on the Commission, when making a proposal, to have regard to the implications at the national, regional and local levels, which is one aspect of subsidiarity. It also says that it is for national Parliaments to consult, where appropriate, devolved or regional Assemblies with legislative powers. It depends on which text you look at: the German text seems to suggest that there is a legal obligation on national Parliaments to do that, whereas the English text is not so clear.

I think one must be careful about what rights one attributes to sub-state entities that have a legislative body. You have to bear in mind that there are some 72 bodies within the EU at sub-state level with legislative powers, so you must be careful to consider what you are talking about. You are not just talking about Scotland; you are potentially talking about a very large number of entities. Of course, the EU must view member states as equal in that respect. I have written two articles on this subject and I entirely agree that the Lisbon treaty introduces a new dimension in the recognition of sub-state entities, but I warn against, from the point of view of any one of them, inferring too much from that.

Aileen McLeod: Perhaps David Crawley would like to comment.

David Crawley: I think that the important point is that any UK Government would be very unwise to fail to consult, at the very least, the devolved Administrations over a significant devolved issue in the context of EU negotiations. That was true before Lisbon and is true after Lisbon. As Sir David says, the Lisbon treaty clearly gives a significant extra boost to EU recognition of the role of sub-state Parliaments, but it does not change the reality that the representatives of the member states of the EU are, at the end of the day, responsible for the formal negotiations in Council.

Sir David Edward: It is important to make a distinction. On the one hand, the EU requires that the Council represents the member states, which are represented by ministers who can commit the Government of the member state in question—as far as the formal situation under EU law is concerned, there is no place in that context for separate representation of any sub-state entity. On the other hand, there are the arrangements that the member states make about their representation and who can commit them, which is a matter of national law and depends very much on the internal structure of the state. We must distinguish the situation in truly federal states, such as Germany, from more loosely federal situations and from arrangements that are not fully federal at all, as in our case.

14:15

Aileen McLeod: One difficulty that we face is that, when the European Union legislates, it reduces the powers not of Governments but of Parliaments—that relates especially to legislative power. When EU legislation affects devolved matters, the Parliament here loses power but, as

matters stand, we cannot ensure that a minister from this Parliament attends EU Council meetings. That means that the Parliament has no one to hold to account for laws and policies that are agreed.

First and foremost, the mechanism is proposed to protect the Parliament's legislative prerogatives and duty of accountability. As Scotland's Government is elected by the Parliament, Scottish ministers should be present when the Parliament's legislative prerogatives are being negotiated. The proposal is about the principle of having the right to attend and of the Parliament being able to hold to account Scottish ministers when they attend EU Council meetings.

Sir David Edward: What you say is also true of the German Länder, each of which has not simply devolved powers—as is true of the Scottish Parliament—but inherent powers. The federal authorities only have such powers as the states—and it is important to remember that the correct translation of Länder is "states"—have under the constitution. What you say is true of all sub-state entities that have legislative bodies whose elected members are responsible to their electorates.

David Crawley: The arrangements that have been in place since devolution have gone as far as they can, within the framework that we have—to recognise precisely the point that Ms McLeod makes. Of course it is important to recognise the Parliament's legislative rights—I believe that that has happened in how the system has worked.

If one wants to move to a more formal system, one must look at where and how the present system has failed us. However, as I said, I doubt whether it has failed us. I will give one example—the negotiations over the common agricultural policy from 2000 to 2002-ish, when I moved away from that area. Officials and ministers were closely involved in those negotiations. The then minister, Ross Finnie, came to the Parliament regularly to explain and account for the part that he played in the negotiations.

Of course rows and disagreements took place between the UK Government and the Scottish Administration—and the Welsh and Northern Irish Administrations—on what they wanted from the negotiations. As the Scottish representatives, and partly because of our place in the UK framework and in Brussels, we worked together with devolved Administrations to press issues such as ensuring continued direct assistance for the farming community. We made such points. Because of our place in Brussels and the respect that we can engender for what we can achieve and contribute, we had relevant informal discussions with other member states and regional representatives about what the new CAP should look like. That is part of the reason why the eventual outcome of those CAP negotiations looked much more like the CAP that we wanted than the CAP that the UK Treasury wanted. I give that to the committee as just one example.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you for your evidence, gentlemen. I refer to two of the bullet points in David Crawley's written evidence. One says that we need

"Full consultation between UK and Scottish officials and Ministers ... well before any serious negotiation starts."

That would, I hope, lead to

"Effective communication during negotiations",

to establish whether those negotiations were proceeding correctly in areas in which the Scottish Parliament has the legislative prerogative. Should the need for consultation and for effective communication during negotiations be delineated in the Scotland Bill, to ensure that they happen?

David Crawley: Based on my experience, I am inclined to feel that it would be extraordinarily difficult to write that type of consultation and communication into legislation, although I do not say that it would be impossible. The chances are that such a provision might have unintended consequences. We could go into that further, but that is my instinct.

It is for the Parliaments to decide whether it would be better to have the arrangements put into statute, rather than proceed on the basis of the existing informal arrangements that are set out in the concordats. For my money, I think that we are better off with the concordats, because that allows the possibility of a more flexible and informal response.

From a practical rather than a political point of view, the fundamental issue seems to me to be about where we are likely to fail to have an impact on the basis of the present arrangements. I do not see such a place on the basis of what has happened so far, certainly in respect of core EU issues for Scotland. The four that trip off the tongue are fisheries, agriculture, environment and justice. Other issues are important, but those are the four that are absolutely central. As long as people in the Administration here put the effort into understanding the negotiations and what is at stake and into communicating with the UK department and the Commission through various relationships at a fairly early stage, and as long as those officials are consistent in their effort and consistently supported by ministers coming to Brussels when the need and opportunity arise, I am confident that we can carry on delivering in the interests of the people of Scotland.

Bill Kidd: To follow up on that, I wonder about the circumstances in Germany, where part of the resolution to the problem was to empower the Bundesrat to appoint Länder representatives who

can participate directly in negotiations alongside representatives of the responsible federal ministry. They operate in conjunction. Could such a process be written into the bill?

David Crawley: Sir David Edward might want to comment on that, but it will be extremely difficult to arrive at that situation unless we turn the UK into a properly federal state. There is a whole set of arguments about that. If we were able to create a fully federal state with symmetry in the type of devolution across the UK, it would be more straightforward to set up institutions that would allow us to operate, broadly speaking, in the way that the German Länder do. Without that arrangement, it is very hard to operate in that way, because the devolution to three parts of the UK is uneven and there is no devolution for England, so English representation is always confused with, and part of, the representation from the United Kingdom department. It is difficult to achieve that kind of federal approach within the UK. Another possibility would be to try an alternative approach that mirrored it and to talk about developing clearer obligations around consultation.

Sir David Edward: You must remember what the situation in Germany is. The Bundesrat is the upper chamber of the German Parliament and consists of representatives of the Länder. You are talking about a situation in which the matter at issue relates primarily to the competency of the Länder, and, in general, where they have competency they have exclusive competency. That is unlike a devolved situation. The constitution provides that the Bundesrat may require the representation of the federation to be delegated to a representative of the Länder designated by the Bundesrat. The equivalent situation in Britain—assuming that we were federal and bearing in mind the fact that England would also have to be involved—would be delegation through a body representing England, Scotland, Wales and Northern Ireland. That body would identify something falling primarily within the competence of the component parts rather than Westminster and would designate one of those, which might be Northern Ireland, Wales or England. It would not involve a right of each component part to be represented separately. It is important to understand each of these arrangements in the context of the country in which it occurs.

