The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SCOTLAND BILL COMMITTEE

Tuesday 8 November 2011

Session 4

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SCOTLAND BILL COMMITTEE
10th Meeting 2011, Session 4

CONVENER

*Linda Fabiani (East Kilbride) (SNP)

DEPUTY CONVENER

*James Kelly (Rutherglen) (Lab)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Nigel Don (Angus North and Mearns) (SNP)
*Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP)
*Alison Johnstone (Lothian) (Green)
*John Mason (Glasgow Shettleston) (SNP)
*Stewart Maxwell (West Scotland) (SNP)
*Joan McAlpine (South Scotland) (SNP)
*David McLetchie (Lothian) (Con)
*Willie Rennie (Mid Scotland and Fife) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Chris Bronsdon (Scottish European Green Energy Centre)
Professor Rosa Greaves (University of Glasgow)
Dr Graham Gudgin (Northern Ireland Economic Reform Group)
Nigel Miller (NFU Scotland)
Professor Andrew Scott (University of Edinburgh)
Alastair Sutton
Dr Alex Wright (University of Dundee)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 1

Scottish Parliament

Scotland Bill Committee

Tuesday 8 November 2011

[The Convener *opened the meeting at 14:30*]

Scotland Bill

The Convener (Linda Fabiani): Good afternoon everyone, and welcome to the 10th meeting of the Scotland Bill Committee in session 4. I remind all those who are present, including members, to turn off their mobile phones and BlackBerrys as they can interfere with the sound system, even when they are switched to silent.

I have apologies from Nigel Don for his late arrival. He is at another committee at the moment.

I welcome our first panel: Professor Andrew Scott from the University of Edinburgh; and Dr Alex Wright from the University of Dundee. I invite Professor Scott and Dr Wright to make short opening statements before we move to questions.

Professor Andrew Scott (University of Edinburgh): The set of issues that we are discussing today are fairly normal issues that have faced many national and sub-central Governments over the years, and they have been resolved in various ways in different places. The point is that there is no uniform resolution to those issues. It is up to individual member states to find their way around them, and many have done so successfully.

The two points that I make in my paper are simple. The first is a fairly straightforward constitutional proposition: when the European Union legislates, Parliaments lose legislative authority, not Governments. When the European Union legislates on matters that affect this Parliament, this Parliament loses powers. Of course, the EU legislates on many issues that are devolved to the Parliament.

In my view at least, as a matter of good constitutional practice, the Parliament, which is losing prerogatives to the European level, should have a minister whom they can hold to account. That would require the minister to attend the relevant meetings at which legislative prerogatives were being discussed. As a matter of good constitutional governance, the idea that a Scottish minister should have the right to attend Council meetings—and working group meetings further down the scale—is very important.

My second point is the practical argument that when Governments go into Council meetings to negotiate, they do not make a simple proposition about what they want and where the red lines are; they negotiate. On many issues, when sub-central legislative competences are being affected, the knowledge might lie with the sub-central Government rather than the central Government. As a matter of good practice, value would be added by sub-central Government representation.

Those are the two basic points I have set out in the short paper that I submitted. I am happy to discuss them further.

Dr Alex Wright (University of Dundee): I have three angles. First, there is a symbolic issue. It is symbolically good for a minister from the Scottish Government to attend the Council of Ministers. It is also symbolic in another sense. From the United Kingdom perspective, it indicates that the devolution settlement has matured, and it looks quite good if the UK allows and enables a sub-central Government to attend the Council of Ministers automatically.

I echo Drew Scott's point about the practicalities of having a minister at the Council in on-going negotiations. I was trying to think of an example for the committee, and the one that I found happened before devolution. One of the criteria for objective 5b funding was low population density. The issue came before the Council of Ministers in the early 1990s and it mattered a great deal to the then Borders Regional Council partnership to get low population density fairly high up the list of criteria. At the time, UK ministers dealt with that, but that was when we did not have a devolved Government with a separate political Administration. In such a scenario, I can see that there might be an advantage to having a Scottish minister present when there is a specifically Scottish issue that matters only to Scotland.

I also echo Drew Scott's point about accountability. The idea that comes to my mind is that if ministers have an automatic right to attend the Council, presumably they will not grandstand because they will not want to waste time going there if there is no point. If they go, ministers will be accountable to Parliament for what they are going to do and what position they are going to take.

I included an appendix with my submission that refers to some Government files going back to 1967 that are now open. From those files, it is quite apparent that civil servants in 1967 were extremely keen for the Scottish Office to take a leading role in Europe. We are talking about an idea that has a 44-year pedigree—it is not necessarily a shiny, bright new idea; it has been lurking in the background for some time.

The Convener: Thank you. I will open the meeting up to questions. Before everyone rushes in, I will ask a couple myself.

Dr Wright, what you said about the views of the Scottish Office way back in the 1960s was interesting. It was also interesting to note that when the first Scotland Bill was going through the Westminster Parliament in 1997-98, Lord Wallace fought strongly for representation from Scotland to have the backing of legality. Do you feel that that was an opportunity missed?

Dr Wright: Yes, but equally I can understand why that happened. There were terrific sensitivities around in 1997-98. I remember one UK minister referring to devolution as the Balkanisation of Britain—he was Welsh, as it happens. Given all those sensitivities, successive Scottish Administrations adopted a somewhat incremental approach, because it was quite important to be seen to act maturely—as those Administrations have done—to reassure people down in London that devolution would not lead to the breaking up of the UK. That was a big concern at the time.

The Convener: Professor Scott, do you think that that could be put right now under the Scotland Bill?

Professor Scott: Back in 1999, I wrote that I thought that it was a big mistake for the concordats to be nodded through Parliament. As we know, the concordats said that a minister would be welcome to accept an invitation to attend from the UK Government. I wrote that that was not good constitutional practice because of the powers that had been given to the Scottish Parliament. It seemed to me to be a bad situation because it would leave a minister bound by confidentiality through the joint ministerial committee system. When that minister appeared in this Parliament, they would be unable to reflect what was being said on its behalf because they would be bound by confidentiality. That is still the case. It seems to me that we find ourselves in a rather strange situation when the minister who has been asked to represent the Scottish Parliament's legislative powers cannot answer to the Parliament on what he or she has agreed with the UK Government because they are bound by confidentiality—or, at least, the UK Government decides whether they are bound by confidentiality. That seems to me to be a rather anomalous situation.

It is also important to recognise that the EU's extension of competences goes on day and daily. The idea that its competences are extended only when there is a treaty revision is wrong. Every time the Commission issues a directive its competences and the competences of member states are affected. In other words, member states' constitutions are in daily renegotiation, if you like, because every time the European Union passes legislation, a national or a sub-national Parliament cannot legislate in that area thereafter. That is the reality.

Given that we are looking at more powers coming to the Scottish Parliament, which is the ethos of the Scotland Bill as it stands—never mind what may happen in the future—the problem will get worse. As I said, this is not a new problem. Other countries have encountered exactly the same anomalies and have resolved them in their own way satisfactorily. As I said in my submission—I think that the Scottish Parliament information centre briefing makes the same point, helpfully—many of those countries have found ways of allowing sub-state or sub-central Governments to be represented at the Council. They decide when that should happen; they do not necessarily allow such Governments to be represented at every Council. In my view, the decision about when there should be representation should reside with the Government representing the Parliament whose powers are being discussed—if that makes sense.

John Mason (Glasgow Shettleston) (SNP): As I understand it, from what has been said already, each country has its own way of deciding who represents it and its own way of arranging that internally, whether by legislation or just by agreement.

Am I right in saying that Germany has the most rigid system? That appears to be the case, from what I have seen. Is it true that the German system is the clearest and the most black and white? In some cases—on matters such as education, for example—it is always the Länder that do the representation. Do you have any comments on how that works? Is the German system too rigid? Is the Spanish system, at the other end of the scale, too flexible? Do all those systems work?

Dr Wright: It is an interesting subject. I thought that someone might ask me about it, so I read up on it last night, just to be careful, although I have to say that my information is a little dated. When I looked into the issue—my information is other people's research rather than mine, I should add—the thing that struck me about the German Länder was that they had a majority voting system, which avoided one Land being able to control the whole thing. There was a consensus arrangement, if you like.

The Belgian set-up was more complex still—at least, it was when the information that I looked at was written. If one of the sub-national entities disagreed with a proposal, they would not proceed with it and would not vote in the Council as Belgium; they would just withdraw from it.

The Spanish situation was slightly different. My understanding of the Spanish situation is that it tended to be resolved politically, through the parties, rather than through formal intergovernmental mechanisms. At the time

covered by the information that I was reading up on, my understanding is that that was because the Spanish Government was not that keen on direct representation in the Council. There was not a full federalised system then. The material that I read was about six or seven years old, so I must attach a caveat. I do not want to upset anyone from Spain by misleading the committee.

Professor Scott: It depends what is meant by, "Do the systems work?" By what criteria do we establish whether they work?

The answer is that the system works in so far as the sub-central Governments in those countries are content with the way in which they are represented. Mr Mason is right that Germany has the most formalised arrangement. The constitution sets out what the division of competences will be. The difficulty that Germany had, which is a difficulty that all countries with quasi-federal or federal systems have, is that when a competence is devolved—in our case, to this Parliament—that competence reverts back to the member state Government—in this case, Westminster—when it is discussed in an EU legislative context. That is essentially what happens, which creates an anomaly.

14:45

Do the systems work in the sense that the struggles, tensions or anomalies have been resolved in each of the countries in which they have come to the surface? Austria is another example. The systems work, as things have been resolved. The system in Spain is very asymmetric, as it would be in the UK under what has been proposed, but it works in Spain.

Does that lead to better representation of issues from the jurisdiction whence the minister comes? I think that it does, but it is extremely difficult to find empirical evidence of that, because we do not have the counterfactual evidence. We do not know what would have happened if the German Länder had not been represented at the table. However, provision has been made in countries in which there is a clear division of competences between central and sub-central Governments, and we are in the business of catching up with that. I do not see anything terribly unusual about being in the business of catching up or anything terribly controversial in what has been proposed, but I know that some people think otherwise for other reasons. I find the proposal constitutionally good practice.