Bill Kidd: Thank you for that.

Jamie McGrigor (Highlands and Islands) (Con): I thank Mr Crawley for his written evidence, which I found very useful.

In paragraph 7, you say that

"Statute will not deliver the conditions at paragraph 4",

which you think are important. You talk about agriculture and fisheries in particular. First, given that in Scotland, England, Northern Ireland and Wales the single farm payments are paid on different bases, how on earth can the UK achieve an agreed line? Secondly, on the fisheries talks that take place each year you say that the delegates from Scotland and the rest of the UK must have time to talk to each other and to agree a position before the next meeting. They would not have long to do so—they would have to start almost the week after a meeting. Can improvements be made regarding those two particularly important subjects?

David Crawley: I will address the single farm payment first. The flexibility that allows different bases for payments to be established within a member state was one of the outcomes of the 2002 CAP negotiation. It was important—not just for the UK, but for a number of member states—to be allowed to do things a bit differently. The French, for example, had a quite different view from the Danes and, to some extent, the Germans and some of the newer member states regarding the type of payments that they wanted.

14:30

The CAP negotiations outcomes—specifically the outcome on the single farm payment—were a good result of the kind of flexible negotiating position that we can end up with. As I said to start with, I do not think that it is what the Treasury would have liked. The Treasury—and, possibly, many major contributor treasuries in the EU—would have preferred a much more substantial reduction in the cost of the CAP, as they will expect next time around; we will soon be in the middle of that debate again. As far as that is concerned, however, I think that the system was fine and worked well.

Fisheries is always a rather different matter because of the substantial share of the catch that Scotland takes and the immediacy of many of the decisions, and because of the tension between the need to allow catching to continue in order to protect fishing communities, and the need to cut catches in line with research, advice and evidence. That is always fundamentally difficult.

The fisheries negotiations tend to be almost continuous over a few months. Jamie McGrigor was absolutely right to suggest that work on the next version of the UK line needs to start the morning after a council of fisheries ministers has concluded: that is what happens. It would be enormously unwise of any UK Government leader of a fisheries delegation to refuse a Scottish fisheries minister the right to attend, because of the major impact of fisheries on Scotland and the major role that we play. It is extremely important

that there is always a Scottish fisheries minister there. I might take a different view if the council were discussing only third-country fisheries off west Africa, but broadly speaking, I think that that approach is right and, as far as I know, that is pretty much what happens. For a Scottish fisheries minister to be excluded from a fisheries council of any kind, or for Scottish officials to be excluded from working group negotiations, would be extremely unusual and, perhaps, entirely unprecedented.

Jamie McGrigor: You would not say that having such things set in statute would encourage better participation. In fact, you are saying that the reverse might be the case.

David Crawley: My instinct is that such things being set in statute would not help at all because that would stratify and formalise relations and it would allow Whitehall to hide behind a formal structure. It would mean that officials could say, "Hands off. You're quite definitely on the other side of this statutory barrier. Your minister is insisting on coming, and he has every right to do so according to this statute, but we don't need to tell you our negotiating position. That's just going to have to wait." I can see all sorts of situations like that arising if we were to create new statutory barriers.

Sir David Edward: It is important to remember that although statutory rules would prescribe what must happen, there is very wide scope for people to say that what is not prescribed will not happen. That is what David Crawley is saying. You have to be careful what you wish for.

In relation to the proposal, presence at Council meetings is only the tip of the iceberg. Except in relation to urgent matters, there is a lengthy process of discussion, proposals, counterproposals and negotiation in working parties and committees. Actually being at the Council meeting might be purely a formality, except in the case of fisheries, where much depends on the final agreement that is cobbled together. If you want to create something that is for the benefit of fisheries, you have to remember that it will apply equally elsewhere. It might be possible to say that there should be a statutory right of presence in relation only to the common fisheries policy, but I do not think that that is what is being looked for.

The Convener: I think that we have taken on board that you perceive that the informal mechanism that goes on before the full Council meets is just as important as a minister's being at the Council meeting. Can you give us your thoughts on why Lord Davies was sent to the informal agri-fish meeting last year but the Cabinet Secretary for Rural Affairs and the Environment in Scotland was prevented—he was refused permission—from going to it? You have explained how we could work hand in hand with others at the informal stage, but we have a situation whereby cabinet secretaries and Government ministers from Scotland are being refused that opportunity to be involved.

Sir David Edward: I know nothing about the details of that—I think David Crawley does.

David Crawley: I do not know the details of the case to which the convener referred, but I think that it was an informal Council meeting that Mr Lochhead was not able to attend and speak at. There are two issues; I do not know the circumstances, so what I will say is not intended as a criticism of whomever made the decision. First, to be frank, I would not have advised the UK minister to refuse Mr Lochhead's attendance. As I said, it seems obvious to me that if the Scottish fisheries minister is available and willing to attend and, if necessary, to speak, even at the level of informal Council meetings, he should be allowed and encouraged to do so, although he would have to accept—I am sure that he would do so—that he was doing so as the UK spokesman and not simply as a Scottish spokesman. That decision was not right. It should have been otherwise, and I would never have advised it.

Secondly, there is an important distinction to be made between informal and formal Council. It is only at a formal Council of Ministers meeting that formal legislative decisions are taken and legislative proposals negotiated in detail in the structure leading to those formal decisions. As I read it, much of the difficulty in the context of the justice and home affairs council has been in relation to informal meetings where, on a number of occasions, it appears that Mr MacAskill has asked to attend and has been told that he cannot. I leave the politics and the tactics of that to others. Again, there might have been circumstances in which I might have advised the taking of a different view, but it is nevertheless true that informal councils are very different entities.

As counsellor for UK representation in the early 1990s, I attended a lot of informal Council meetings, which could be very boring. They are probably even more boring, now—now that there are 27 member states around the table, which all have to have their shot in a fairly short time. It is a difficult forum in which to negotiate anything serious, and it is rarely done. They are usually used as vehicles by the presidency of the day to develop ideas that they want to throw into the system. Their conclusions may well be important down the line in terms of policy development, but there will be a lot of other opportunities to get a grip on the policy as time goes on.

From a practical point of view, I tend not to worry too much about informal Council meetings,

although fisheries may well be an exception when issues of long-term significance for fisheries might be discussed. For my money, there should be a Scottish minister there, if he wants to be there.

The Convener: Thank you for that clarification.

Hanzala Malik (Glasgow) (Lab): I read David Crawley's paper with interest, and I think that there needs to be discussion elsewhere, as well, about some areas. In paragraph 9 of your paper, you share your personal view of how

"the Scottish interest is likely to be best served."

I take on board what you say, but in paragraph 10 you partly recognise that there may well be a case for a formal structure because of the policy gap between the UK and Scottish Administrations. That is interesting, because in recognising that there is a growing gap, if—regardless of where a discussion takes place—compromises are made, our demands are diluted before they even get to the table. My fear is that our representation of the Scottish interest is being diluted before it gets to the negotiating table. That needs to change. What I am really looking for is a mechanism by which we can address that issue more forcefully. The idea that ministers are not allowed to attend meetings is ludicrous, because it means that democratically elected members find themselves in a position in which they cannot represent their constituents, which is wrong. There must be a mechanism in the European Union that recognises that. Given your expertise, are you aware of such a mechanism? I accept that the German example is perhaps a little different from our situation, but morally the same principle applies: it is all about equal opportunities and the right of the individual to be represented. A democratic European Union has to take account of the wishes of people throughout the Union, which includes Scotland. Some people might find it surprising, but we are part of the European Union. Perhaps you could advise us on how to address the issue.