John Mason: I quite like the idea of formalising the whole system a bit more; it would then be a bit less arbitrary. I understand that, in the German system, there are three subjects—one of which is education—on which the Länder take the lead. Therefore, they have a stronger voice in those areas, but they are perhaps excluded from other areas. In our case, if we wanted to be stronger in fisheries and justice, say, I would not like us to be excluded from all the other areas that we might want to consider. Is that a danger if the system becomes too formalised?

Professor Scott: According to the letter of the concordat, the joint ministerial committee on Europe is the forum in which the UK Government will talk to the devolveds about reserved matters that impact on them, and the devolveds will talk about devolved matters that impact on the UK Government. It is entirely a matter of where the JMC goes.

I do not see the question as being an either/or question. Particularly when many things are happening in the UK Government relating to Europe that seem to me to be potentially incredibly important to all of us—there are issues relating to taking powers back from Europe, for example—it seems to me that the JMC must continue as that forum, notwithstanding any changes. I do not think that a devolved Government having a seat at the table to discuss culture or education means that it should not have a seat with the UK Government to discuss foreign policy or security matters or, much more important, matters that relate to the UK's position in the European Union. It seems to me that the debate about that is the most prominent debate that is about to be unleashed, unlocked or triggered—however one wants to describe it—in the UK Government. One would not want to see any of the devolveds not having an interest in that huge question. We know that it is very alive in Whitehall. One would not want the UK Government to take decisions about the repatriation of powers, if that is the right way to put it. I presume that one would expect it to continue to discuss that with the devolveds within the JMC machinery.

As I said, I do not see the question as being an either/or question.

John Mason: Does the JMC machinery need to be changed?

Professor Scott: That is a different subject, in a sense. I would like to see the JMC machinery opened out so that there was a little bit more transparency, but it is a secondary issue. The JMC machinery reconciles the devolveds' position and the UK Government's position, but the trouble with it is that nobody speaks for England in it. That has always been its defect. There have been occasions when a junior minister for agriculture, for example, has turned up at the JMC to speak for England; the UK Government minister then presides in a sense, and speaks for the whole of the UK. However, the difficulty is who speaks for England. It is not quadrilateral in the strict sense of

the word, but I would like to see it become quadrilateral. I think that it would be better if a presiding Government minister looked after the broader questions.

At the moment, the JMC is very confidential—no one knows what is discussed in it. I return to the original point: that makes it incredibly difficult for a minister from the Scottish Parliament to go to the Scottish Parliament and say, "This is what we've agreed," as they are bound by confidentiality.

I think that both those issues are in play, but I do not think that there is a trade-off.

Dr Wright: I might have misunderstood the point, but my perception of the proposal is that, in relation to any matter that was not reserved, a minister from Scotland could automatically attend and that it would be only where a matter was reserved that the existing practice would be maintained and the consent of the UK Government would be required. In other words, in relation to fisheries, which is devolved, the minister would not be excluded. I assume that that would also apply in the area of justice. I am not a legal expert but Scotland has its own laws, so one assumes that there would not be an exclusion there. I might have misunderstood, of course.

David McLetchie (Lothian) (Con): Professor Scott, you said that every time the EU legislates on a devolved area, it is potentially taking away powers from the Parliament and that a repatriation of powers is accruing powers to the Scottish Parliament, in so far as that repatriation applies to areas that are devolved. Could you clarify that?

You also said, I think, that a minister cannot come to the Parliament and say, "This is what we've agreed in a JMC". However, would it not be more accurate to say that a minister cannot come to the Parliament and say, "This is what we haven't agreed." The ministers, as a whole, can say what the UK position is, and everyone can report back on what they have agreed, because that is the UK position. What they are not allowed to do—which is where the issue of confidentiality presumably kicks in—is say what they have not agreed, because, if that came out, that would undermine the UK negotiating position. Is it not the negative rather than the positive that ministers cannot report on?

Professor Scott: What they cannot report on is the negotiating brief. When Governments go to Brussels, they go with a flexible brief, not an agreed brief. They agree what they can discuss, the issues that are in play and the trade-offs that can be made. That information is simply not available elsewhere. I am not advocating that that should become public. In Denmark, the relevant scrutiny committee of the Parliament is briefed in private by the Danish minister with responsibility for Europe, who tells the committee what the Government's negotiating brief is. The committee holds the Government to account in that regard, and its members are bound by confidentiality. Many years ago, I recommended that that approach be adopted by the Scottish Parliament. There is no reason why a Scottish minister could not come to a committee of the Parliament and say, in private, "I am accountable to you for what we have agreed with the UK Government will be its negotiating brief."

You are right, up to a point. However, Brussels does not work on that basis; it works on the basis of what is in the negotiating brief, which can change over time. It can change at committee level and at ministerial level and it can change within Committee of Permanent Representatives meetings and working groups. It is not as straightforward as the minister saying, "This is what we've agreed." Rather, it is more of a case of, "Here is the negotiating brief."