David Crawley: I would be doing well if I could advise you on that, because that matter is clearly what underpins much of the concern that has led us to where we are this afternoon.

I will start with the reason why I have said what I have said. My view is based on the practice in which I have been involved. It is not only from a European perspective; I was also involved in the preparation of the Scotland Bill as the head of the division that was concerned with powers and functions, and I was head of the Scotland Office—I should probably admit that—between 2002 and 2005. While I am getting declarations of interest off my chest, I should also say that I was involved in the creation of the common fisheries policy between 1977 and 1981. When you articulate the concern that underlies all this—which I quite understand—you come up against the harsh reality that the European Union is a union of 27 member states and its formal structures require that decisions be taken by the Governments of those states. In a European Union context, that Government is the United Kingdom Government, although that is qualified in a number of ways, which we have discussed.

The issue comes down to how the Scottish interest can best be represented through the United Kingdom Government, given where we are at the moment. We have looked at Germany; other useful or interesting comparators are Spain and Belgium, from where there might be useful practice to draw on, although from the point of view of negotiations in the Council chamber, I would prefer not to be organised as Belgium is. On how Spain organises relationships with its autonomous regions, it seem that not a great deal of power and responsibility in European negotiations is handed over by the national Government. There are certainly more complex and formalised structures for consultation in Spain, which might be a route that the committee would want to explore. However, when it comes to representing the people of Scotland at the European Union negotiating table, that really is not where we are. We have to accept that and to look to work within the systems that we have.

The point that underlines all the evidence that I have given is that in the circumstances that I described, the way in which we are structured has given us the best possible opportunity to represent the interests of people here.

14:45

Hanzala Malik: I disagree. The European Union has changed since its inception and has accepted in principle the changes that have taken place in Europe, so the legality is open to challenge. There is room to go back to the European Union and say, "Okay. You accepted those changes; now you must accept that we have another tier of democracy, which is answerable to its constituents." Those constituents are European Union constituents, in the holistic sense, so the European Union will probably find that it is answerable to them.

How can legislation in that regard be effected? How can we go back to the European Union and say that it is no longer fit for purpose? The European Union has moved on. It has new members and Europe has new states and Parliaments. If the European Union has accepted all those changes, surely it must also accept its new responsibilities to the new Parliaments and democratically elected Governments.

David Crawley: I think that what you are looking for—whatever it is—would require substantial change in the Union treaties. One can always argue for such changes, but we need to be careful about what we wish for, as Sir David observed, because if we throw the question of treaty change into the pool an awful lot of things might happen that we do not want to happen—

Hanzala Malik: You do not know what I wish for.

David Crawley: No, indeed.

It is important to remember that the 27 member states, new and old, have a wide range of democratic and constitutional structures. One cannot stand back in Brussels and take the view that one model applies to all members. That is why it makes a certain amount of sense that the treaties currently say that it is for the member-state Government to decide who can represent it.

Pre-Maastricht, there was a degree of doubt about whether ministers other than ministers from the national Government had the capacity to represent the national Government at European level. Maastricht made it clear that one could nominate a regional minister to speak for the national Government. However, at the end of the day, who represents the nation is left to the national Government. Without significant treaty change I do not think that you can do much about that.

Sir David Edward: The problem is illustrated by the Committee of the Regions, which was supposed to be a body in which the regions—Scotland, Bavaria, Catalonia and so on—would have something to say. Given the way in which the EU is structured as a union of states, Malta's regions and Luxembourg's regions collectively have more members of the Committee of the Regions than Scotland has. That is where you end up if you insist on EU legislation on structures.

As I said, more than 70 sub-state entities have legislative assemblies. We should remember that there is also Regleg, which represents the 70 regional legislatures, and another body—I cannot remember what it is called—that represents the speakers of regional assemblies. I do not know why there are two bodies. The two have different numbers of members. If you are looking for action at EU level, you must take that into account: it is unavoidable. We cannot have a system like the Council of Ministers in which there are 70 representatives of sub-state legislative assemblies plus 27 members representing the member states—that is, 100 entities. One must be realistic about what one can expect. As far as the EU is concerned, it is for the member states to organise their representation within themselves, and each of them does so in a different way according to its own system. All we are saying is that when it is properly operated, the system of informal agreements, concordats or whatever should, on balance, produce the best result.

You should not forget that the negotiations start with discussions, proposals and counterproposals. That involves an enormous amount of sustained hard work and it places an enormous burden not on ministers—indeed, the burden on ministers is almost marginal—but at the administrative level. Does Scotland have the number of people at the administrative level who are capable of undertaking that? These are the realities that you have to consider.

Hanzala Malik: That is a very unfair comment to make. I am sure that we can find the people in Scotland.

Sir David Edward: I am not saying that you cannot find them. The question is whether you can pay for them and organise them.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Good afternoon, gentlemen. I apologise for being a little bit late—such are the joys of the tram system in Edinburgh and the resultant traffic, but let us not bring up trams today.

I have listened with great interest to your answers to the committee's questions. The Scottish Parliament is a national Parliament, not a regional assembly—I start from that perspective when looking at this important issue. It is also important to point out that a laissez-faire, informal approach works only so long as there is a commonality of interest. If there was no commonality of interest, further pressures would be brought to bear on an informal approach and there might not be any remedies available to a party that was aggrieved at the formulation of a position that it viewed as being diametrically opposed to its interests.

David Crawley, whom we met many times in Brussels, raised the important issue of the common agricultural policy. He will be aware that, this time round, as matters stand, the stated position of the UK Government at Westminster on the key issue of the pillar funding is at the opposite end of the spectrum from the stated position of the Scottish Government. In an informal system, notwithstanding the interests of Scottish farmers, the UK Government could show the same lack of respect on that issue that it showed when it said that Richard Lochhead, the cabinet secretary for fisheries, could not attend the informal agri-fish council in May 2010 and instead sent Lord Davies, who was at the time the Westminster minister for bees. That was insulting not just to the cabinet secretary, the Scottish Government and the Scottish Parliament but to the Scottish people. The Scottish people are feeling increasingly frustrated

that their positions on vital national interests—apart from any other issues—are not being respected.

I will get down to the nitty-gritty. At paragraph 10 of his report, which has already been mentioned, David Crawley states:

"there may be a case for some form of statutory duty requiring consultation. In the light of the difficulty of drafting an effective provision ... my preference would be to see a strengthened"

informal structure.

From my previous life as a lawyer, I know that a question of drafting is simply that. You have been involved in drafting many documents over the years—you owned up to being one of the authors of the CFP, which was a brave thing to do. There are people who have the skills to draft documents, which brings me to Professor Sir David Edward's comment about the need to involve civil servants at every stage of the process. I absolutely agree that that is vital and, as far as Scottish interests in Brussels are concerned, we want it to happen. We certainly have excellent civil servants in Scotland who would be happy to become more involved in the formulation of positions on areas in which they are directly involved on behalf of the Scottish Government and the Scottish people.

Focusing on that specific issue, do you consider it possible that we could find an acceptable language to allow Scottish interests to be better represented, rather than relying simply on the whim of circumstance in which there may be a commonality of interest but, more important, there may not be. I would like to hear your comments on that.

David Crawley: It is difficult to know which of your points to come back on, but they are all interesting.

On your point about Scotland being a national Parliament and not a regional assembly, one absolutely understands the language that is spoken here. Of course this is Scotland's national Parliament—there is no question about that. However, if one looks at the United Kingdom's structure of legislation in parallel with other member state structures from a Brussels perspective, one sees that Westminster is the United Kingdom Parliament, and that its ministers represent the United Kingdom. If I may say so, that situation will be changed only if and when Scotland ever becomes an independent state—which I imagine is what you are after here—and if we assume that negotiations on that subject are wholly successful.