On your first point, the presumption is that repatriation of powers is a good thing, but I take your point that it is not necessarily a good thing if powers come back to the UK and are not reserved but devolved. It might well be that, in the interests of our welfare, employment and growth, it would be better for those powers to stay in Brussels. I am not convinced that repatriation of powers is, in and of itself, a good thing. Repatriation of the wrong powers could be damaging to the economy, because it could create anomalies that had not been predicted. It would be proper, in such cases, for Governments that were responsible for devolved powers to have some input in discussions of what powers the UK Government is considering devolving because, although it might be the right thing for the Government in London to do politically, it might be the wrong thing to do in economic terms.

Willie Rennie (Mid Scotland and Fife) (LD): On the issue of accountability that you are exploring, do such in-camera sessions happen in Westminster? How does the accountability function there?

Professor Scott: You were there, not me. However, there is, notionally, a scrutiny reserve. The fact is, of course, that that scrutiny reserve does not work. Technically, however, the UK Government cannot go and negotiate on a prospective piece of European law without scrutiny being carried out by the relevant committee. Under certain exceptional circumstances, the Government is empowered to do so, for reasons of time and national security. However, the system does not work.

I concede that there are few scrutiny committees around the EU—there is one in Denmark, of course, and I would say that it works

quite well. However, there is, in Westminster, a clear line of accountability. The Government should not go and represent UK interests unless the scrutiny committee has signed off on that. There is a scrutiny reserve.

Willie Rennie: However, you would say that it does not operate at the level of detail that you have outlined. I have been on one of those committees. It was a fascinating experience, but I would not say that I was particularly enlightened by the process.

Professor Scott: That takes us back to the issue of the empirical reality versus the principle of accountability. You might say that the system in Westminster does not work very well, and I might agree with you, but there is still, nevertheless, a clear line of accountability from the Government to that Parliament. It must come and answer questions on Europe in relation to issues for which it has responsibility. I am not pretending for a minute that that works perfectly, but the process is in place as a constitutional reality. There would be no huge objection to this Parliament having a similar system. In fact, I find it bizarre that a Parliament is happy to see its powers usurped by Brussels—to use really loaded language—and simply to say, "We're actually not interested in what the UK Government is doing with our powers." That is a strange position, and it is not one that many Parliaments in other parts of the EU with the same devolved or federal competencies would be as philosophical about. However, I might simply be making a principled point.

Willie Rennie: Through the JMC arrangements, we could have that kind of system in operation here. However, as Mr McLetchie said, ministers could perhaps not reveal what had not been agreed. I presume that, at Westminster, ministers do not reveal what has not been agreed.

Professor Scott: With respect, the problem does not arise with the JMC. European law is negotiated not in the JMC but in Brussels—in working committees, in COREPER or in the Council. That is where the decisions are made.

We are hooked on this idea that the UK Government goes off to Brussels with a negotiating brief or position and that is the end of the story. That is seldom the case. People in Brussels will tell you that their job is to make things work, not to go in there with a brief that they will not depart from. They will be phoning London and saying, "This ain't going to work. You've got to move your position so we can get an agreement."

If it were the case that a British minister turned up and said, "This is my negotiating brief; that's all I can say," you might have a point, but that is not the way it works.

The Convener: We shall now move on to another subject.

James Kelly (Rutherglen) (Lab): If the Scotland Bill were amended to give enhanced representation to Scotland, where would that leave Wales and Northern Ireland? How could that issue be addressed?

Professor Scott: Is that addressed to me?

James Kelly: To either of you.

The Convener: I think that it is your shot, Dr Wright.

Dr Wright: Thank you. The Scottish Government briefing note that was published in August mentioned the other devolved Administrations and made the point that the matter Mr Kelly raised must be considered. Clearly, if the Scottish Government has the automatic right to have ministers attend the Council, the other devolved Administrations should not be denied that right.

Ultimately, it comes down to a question of what issues matter to those Administrations. Fisheries might not be such a big issue for Wales, so it might not merit a Welsh minister going. For Scotland, it is a big issue, as 70 per cent of the sector is in Scottish waters, so it would merit a minister going.

I am sure that there would be occasions when those Administrations would want to have direct representation as well. It is up to them to articulate that.

James Kelly: Would the procedures need to be set out in legislation, so that people could be clear about how the decision as to who would be the representative on a particular issue would be made and how the various policy agendas that might exist among the devolved countries would be addressed?

Dr Wright: It is a moot point. If one is talking about a minister from a devolved Administration speaking on behalf of the UK because the matter concerns an area that is primarily devolved, there would be an issue about divvying up which devolved Administration would be responsible for speaking for everyone else.

If I remember correctly, there is an ad hoc arrangement in Belgium whereby each Administration takes its turn. My feeling is that, if an issue matters primarily to Wales, the Welsh minister would be responsible for articulating that view in the Council of Ministers. However, I am not so sure about setting it out in legislative terms. It is a political issue. I will duck that one and pass the ball back to you guys. I am not sure that legislation would be necessary.

15:00

James Kelly: You have mentioned the Belgian example. Do you have any other examples of where that approach has worked effectively or where there has been conflict?