As you indicate, and as I accept at paragraph 10 in my report, the pressures—and particularly the political pressures—will grow as time goes on, following devolution in 1998 and the preparation of a set of informal concordats. You clearly demonstrate that that is the case, and I quite understand that. However, I do not believe that that has yet invalidated the way in which those texts were drafted. I continue to believe that, given good will on both sides, our structures are capable of delivering UK positions that take into account Scottish, Welsh and Northern Irish positions and the views and concerns of other parts of the UK, many of which match our concerns. I emphasise the need for good will on both sides. UK Governments have made many mistakes on the subject, but those are the consequences of a certain amount of political tactlessness rather than problems with the structures themselves.

I do not know whether that will apply in the case of the forthcoming CAP negotiations, but the UK must come up with a common position and take account of the views of its different parts, although that will be difficult.

My former colleagues in UK Governments would not like to hear this, but the fact is that the UK is not the only negotiator in the European Union, and the chances of its view on the CAP's future coming to pass in the form that has been suggested are pretty low. Equally, we must recognise that there are major fiscal issues facing the EU as a whole, which might qualify what we can get for Scottish farmers, as it will qualify what President Sarkozy or his successor can get for French farmers. That is the world that we live in in the negotiations. Will the situation be made better if Mr Lochhead has a statutory right to attend the CAP councils? I doubt it. Equally, I will be very surprised indeed if he is refused attendance at those councils.

15:00

It must be accepted that capacity is an issue. In areas that the Scottish Administration has not dealt with in substance, it would have to find capacity to do that. Many of the issues are extremely complex. For example, making progress in trade-related negotiations requires a lot of experience and understanding, and it requires people. Sir David Edward is therefore right in suggesting that, if we go down the suggested route, we will end up imposing a significant new administrative burden on the Scottish Government. That might be what you want, and you might be capable of funding that, but that will be the consequence.

Sir David Edward: The member seems to be looking for involvement at the pre-council meeting stage, but that is not what the proposed amendment to the Scotland Bill suggests; it is simply concerned with the participation of the Scottish ministers in EU institutions and specifically in the delegation that represents the

United Kingdom at relevant proceedings of EU institutions. You might want a much wider statutory obligation, but that will not be achieved through the amendment.

Annabelle Ewing: I have just been handed a background note entitled "Scotland Bill—EU Involvement", which states that the Government

"is proposing an amendment ... to provide Scottish Ministers with a statutory right to be included in the UK delegation attending relevant proceedings of an EU Institution. This would cover attendance at Council of Ministers' meetings (both formal and informal), and attendance of officials at Commission and Council Working Groups, where any non-reserved matter is to be considered."

Therefore, the Scottish Government's clear intention is that the amendment would cover participation in such meetings. As we all recognise, and as Sir David Edward rightly said, although the work that the Council working groups do might be boring—to use Mr Crawley's words—they are nonetheless where progress is made towards the formulation of a position.

I see that Mr Crawley wants to comment.

David Crawley: It is just to make a brief correction. The meetings that I said could be a little on the tedious side are the informal Council of Ministers meetings when all ministers are present, which are usually in the member state that has the presidency. Those are not in the direct line of negotiation on any particular issue, although they might ultimately have an impact somewhere, and they are not the same as the working groups, which I absolutely agree are a vital part of negotiations, as is the European Parliament, which we have not discussed today.

Annabelle Ewing: I want to go back on the point that David Crawley made about negotiation. I should refer to him as David, as I have known him for some years. He mentioned the CAP, which I highlighted in my question, and the negotiations on it. He went on to state that, in any event, given the debate on CAP reform among the 27 member states, it is unlikely that the UK will have its stated position adopted. That goes back to my central point. Surely, in devising a way to ensure that Scotland's interests are best protected, we should not rely on the vagaries of whether the UK's position is agreeable to the French, the Germans or whoever. The issue is whether our stated position has a chance of being promoted to protect our farming community. That is the key point—it is about how we can best achieve that. That is why the Scottish Government has proposed the amendment and why we are discussing it. If, at the end of the day, the key objection is that we will not have the civil service or that we will not find the language to allow for flexibility, I think that that is a very defeatist view of where we have reached in Scotland since devolution in 1999.

Sir David Edward: With great respect, I do not think that it is defeatist. I lived for 14 years in Luxembourg. The Luxembourg Government does not try to do everything, because it simply does not have the resources, and that is true of many smaller member states in the EU. You have to be selective about what you focus on.

Annabelle Ewing: Yes, but the Luxembourg Government sits in the Council of Ministers when it is discussing fishing and it has a vote.

Sir David Edward: That is self-evident. My point is quite different. You have to be selective about what you do with the resources at your disposal. Furthermore, with great respect, I do not think that the proposed new clause has anything to do with participation in working groups.

David Crawley: First, I do not think that the question of capacity applies to quite the same degree on agriculture, in the sense that we have always had a significant administrative capacity in it. With good fortune, we can do all that we need to do on agricultural issues.

I think that we do quite well out of the present system, even given the difficult tensions to which Ms Ewing rightly refers. We are engaged in the process of influencing the position that the United Kingdom takes, and nobody prevents us from making our own informal approaches to other member states or the Commission. The interest of Scottish farmers is clearly on the table. It is well understood in Brussels and it is part of the mix. The only problem from your point of view—if I may say so—is that we are not represented directly as a separate speaker at the conference table. My guess is that, realistically, we would not find it much easier if we were. Clearly, however, that discussion is probably not for here. I am getting perilously close to revealing certain political views on the issues, so forgive me.

The Convener: Let me take us back to the proposal to put Scottish ministers' attendance at meetings of the Council of Ministers on a statutory footing. We had written evidence from two other witnesses who could not be with us today, and it is important to put on record some of what they said. If the witnesses will forgive me, I will read a paragraph from each of them.

The first is from Michael Aron:

"Based on my experience at the time I believe it would be worthwhile clarifying the nature and status of Scottish (and other devolved) Ministers attending council meetings. I do not have views on how this should be done. But I think it would be worth making clear that (a) devolved Ministers should have the right to attend Council meetings of interest to the devolved administration concerned, rather than leaving it to the UK Secretary of State to decide, and (b)

that when a Minister is present (UK or devolved) that the minister should have precedence over any civil servant in representing the UK."

The second is paragraph 4 of George Calder's submission, in which he states:

"However, for some Councils of Ministers it is important—indeed essential—that a Scottish Minister is present. The main reason is that deals and compromises may have to be considered rapidly in the course of the meeting, and a Scottish Minister who is present can make a forceful input to the UK Delegation's discussion of such issues. This is obviously so in the case of the Fisheries Council, which is particularly fluid and fast-moving as it seeks to make annual catch allocations. I would also be uncomfortable if a Scottish Minister were not present at an Agriculture or an Environment Council, given the scale of our interests in their decisions."

Given that neither of those witnesses could be with us today, I thought that it was important to get their opinions on the record.

We have talked about the Scottish Government's amendment to the Scotland Bill. Let us go back to Jim, now Lord, Wallace's proposed amendments to the Scotland Bill in 1998—David Crawley may have been there at the time. Lord Wallace suggested:

"We start from the view that the United Kingdom is a signatory to the European treaties, and therefore the relationships are first and foremost between the United Kingdom and the European Union. In this group of amendments, recognising that fundamental truth, we are trying to find ways to ensure that the Scottish interest is best safeguarded."—[*Official Report*, *House of Commons*, 30 March 1998; Vol 309, c 926.]