Dr Wright: The feeling that I got from the material on Belgium that I read is that, given the different actors involved—there are the lingual communities as well as the territorial communities—it proved quite complex to come to a position. At the time that I was reading about, the Belgians were trying to refine the structure, which was an extremely complicated process. I do not think that we have those complications here because, although we have a lingual community in Scotland, we do not have it in the political sense that they have it in Belgium. For us, the issues are rather more clear cut and divided along functional lines—for example, fishing has been mentioned as a Scottish interest.

Professor Scott: There is no possibility of any sub-central Government having its own line, nor would that be desirable. That is not possible in the European Union and it would undermine the entire UK position. We have never seen any example of a sub-central Government in any country grandstanding in the Council. It would undermine the entire negotiating position of the member state were a sub-central Government to take a different line in public—that would be unacceptable.

We need to look at what legislative competences the Welsh Assembly and the Northern Ireland Assembly have. I take the point, but the obvious response is to ask whether a sub-central Government would have either the resources or the interest to attend every meeting of the Council, even when nothing of direct interest to it was being discussed. The public would get fed up with that, and I do not think that ministers have that amount of time to play with, although they would go along when there was definitely value to be added. For example, there is only one jurisdiction in the UK where salmon farming works and that is up here. Before devolution, it was always the Scottish Office ministers who represented the UK at meetings on salmon farming because they were the ones who knew about salmon farming. It made sense for the Scottish Office ministers to attend in other instances, too, because they were the people who had the information and the technical expertise to negotiate.

I do not think that it would work or be desirable for a Government to turn up at every meeting. Some of the difficulties about who should go and whether there are enough seats around the table would, therefore, take care of themselves because Governments do not have the time to play around on committees where they do not have an immediate and important interest. My assumption is that this is a facilitating device rather than a mandating device—it would not mandate a Scottish minister to turn up at every meeting of the Council when a devolved issue was being discussed if there was no direct bearing on that devolved issue in their jurisdiction.

The UK line is almost always similar to the Scottish line; we are not living in a world in which the two jurisdictions are at each other's throats. They tend to have the same line, and it would be an exception, as a matter of practice, for a Scottish minister to go; however, it should be provided for if it is deemed necessary.

Alison Johnstone (Lothian) (Green): I would like to revisit briefly the accountability issue. It seems to be the view of both Professor Scott and Dr Wright that the current set-up impacts on ministers' accountability to the Scottish Parliament. In his written submission, Dr Wright suggests that the issue of accountability could be one reason for a statutory basis for attendance at the Council. Are the mechanisms of accountability that are available in the Scottish Parliament fit for purpose?

Professor Scott: Do you mean on the European question?

Alison Johnstone: When ministers come back to Parliament, can Parliament truly be fully informed, confidentiality aside?

Professor Scott: It is difficult and ministers are in an unenviable position. As a practical matter, if the minister comes back and spills the beans, they are cut out of the system. If they do not, they are somehow not telling the Parliament what it needs to know. That is a difficult position for ministers to be in. If they could attend the Council, they could report back directly on what happened and explain to the Parliament how things happened. It is a case of reporting back, and accountability is one of the key principles of the Parliament.

It seems to me that ministers have their hands well and truly tied—by the Parliament, I would add, because the concordats were passed and resolved without debate in October 1999. I watched it happen and I said at the time that it was a mistake because I could not see how a Europe minister could be held to account in any meaningful sense for legislation that affected the prerogatives of this Parliament. That was true then and it is becoming truer. Two things are changing. First, the legislative action of the EU is not getting smaller. Secondly, the Scotland Bill sets out ambitions for more devolution in areas where Europe has a footprint, albeit a soft one.

Alison Johnstone: That is very clear. Thank you.

Dr Wright: There have been problems with accountability. I have followed the European and External Relations Committee from its inception and it has faced quite a big task over the years.

I would look at the issue in another way, by considering it in the context of the people. What struck me when Scottish Office ministers went to Brussels was that they provided a focal point. The case that I recall involved the fishing community and local councils such as Shetland Islands Council. The Scottish Fishermen's Federation would be there outside the Council of Ministers. If a Scottish minister had been there, they would presumably have come out after the meeting and given a briefing to the fishermen, the island councils and so on. There is an indirect element here—it is not just about the Parliament, but about the various groups in society that are affected by what goes on in Brussels. This is a mechanism or a means whereby the relevant minister can provide a direct brief to those people, and that is quite important, too. It is a softer form of accountability, but it was inherent in the work of the consultative steering group as regards accessibility and engagement with the people of Scotland.

The Convener: Can I go back—[*Interruption*.] Sorry, Mr McLetchie, did you have something to say, or are you just waving at me?

David McLetchie: I was hoping to ask some questions, but do you want to follow up on that issue specifically?

The Convener: No, no, carry on.

David McLetchie: Thank you very much.

I am interested in the negotiating briefs that we talked about earlier. I thank the panellists for explaining them, but I do not quite follow one point. If you negotiate the brief and the position in the JMC and there is consideration of a range of possibilities for what might be accepted, the concessions that might be made and so on, it does not make an awful lot of sense to me or seem to be in anyone's interest for that to be disclosed in advance, nor is it necessarily in anybody's interest for it to be disclosed after the event, because if you get the same run of cards again in six months' time, you will have exposed your hand. I do not understand the issue of accountability and negotiating briefs. If you are in negotiation, surely you want to keep your cards to yourself.

Professor Scott: After the event, you might want to come back and ask why an agreement was reached and why the Parliament's prerogatives have been diminished by, for instance, an EU directive on the environment. For example, in the middle of negotiations, another country might throw in an idea about the minimum toxicity of a substance, as countries do in working groups. I stress that we are not talking only about the Council in its full format. As the discussions are pursued, the 27 countries will have 27 different negotiating positions and the negotiator from Britain—the minister—will not say, "Hang on. I have to go back to the JMC and get a new negotiating brief." They will make decisions on the hoof.

The negotiating brief gives a red line and states that certain things cannot be negotiated away, full stop. Of course, if it gets to that point, there will be a mini-crisis or indeed a macro-crisis in the Council. However, the idea that the negotiating brief covers every possible outcome is wrong. It covers the Government's preferred set of outcomes. If someone throws in an alternative proposal, the ministers and officials have to think on their feet and work out what to do in response. They cannot just suspend the meeting.

My argument is that ministers should be there from Parliaments whose powers will be affected by the decision, regardless of the negotiating brief, which by this time, other than the red lines, might have ceased to mean a hell of a lot. It might well be that we want ministers from Scotland to be in the discussions so that somebody can say, "This is what we think about the issue."

David McLetchie: But they would be saying that in a private forum within the UK delegation and not from the negotiating table, because, as we have already agreed—or as I have understood—there is at all times but a single UK negotiating position.

Professor Scott: It is entirely feasible to think up any scenario you wish in which having a Scottish minister in the room does not make a difference, but that does not undermine the central fact that, constitutionally, it is bad practice for them not to be there. I could think up any number of scenarios in which it was essential to have a Scottish minister in the room, and doubtless you could think up any number of scenarios in which that was irrelevant. We could bat that across the table all day. I am happy to respect your judgment, but I do not agree with it and I certainly do not agree that, on the constitutional principle, it represents good governance.

David McLetchie: I do not think that we necessarily disagree. The point is that I accept the logic that the United Kingdom is the member state and there is a single negotiating position that has to be adhered to not just by Her Majesty's Government, but by all the devolved Administrations, because that is the European rule. We cannot change that and nor can the Westminster Government.

Professor Scott: I am not suggesting that we should.

David McLetchie: Exactly. We have to bear in mind the framework within which we are working, which is that there is a UK position and there are only so many UK chairs at any given meeting. Indeed, at some levels, only a single UK representative is allowed in the discussions. That being the case, how could we create in UK law a statutory right for one Administration to take that chair? That does not seem to make sense within the framework of the rules that the European Union—not Her Majesty's Government—lays down.

Professor Scott: There is little point in my trying to persuade you on that.

David McLetchie: No, I want you to address the question. Is it not the case that we are dealing with the matter within the framework of European Union rules, which we cannot change unilaterally?

Professor Scott: As a matter of fact—

David McLetchie: The premise of European Union rules—

The Convener: Professor Scott was attempting to answer your question, if you will let him.

Professor Scott: The treaty permits sub-national Government ministers to represent the member state. It is nothing to do with the European Union that Scotland is not sitting at the table. It is entirely to do with the internal decisions of the UK Government. You may—and you obviously do—support those. I do not, and I do not think that there is much point in debating that any further.

David McLetchie: Can you then explain to me—

The Convener: Wait a minute, Mr McLetchie. I would like Dr Wright to respond to that as well.

Dr Wright: I do not have much response to it, in truth. I would like to come at it a slightly different way. There are issues that matter only to Scotland. The one that comes to mind is the Danish by-catch in 1983, when Hamish Gray, later Lord Gray of Contin, was the Scottish Office minister. He went back and forth to Brussels and the whole issue rumbled on. Because he was at the Council, he had to come back, stand before the Westminster Parliament and explain to Scottish MPs why the outcome was a failure. Admittedly, many other countries were involved, particularly Denmark, but it became deeply embarrassing for Hamish Gray, to the point that it became a priority for the Scottish Office to resolve the matter satisfactorily, because it had gone so high up the political agenda.

I suppose that I am being slightly cowardly, but I think that politics is also a subtle game. The mere fact that somebody attends exerts a latent pressure. I share Professor Scott's view. Under what was article 146, which was inserted by the Maastricht treaty—I know that the numbers changed under the Lisbon treaty—where constitutions so allow it, member states' sub-state Governments can attend Council meetings. The issue is just whether the constitution allows that.

15:15

The arrangements between the member state and the devolved Administrations are up to them. Under a federal constitution in a member state, a sub-state unit will feel that it has certain entitlements. That was certainly found with the German Länder and the Belgian sub-national entities just after the Maastricht treaty. They demanded certain rights and entitlements because they had a federal situation. The approach in the UK is slightly more pragmatic, because we do not have a federal constitution.