I do not know whether David Crawley advised the Government or was consulted by it at the time, but, if that were the case in 1998 and those amendments had been pushed to a vote, we would not be here arguing about amendments to the new Scotland Bill. Could you give us your insights and feelings on that?

David Crawley: I am afraid that I do not remember the detail of that discussion. You are better briefed than I managed to be in preparation for this meeting. I am sorry about that. The general position of the UK Government was that those arrangements should be set out in non-statutory concordats. That position was expressed pretty consistently throughout the consultations and negotiations; it is what was set out in the white paper in 1997, "Scotland's Parliament", and it is what was reflected in the outcome. In a sense, the fact that Jim Wallace's proposals did not emerge in any form of statutory amendment is not surprising.

If I may say so, I could not agree more with the point that George Calder made in paragraph 4 of his statement. I hope that nothing that I have said suggests otherwise. He said:

"I would also be uncomfortable if a Scottish Minister were not present at an Agriculture or an Environment Council".

I did not include the word "environment" but, in general, that is true. In my experience, Scottish ministers have often looked at the agenda of various councils and decided that they have neither the time nor the inclination to attend. In a sense, they are in a good position, as they can pick and choose whether to attend a council. That is partly why I emphasised the point of consistency of attendance earlier. Scottish ministers need to be consistent in their preparedness to attend councils and opine on issues in which they have a relevant background and interest. That has not always been the case.

I broadly agree with what Michael Aron says in paragraph 5 of his submission although, with regard to his suggestion that there be a right to attend Council meetings, I think that that is delivered in practice by the way in which the concordat operates. The point that he makes about the balance between ministerial and civil service representation is probably right, but I suspect that that is a question of what happens on the day.

Sir David Edward: What David Crawley has just said illustrates my point better than I made it. Scottish ministers decide whether they will attend councils. The proposed amendment says that a minister of the Crown must ensure that the delegation includes a Scottish minister or another person. I was trying to say that you have to allocate your resources, and that involves a bilateral duty. It would involve ministers of the Scottish Government being represented at all meetings. You could not pick and choose, so you could not allocate your resources to what you regard as significant matters. This is a huge area of discussion.

The Convener: I absolutely agree that that is the case. It is not for me, as the convener of the committee, to pre-empt what the Scottish Government ministers will do, but I think that there is an absolute willingness on their part to engage much more than they do. We need to recognise that.

Jamie McGrigor has a question. We will close this part of the meeting in a few minutes. If anyone has anything else that they want to say, I will allow a few minutes after that for a quick wash-up session. I am conscious of time, and our witnesses have been in their chairs longer than they expected to be.

Jamie McGrigor: Mr Crawley, you say in paragraph 5 of your submission:

"In Brussels we have been well served by the UK Representation and also by the Scottish Executive EU

Office, which enjoys diplomatic status unlike the representations of other major regions".

Annabelle Ewing rightly says that the difficulties arise where there are no commonalities of interest. In an earlier question, I raised the point that, thanks to the UK line, the CAP delivered four systems for the four countries last time round. At that time, the commonality of interest was in delivering four systems. That says something for the flexibility of arrangements. Is there any reason why the same thing should not happen in the present negotiations?

15:15

David Crawley: I hope not. The UK Government is bound to want to seek a common system that, in broad terms, reduces the cost to the UK Exchequer and has the best possible lowering impact on the UK's contribution to the EU. At the same time, it is recognised that the demands for resources from the CAP—particularly from new member states—are bound to grow in the period that follows 2013. A series of new factors is coming into play in the CAP negotiation, on which I am not briefed in any detail.

It is important for the Scottish Administration to continue, as I am sure that it will, to state clearly to the UK Government the reasons why it needs to continue to have a rather different system from the one that ministers might prefer for England—no doubt it will enjoy co-ordination with Wales and Northern Ireland on that. That must be a central part of whatever the Scottish Administration says to the UK. If it sticks to that, simply overriding that will be hard for the UK. I do not know—I cannot forecast, and I do not think that anybody can forecast, how the CAP negotiations will run over the next year or so. It is clear that they will be tricky, but there will be openings and possibilities for delivering the measures that we want.

Hanzala Malik: I genuinely appreciate the concerns that Professor Sir David Edward has laid out about resource costs and implications for the Parliament. However, we are democratically elected, and there is a price to pay for services. Sometimes, we must balance that against what the losses might be. Morally, we are duty bound to provide a quality of service to our constituents. If that means taking on additional burdens, that is exactly what we will do. However, I thank Professor Sir David Edward for pointing out his concerns.

Sir David Edward: Beware—look at the vast number of civil servants in London who deal with nothing but EU issues. It is huge.

Hanzala Malik: I appreciate your advice.

The Convener: I thank both our witnesses for an informative and interesting session. I invite you both to stay in the public gallery to listen to the next panel, if you wish.

Sir David Edward: I apologise for not staying, as I have another meeting.

15:18

Meeting suspended.

15:22

On resuming—

The Convener: Our second panel today is Professor Laura Cram from Strathclyde University and Professor Michael Keating from the University of Aberdeen. We are delighted to have you here. I realise that you sat through the first evidence-taking session, so you are probably well informed, and forewarned is usually forearmed in these cases.

I shall kick off with the first question, as I did with the previous panel. Are the arrangements for ministerial attendance at the European Council or Council working groups appropriate, do they work and do they serve Scotland's interests well? I would not mind hearing your comments.

Professor Laura Cram (University of Strathclyde): I think we have heard that the informal processes, for the most part, have worked fairly well, but there are exceptions. What interests me from this perspective is the ability of the law to be neutral and effective regardless of who is in power at what time, what the relationships are between them, what the power relationships are and what is the topic in hand. Although the evidence in general, as we have heard very well described, shows that the informal processes have been extremely effective in many cases and that the Scottish voice is heard extremely clearly, on occasion there are disputes or uncomfortable relationships that mean that those systems do not work quite as well. That is the distinction between a statutory provision and an informal provision.

Professor Michael Keating (University of Aberdeen): I agree with that. The current arrangements have worked fairly smoothly and great emphasis has been placed on informal political negotiations, which is true not just in the UK but, generally, in other counties, but there is a case for formalisation for the reasons that Laura mentioned.

We must look to the future, because we are developing a United Kingdom constitution. Although a lot of it still depends on convention, it is increasingly being written down. It is sometimes useful to have a statutory provision that underpins convention, so that everything else follows from it. Although speaking at the Council of Ministers

might not be the most important thing, the right to be there underpins a whole lot of other things: the infrastructure, the participation in working groups and so on. I see no problems with putting that into statute.

As I listened to the previous discussion, it struck me that on various occasions and in different scenarios it might be necessary or desirable for Scotland to have its voice heard. We can perhaps say that there are three types of issues. There are run-of-the-mill issues that do not really matter and are entirely uncontroversial, which is true of a huge amount of EU legislation. There are middle-level issues to do with agriculture and fisheries, structural funds and so on, on which there are negotiable differences, so it would be important for Scotland to be there and strike some kind of compromise to get a Scottish position as part of the UK position. There might be issues in future on which there is such a big difference that there is no possibility of reaching a common position. If that were so, Scotland would not want to be there, because by being there it would be bound to a common UK position.