David McLetchie: Indeed—the position is more pragmatic. I am interested in how the Scotland Bill can impose a justiciable statutory right—let us be clear that that is what is proposed—on the pragmatic framework. Moreover, how can we confer that statutory right on one devolved Administration? In so doing, we would elbow the other devolved Administrations out of the way, because there are only two UK chairs at meetings of the Council of Ministers, for example. I ask Dr Wright to comment on that.

The Convener: I suggest that Mr McLetchie has made a political point.

David McLetchie: No, I have not.

The Convener: The experts are here to talk about constitutional points.

David McLetchie: The point was not political at all.

The Convener: Well, okay—I will allow the witnesses to answer.

David McLetchie: I asked a practical question about how we can confer the right.

Dr Wright: How many times will a Scottish minister demand a say? We are talking about a minister having the automatic right to be present, which is a really moot point. Years ago, I formally asked the Scotland Office whether ministers had the automatic right to attend. A long delay occurred before I got a letter that said, "No."

Giving people the right to attend does not necessarily mean that they will speak; they merely have the right to be present. Whether a person speaks depends on what the Council is discussing

and—I presume, because I do not know what goes on in the Council—on whether other member states allow people from sub-central Administrations to speak, unless the member state happens to be Belgium—for example, one of the Belgian sub-national entities represents those entities collectively on cultural matters.

David McLetchie: I agree with you about issues such as fishing, which we have discussed—

The Convener: Mr McLetchie, I ask you to speak through the chair. I ask Professor Scott to answer your question and to refresh our memories—I think that his paper talks about other member states that have given sub-national Governments a right.

Professor Scott: That is not in my paper but in the SPICe briefing. It is difficult to trade off our statutory rights against the number of seats round a table. The delegations that go to Council meetings involve more than two individuals, so the number of seats at the table—rather than in the room—is not a binding problem.

The statutory right that seems to be sought is in recognition of the Scottish Parliament's legislative prerogatives, which are far and away more significant than those of the National Assembly for Wales as matters stand. Granted, the Northern Ireland Assembly has more legislative prerogatives than the Welsh Assembly, but it does not have as many as the Scottish Parliament. The solution is asymmetric as a matter of practice.

There is absolutely no reason why the UK Government could not extend to any devolved Administration the right to attend Council meetings if it wished. That is not the same as saying that the devolved Administration would speak on the member state's behalf, although one way round the situation would be simply not to have a UK minister present and to invite the devolveds to represent the member state, for which article 9 C, which was inserted by the Lisbon treaty, provides. If there is a single negotiation line that any minister who is competent so to do can represent, I am not sure why the UK Government must always be present.

My final point is about subsidiarity. Another new development in the Lisbon treaty empowers sub-national Parliaments to say whether they consider subsidiarity to have been violated. That is another reason why it would be helpful and proper if sub-central Government ministers were able to attend the Council.

The number of seats round the table cannot be a limitation on the way in which we conduct our constitutional affairs.

David McLetchie: The number of seats is relevant, because it is determined by the European Union, which determines the number of people who can contribute and, indeed, the idea of the unity of the line.

I have a question that relates to the other devolved Administrations. The Scottish Government's paper on the matter, which was published in August 2011, said that it would need to do further work

"to explore options which would support the proposed amendments"

in tandem with

"the Devolved Administrations and the UK Government."

Is either of the witnesses aware of the positions of the other devolved Administrations on the matter?

Professor Scott: No.

Dr Wright: No.

David McLetchie: Perhaps we will find out when we get replies to our letters, convener.

The Convener: I remind everyone that we have written to the First Ministers of the other devolved Administrations to ask for their views on the matter. We have not yet had responses.

Willie Rennie: There was an implication that Scottish ministers are not currently able to attend the Council of Ministers and are able to influence it only through the JMC. That is not the case; they do attend.

Professor Scott: I am sorry. I did not intend to imply that.

Willie Rennie: Other countries have informal arrangements, as we have discussed. What is your view on how the current informal arrangements on the involvement of the Scottish ministers in decisions, as given a wee bit of a refresher by the Foreign Secretary last July, are working?

Professor Scott: I do not have any up-to-date empirical evidence. I have not studied the new position. As far as one can glean from statements made by ministers with responsibility for Europe in this Parliament, they seem to be working fine.

My argument is not predicated on arrangements not working. It is predicated on two other points, which are in my written submission. I have heard nothing in public or private to suggest that the arrangements are not working, nor have I done any research that would suggest that. However, that brings us back to the question of what we mean when we say that arrangements are working or not working. If there is no public dispute—and there has been none since 1999—they are working.

Dr Wright: Only one case came to mind, which I highlighted in my written evidence. It relates to

the fisheries council and the Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead. That is the only instance that I have, and I have been microtracking the issue for about 15 years. It is not a high-profile matter.

The Convener: I draw Mr Rennie's attention to the SPICe briefing, which details times that requests have been made and refused.

Willie Rennie: I have seen that.

John Mason: It struck me that Mr McLetchie's questions came from a legalistic point of view. Am I right in saying that one of the arguments that the witnesses make for formalising the arrangements a bit more is that it would improve some of the softer aspects and result in better communication and understanding? If the Parliament and Scottish fishermen understood better why Luxembourg was taking a certain angle or why eastern European countries that do not have fisheries were arguing the way that they were, would it help us to know what was going on and help us to advance our agenda in the future?