The last time that I was at the committee we talked about this and agreed that no big issues would be coming up in the EU over the next few years and that there would be no treaty reforms. After last night's events at Westminster and following events in the euro zone, that is no longer true. A lot of big changes will be coming up in Europe and it may well be that Scotland will have a different position with regard to repatriation of powers, the future of Europe and so on from the UK Government. That might be one of the cases in which it is impossible to reach agreement. If that is so, the Scottish Government will have to express its dissent formally and simply not participate. There may be participation but non-participation might be a choice.

The other point that I emphasise, which Sir David Edward mentioned and which we emphasised at a previous meeting of the committee, is the importance of the Scottish Government being well prepared, because unless you are well prepared and briefed and know what is coming up, you do not know whether you need to be at the Council of Ministers, you do not know where to go and you do not know how to make your case. So, let us have formal provisions for representation but, above all, let us have the capacity to decide when Scotland needs to be there and to ensure that, when it needs to be there, it is able to make a good case.

The Convener: That is interesting. Do you have any ideas on how the Scottish Government would have the capacity to decide whether or not it should be there?

Professor Keating: I think that things have been improving. I am not up to date with developments since the last election, but I know that in the committee, in the Scottish Parliament and in the Scottish Government, some changes have been made to try to ensure that you can anticipate what matters are coming up. That is most important, but we are not there yet.

I agree with Sir David Edward that you do not want to be there all the time. Scotland does not have the capacity to follow everything, so you need to know what is important. That involves what is going on in the committee, the representation in Brussels, the Government and the Parliament.

The Convener: When the new committee was formed after the election, it was clear that, in the previous session, the committee had been commenting on things on behalf of the Parliament not as early as possible, but at the end of the process. If the committee could comment earlier, it might be in a position to influence decisions. That might be a pipe dream, but it is one that we are pursuing.

Annabelle Ewing: I will revisit a point that was made in the previous evidence session. Although it was stated that, at the end of the day, it would be entirely a matter for the UK, as the member state, to decide vis-à-vis the EU whether there would be a Scottish dimension to its delegation and that that was not a matter of EU law, it was also implied that there might be problems from other member states because they might think that a precedent was being set, blah-de-blah. It was also mentioned, however, that there are already precedents.

Can you both comment on that? As I understand it, as a former European lawyer, representation is completely a matter for the member state and the other member states would just have to accept the UK's decision in that respect.

15:30

Professor Cram: It is absolutely clear that it is not an issue or problem for the EU who represents the member state in the Council of Ministers. It is entirely a UK domestic issue that is related to the UK constitutional settlement, and it is an internal decision as to who should have that representation. However, it was pointed out earlier how complex that decision is. It is not an easy decision and we know that in a system of asymmetric devolution it will be complex and complicated, as it is in many other member states.

Sir David Edward pointed out clearly that the Länder system is not the same as our system. However, it would also be fair to say that the

German federal system is not the same as the Belgian system or the Spanish system and that each of those systems has created its own constitutional settlement and negotiates within their own context on who should be represented and in what ways they should represent the federate state or the devolved territory. In that regard, I suppose we could say that faint heart never won the laddie. Such decisions are complex and difficult, but that does not mean that a negotiated compromise is impossible. Within that context, the UK needs to work out its own unique arrangements that can satisfy each of the different parts of the devolved settlement.

In some ways, I think that we are talking about a change in the burden of proof. Prior to a statutory declaration that there is a statutory right to have a voice from the Scottish Administration at the EU level, the burden of proof that there is a case for them to be there is on the Scottish bodies. In certain ways, a statutory right turns the burden of proof the other way: one would have to prove that they did not have to be there. As I understand it from the proposed clause in the amendment, if the Scottish Administration felt that this was one that it did not want to pursue or that too much time was involved and it was not worth the candle, it would have the right to say that it did not want to pursue it.

The decision on representation would be complex and difficult and one would not necessarily want to have all the nitty-gritty in the act. I know from Professor Keating's evidence that there are ways around that. Just because the system is not the same as elsewhere does not mean that nothing is possible.

Annabelle Ewing: Does Professor Keating have anything to say on that?

Professor Keating: No. I agree with what has been said.

Bill Kidd: I want to return to a question that I asked David Crawley earlier. Perhaps you were both here for that. Just in case you were not, I will go over again what David Crawley said in his written evidence. He said:

"Full consultation between UK and Scottish officials and Ministers is needed ... before ... serious negotiation starts ... Effective communication during negotiations"

will be required to ensure effective decision making. However, there may not be sound enough structures to ensure that full consultation is achieved and there may not be

"broad prior agreement on objectives"

during the negotiations. Would it therefore be more satisfactory if such issues were delineated in the Scotland Bill? If so, how tightly should they be delineated? Should there be guidelines or guidance?

Professor Keating: I do not think that all that should go into legislation, but I do think that the right to attend Council meetings and other ministerial meetings can be in legislation. As I said before, that should simply underpin a lot of conventions. As for the detail about working parties and so on, that has got to go into the memorandum of understanding, which is the appropriate place for it. It would not be justiciable, but it would nevertheless be part of the convention. Governments violating that would then have to pay the political penalty.

Bill Kidd: And the alternative would be to ensure that ministers from the devolved regions and nations had more opportunity to attend.

Professor Keating: No. As I said, it is all part of the same thing. Most of what will be decided will be decided in political negotiations, which you cannot really legislate for. I should also say that, as far as the political culture is concerned, the UK relies on legislation and regulation less than, say, Germany. We are much more like Italy, Spain and perhaps France in that respect. As I think the previous witnesses were trying to suggest, it does not make much difference whether you put any of that in legislation.

Of course, that does not exclude any of the other things. You can put all this in legislation to give it some kind of constitutional guarantee but doing so does not obviate the need for all the other levels of consultation, negotiations and joint working, all of which are vital.

Aileen McLeod: My question is probably related to Bill Kidd's comments. Your evidence makes it clear that the other sub-state Governments have a clear legal right to participate in relevant Council meetings; indeed, the Spanish autonomous communities, the German Länder and the Belgian system have already been mentioned.

Nevertheless, I return to my earlier question why Scotland's national Parliament should be relegated to the junior ranks of Council meetings. Surely it should be up to the Scottish Government to decide whether it needs to be present at EU negotiations on devolved issues, especially right now, given the number of key dossiers that are on the negotiating table. For example, the proposed package of EU structural funds was published the other week and we also have the €40 billion connecting Europe facility; horizon 2020, which is the European research, development and innovation funding programme; and the CAP and CFP reforms. Those important dossiers have significant implications for Scotland's interests.

We should be able to attend not only Council working groups in those areas but the comitology groups. As you are both well aware, comitology is where the nuts and bolts of European legislation are discussed and agreed. Given that it does for European law what Scottish statutory instruments do for Scots law, we must ensure that Scotland is represented at those meetings at all the different levels. It all comes back to the idea of protecting the legislative prerogative of Scotland's national Parliament, ensuring that it can meet its duty of accountability and giving the Scottish ministers a guaranteed right to attend Council meetings at all levels.

Professor Cram: You raise a number of important points, particularly the need to focus not just on the Council of Ministers but on proceedings in general. We have heard a lot about informal proceedings. Earlier, you suggested that when the EU gains powers it tends to take them not from Governments but from Parliaments. That is an important distinction because the focus on the Council of Ministers can be a bit misleading with regard to parliamentary scrutiny. In many ways, the things that come before the Council of Ministers are the easiest to scrutinise; they tend to go through the ordinary legislative procedure and, through the subsidiarity protocols that you mentioned, there is a role in that process not only for the European Parliament but for national and regional Parliaments.

Informal proceedings, supporting competence, the open method of co-ordination, the Bologna process and so on are much more of an issue. Given that, despite significant Scottish participation in such matters, their scrutiny by Parliament is a much more complicated question, it is more relevant to focus on proceedings more generally rather than on the Council of Ministers. As we know, the Council makes the final decision after most of the other things have been decided.

A statutory right to be there and a right to decline when one does not want to be there is one thing, but that should not be allowed to distract attention from a great number of developments at the EU level that are highly relevant to areas of devolved competence or areas with devolved interest which have significant input at the EU level and for which there are much less clear lines for parliamentary involvement.

Professor Keating: It has been pointed out before that the difference with the UK system is that it is asymmetrical, so it cannot be compared with those of Germany or Belgium, where all the regions can decide the line among themselves. One result of that is that many of the relationships in Scotland are bilateral. It is Scotland and the UK rather than the devolveds and the UK, because there is no particular reason to think that Scotland should share the same interests as Wales. It may do so, but there is no particular reason why that should be the case. There is a series of bilateral relations here that require particular kinds of institutions which cannot be borrowed from elsewhere.

There is a parallel with the system in Spain. Catalonia and the Basque Country have succeeded in getting an element of bilateralism into their relationships by saying, "We're not the same as the other autonomous communities on two grounds: we have more competences and we represent a national reality." That is a normative claim, but it is the reality, and we cannot get away from it. The latter claim is very difficult to get past the Committee of the Regions, as it says that everybody is the same, but we know that there is a difference and a sociological reality there. In the United Kingdom and Spain, which is a plurinational state, we must take such things into account. It is therefore important that where Scotland is entitled to be present should be absolutely clear, and that should not be merely at the discretion of the UK ministers.

Jamie McGrigor: Professor Cram, you say in your briefing:

"The existing processes of UK intergovernmental negotiation on EU policy usually work well"

and that there have not been many

"serious conflicts over representation of the Scottish position".

Earlier, David Crawley was more emphatic about things working very well. Professor Sir David Edward said about the amendment that you have to be careful what you wish for. Those comments say to me that if it ain't broke, don't fix it. Am I right or wrong?

Hanzala Malik: Wrong.

Professor Cram: I cannot speak about anybody else's evidence, but that is not what mine said. As a general rule, the arrangements have worked fairly well and there have been few major disputes, but I have also said that good law should work when there is conflict as well as when there is coherence. That is extremely important. It is terribly important that, if one is putting a law in place, it must be able to cope when co-operation is not forthcoming on both sides as well as when it is. Although it has been possible to negotiate, there have been cases when it has been felt that the Scottish interest has not been fully articulated through the consultation processes or the Scottish ministers have not been included when they wanted to be. In my evidence, I made the point that the arrangements generally work well, but they should not depend on whether there is co-operation and the accurate and acceptable

constellation of favourable interests, and the stars being well aligned. Things should work regardless.

Annabelle Ewing: I want to look at things from a general perspective. We have touched on the positions of the Länder, Spain and Belgium, to name but three. It occurs to me that we in the UK are really a bit behind the times. Could things be viewed in that way? The arrangements in those three examples have been in place for a considerable time. The Scottish Parliament was reconvened in 1999; this is now 2011. Surely in one respect we are talking about a housekeeping exercise and trying to catch up with a well-established and well-running precedent elsewhere in the European Union.

15:45

Professor Keating: It took the Spanish autonomous communities 20 years to get the right to attend the Council of Ministers, and the issue is still conflictual. Day-to-day issues are mostly negotiated without particular difficulty, but some symbolic issues have become very important. The question of presence has become symbolically important, not for all the autonomous communities but for the historic nationalities, who regard presence as part of the recognition of their distinctive status.

Annabelle Ewing: Belgium's arrangement was put in place in 1993—I think that I read that in one of our briefing notes. I am not sure when the arrangements for EU involvement of the Länder were put in place, but they seem to have been in place for some time. Surely now is a good time to look at what we can do to facilitate better representation of Scottish interests in Brussels.

I am not talking about something new under the sun; there is precedent for an accommodation. Arrangements have been up and running for some time in several instances and are not causing anyone to hold the front page. The Wallonian and Flemish regional Governments have chaired the presidency from time to time when Belgium had the presidency. Such arrangements are a fact of EU life and it is interesting that the UK seems—at least at present—to be resisting an approach that is reasonably common in other parts of the EU.

Professor Cram: As with much constitutional law, the approach is evolutionary rather than revolutionary. In the context of the European Union there is a well-established precedent; there is not a well-established precedent internally in the UK, and it is the UK constitutional settlement that matters in that regard.

Under Belgian law, in an area of devolved competence the devolved body has the right to negotiate agreements up to and including international agreements. That is interesting, because it is not just about the arrangement with the Council of Ministers.

Premiers in Canada are considering whether there should be a formal mechanism with the federal state that allows the devolved bodies to negotiate, including in international negotiations. Such an approach is not unusual in the international or European contexts; it is simply a case of the UK's housekeeping and its decision on its constitutional settlement.

The Convener: Lord Wallace was maybe a bit of a visionary when he proposed a series of amendments in 1997-98. He thought that such an approach was natural.

Hanzala Malik: I want to tidy up my thoughts on the issue. Do the witnesses agree that we should have a formal position whereby we have the right to attend and indeed negotiate, where necessary? It is not a matter of supporting the status quo; we want to ensure that attendance is a right. I am keen to establish that the advice is that we want to ensure that there is attendance from the Scottish Parliament and that we can make a contribution as and when we need to do so. We would also have a choice on whether to attend, as everyone else has. Am I clear on that? Both witnesses are nodding, which is helpful.

Aileen McLeod: I reiterate the point that Annabelle Ewing made. All that the Scottish Government is seeking to do is to ensure that it enjoys the same access to EU discussions as is enjoyed by comparable legislatures across the EU.

We should remember that before devolution there were no constraints on the attendance of Scottish Office ministers at meetings of the Council of Ministers at which matters of importance to Scotland were being discussed. Indeed, because of their expertise in the policy areas under review and the significance of those areas to the people of Scotland, Scottish ministers routinely attended Council meetings and frequently led the UK delegation, which was a lot stronger because of the Scottish input.

Professor Cram: That is an interesting point. It is not unusual for a body to want a voice in negotiations that affect it. This week has been interesting because of the petition by the UK Government to be involved in the euro zone negotiations. The UK chose not to be involved in that area, yet we know that it affects deeply developments in the UK's business and economy. It is natural to want to be involved, and I do not see any distinction between the pre-devolution situation in which there was involvement in matters that affected Scotland and the post-devolution situation in which it is a matter of statutory devolved competence.

Professor Keating: Nevertheless, I reiterate the point about your needing to select where you are going to intervene. Make sure that you develop the right policy capacity to intervene effectively, otherwise you could disperse your energy in trying to be everywhere and not make an impact.

The Convener: We have exhausted our questions. Thank you for your evidence, which will help to inform how we move forward on the issue.

Jamie McGrigor: Am I too late to ask a final question?

The Convener: Be very quick.

Jamie McGrigor: It is for Professor Keating. Are you saying that it would be relatively straightforward to put on a statutory basis the Scottish ministers' attendance at negotiations but not the extent to which they could participate? You talked about putting something in an amendment that would not be legally enforceable but that would allow them to speak if it seemed important. Surely, that is what happens at the moment. Do you want to change that?

Professor Keating: I am saying that a problem with the procedure at the Council of Ministers is not something that legislation can control. Above all, it is a matter of political will and accommodation. Matters of procedure belong in the memorandum of understanding rather than legislation—that is the distinction that I am making. I want things put in legislation that are clear and unambiguous and that can be enforced; things that are not should be somewhere else. You would discredit the law by trying to put too much into the law.

Jamie McGrigor: I take your point.

The Convener: The point is well made. We should not be victims of individual personalities in some cases.

I thank you for your evidence and look forward to having you back at the committee again.

I suspend the meeting briefly to allow our witnesses to leave the committee table.

15:53

Meeting suspended.

15:53

On resuming—

European Commission Work Programme (Priorities)

The Convener: Agenda item 3 is consideration of the criteria that will inform the annual selection of the Parliament's European priorities. Members may recall that we considered the draft criteria at a recent business planning day. We have incorporated some amendments that Annabelle Ewing suggested, which are contained in the paper that members have before them today. I ask the committee to note the paper and agree it, as we are advised to do.

Members *indicated agreement.*

The Convener: The paper will be published on the committee's web page on the Parliament's new website.

Aileen McLeod: I have a point on the bullet point entitled "Impact on Scotland". It states:

"Many EU issues have a significant policy/political impact upon Scotland."

Is there any chance that we could insert the word "economic"?

The Convener: Okay. Is everybody happy with that?

Members *indicated agreement.*

The Convener: The amended version will be published on the website.

"Brussels Bulletin"

15:54

The Convener: Agenda item 4 is the "Brussels Bulletin", which is compiled regularly by Ian Duncan. Do members have any comments on it?

Annabelle Ewing: I want to ask about the last major point on the common sales law. I see that the matter is at the stage of a draft regulation. Does Ian Duncan have any intelligence on how likely it is that other member states will ever agree to it, because it will require unanimity, will it not?

Ian Duncan (Clerk): That is a fair point. The UK does not like it and a number of other member states do not like it either, because they see it as creating an unfortunate precedent. The Scottish Government does not fully support it either. All that begs the question: will it ever really become law? There is a long way to go, given what we know at the moment. If the member states stick to their current position, it will not become law but, as things move on, they might evolve in a more positive direction. You are absolutely right. At the moment, the answer is no, but in time it might become yes, possibly.

Bill Kidd: On page 3 of the bulletin, under the heading "EU Summit", there is a reference to "A roadmap to stability and growth", which was published on 12 October. The bulletin states that the document

"calls for 'maximising' the €440 billion euro rescue fund".

I spoke to someone involved in banking—which is unusual for me, unless it is about drawing out £100 or something—who said that the amount involved is really €1.3 trillion, that the figure that has been given would underfund the roadmap to recovery and that people are panicking about putting forward as much as is required. Is that correct?

Ian Duncan: That is spot on. What is in the bulletin is yesterday's news. When it was written, it was right but things have moved on. The amount now stands at around the €1 trillion mark. There is even a debate about whether that is adequate, given the instability in Italy. By the time I write the next bulletin, who knows what the figure could be.

Bill Kidd: I just wanted to know whether the figure in the bulletin was the true figure.

Ian Duncan: It was at the time.

Bill Kidd: That is fine.

Hanzala Malik: There is a danger of copycatting by countries that are struggling. They might think that a bail-out would be possible for them too and fast track some of their shortcomings. I am sure that the European Union will have its work cut out to ensure that that does not happen.

Ian Duncan: You are absolutely right. Tomorrow is the big day. A lot of this should be—should be—resolved tomorrow.

The Convener: Hope springs eternal.

Ian Duncan: There is a meeting of the euro zone countries the following day, which should consider the issue. The difficulty that they continue to face is that they are always one step behind, never one step ahead. Until they get to the stage of signing off a process that actually functions and restores some sense of confidence, they will always be behind in the race.

Bill Kidd: Thanks.

Jamie McGrigor: Thank you very much for all the stuff, Ian; there is plenty of detail there. On the CAP, what is the next move? Thus far the proposals have not been warmly received by anyone. Is it the NFU Scotland that we are speaking to on 7 November?

Ian Duncan: In your other committee?

Jamie McGrigor: I am sorry, where is that happening? Maybe I have made a mistake.

Ian Duncan: Sorry, did you say "we" meaning—

Jamie McGrigor: Sorry. The agriculture committee is taking evidence. What is the next step in Europe on this? When do they listen to what everyone is saying?

Ian Duncan: The process has now begun. The draft documents—draft legislation—have been launched, so two things will begin to happen, all but simultaneously. The European Parliament will begin to consider them in the agriculture committee, which will lead on this, as you would expect. At the same time, the member states will begin to consider them in working groups, too. The member states first examined them at a political level in Council just the other day, to see whether they felt that they were going in the right direction. At the moment, nobody is happy with the draft legislation, but no one is unhappy with it for the same reasons, if that makes sense. The negotiations will be interesting because everyone is unhappy about different things and the negotiations will be on different points.

As for the next stage, the Parliament will carry out a series of evidence sessions and gather information to consider the issue. At the same time, the working groups will begin to consider the pinchpoints between the member states to see whether compromise or agreement can be reached. They will go backwards and forwards as they move towards the first reading in the Parliament and a sign-off, if they can get it, in the Council. If they cannot, there will be a second

stage up until the second reading in the Parliament and so on, up to the point when the bell rings and something has to be done before time runs out.

16:00

The Convener: For the record, that will be the European Parliament. We are getting our Parliaments mixed up here—Jamie, you thought it was our committee, didn't you?

Jamie McGrigor: Well, Ian Duncan said the agriculture committee, but does the agriculture committee here not do something about it?

The Convener: The Rural Affairs, Climate Change and Environment Committee.

Annabelle Ewing: Yes, we do—we are. Would you like to come along?

Aileen McLeod: There is an invitation.

Jamie McGrigor: When are you doing that?

Annabelle Ewing: Do you know the date, Aileen? You should check with the clerks, because they keep the paperwork.

Jamie McGrigor: I can check.

I am sorry, I made a mistake. I thought it was our agriculture committee.

Ian Duncan: I think the NFU has been invited to give evidence to the European agriculture committee and also to the Scottish Parliament Rural Affairs, Climate Change and Environment Committee.

Aileen McLeod: I was going to ask a quick question to do with regional policy. Obviously, the publication of the Commission's proposals for the European structural fund is hugely significant for Scotland. I wonder whether we are any clearer about the timetabling of consideration in the European Parliament and about what the Scottish Government is doing.

Ian Duncan: The position is becoming clearer. As far as I am aware, the scheduling has not been completed inside the Parliament, but I think Alyn Smith might be able to help us in that regard. It might be worth while my having a dialogue with Alyn Smith to take that forward. I was speaking to the Scottish Government about this and it is doing something, but it is not ready to tell us what that is yet. It is beginning the process. Iain McIver is also writing a paper, which will be brought to a future committee meeting—the next one, I think—[*Interruption.*] No, the one on 15 November. Today's update is a starter for 10 to give you the bones of what is happening. Panic set in there.

Annabelle Ewing: I see that.

Ian Duncan: The next paper will contain the fully fledged detail that will allow us to make decisions. We spoke again about the round-table discussions that the committee would have and we were planning to do one on structural funds, cohesion funds and so on. That is likely to be at the meeting on 13 December, when we can move things forward.

The Convener: May I thank Ian Duncan? We find the "Brussels Bulletin" hugely helpful in keeping track of things, although in some cases by the time it has gone to print it is old news. May I ask members whether they are content to send the bulletin to our other committees for their consideration?

Members *indicated agreement.*

The Convener: We previously agreed to take agenda item 5 in private, so I thank members of the public for their attendance. We will clear the public gallery and move into private session.

16:03

Meeting continued in private until 16:33.

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