Dr Wright: Yes. I also take on board David McLetchie's point about the release of confidential information that could be damaging to UK interests. Clearly, if we are going to pursue a particular line of negotiation, to leak it in advance to other countries would completely undermine our position. Equally, if that were to happen retrospectively, it could undermine action in the future.

On the wider issue—the softer issue—it is a precious point. A group of us are studying the Parliament and considering how the consultative steering group principles are applied in practice. It is important to take opportunities to up your engagement with practitioners. That is perhaps one vehicle for doing that, albeit informally and in a soft way.

The Convener: Mr McLetchie has riled those on the other side of the table, so I will allow one question from Ms McAlpine.

Joan McAlpine (South Scotland) (SNP): I want to get away from the technicalities and go back to the first principles about what is best for Scotland. In his paper and earlier in the meeting, Professor Scott made a point about the power of the national UK Government to negotiate on devolved competences in Europe. Dr Cram made a similar point in her submission. She said that, since the original Scotland Bill was drawn up, large areas of devolved responsibility have been negotiated away to Brussels and that that was a significant shift. She described the issue as

"the West Lothian Question in reverse",

in that the state, which does not have competence, negotiates that competence away and makes decisions on it. Do you agree that the issue is on that scale of significance?

Professor Scott: Absolutely. It is strange that there is angst and agony in this Parliament over legislative consent motions when Westminster is going to legislate on something that is devolved, yet there seems to be a complete lack of interest when Europe is about to legislate on something that has been devolved. That is a strange anomaly. Frankly—I was going to say that this is off the record but, obviously, it is not—we can trust the Westminster Parliament in large measure, but that might not be true of other Parliaments.

That relaxed approach is extraordinary when the European Union legislates every day in ways that affect the powers of this Parliament significantly. There seems to be a "Who cares?" approach. What I am trying to say is that that is not appropriate. Other subnational Parliaments have recognised the anomaly and have taken steps to address it. I agree with Laura Cram that it is a significant anomaly. It is not something that happens once in a blue moon—it happens every day. If the Westminster Parliament was as muscular in taking away the legislative prerogatives of this Parliament as the European Parliament is, there would be a song and dance about it, to put it mildly.

Joan McAlpine: Last week, in evidence to the committee, Alan Trench raised a point about clause 27 of the bill, which gives the UK Government the right to enter into international obligations that affect devolved areas without consulting the Scottish Parliament and without the Scottish Parliament's permission. That seems to be a widening of the issue into huge areas.

Professor Scott: I do not think that the issue arises by wilful intent. I do not ascribe motive to it. Europe has ducked beneath the radar in Scotland for many years. Some of us, including Alex Wright, have been trumpeting the issue for many years. It is not done wilfully; it is simply neglect. An opportunity has arisen to close some of the constitutional loopholes, as I call them. In my view, that opportunity should be taken.

The Convener: With the final question, I return more or less to where we started the discussion. Dr Wright talked in his submission and earlier about the symbolism of sitting at the top table in Europe. I seek your views on that symbolism. We have heard that the main decisions are taken by the wider delegation. There are also the Commission working groups and the working groups in the lead-up to the formal and informal meetings of the Council. Is it your view that, putting in statute the right of representation at the top table, with all the symbolism that goes with that, would ensure that we had a proper place in

the various groups, delegations and working parties that make the big decisions?

15:30

Dr Wright: Yes, I think so. It is a recognition of entitlement. Successive devolved Administrations in Scotland under different parties have played the game and respected the ground rules as set out in the memorandum of understanding. When I discussed that with my students last week, we could not think of a single high-profile conflict that had broken out between the two tiers of Government on constitutional matters. It has been a strong relationship. Therefore, it is no bad thing to have that symbolic entitlement, because the Government here has acted extremely responsibly from the word go. It is important. As I said in my opening comments, it would be indicative of the UK and a symbol that the devolution settlement in the UK has been a success. My understanding is that the Foreign and Commonwealth Office is keen to demonstrate the success of devolution in the UK. That is where my comments on symbolism were coming from.

Professor Scott: I do not know about that. I am not big on symbolism. There are many reasons why that representation would be useful for the UK delegation and for the Scottish Government. I agree with Alex Wright that, by and large, the UK and Scottish Governments take a similar view on most things and that there is no place at the Council for that to fall out. If constitutional governance is symbolism, I am a big fan. It is important that this Parliament is represented at that table, because big decisions are being made. However, I do not think that the issue is about symbolism; it is about something much more important: the proper representation of this Parliament in places where its legislative prerogatives could be undermined.

The Convener: What about the Council and Commission working groups?

Professor Scott: The decisions that are taken through the comitology procedure, which is the equivalent of the statutory instrument procedure, are extraordinarily important and hugely significant. We should pay more attention to engagement at that level in the European legislative process than we do to the symbolism of sitting at a table. I would like a ramping up of engagement in a range of areas. I would be happy to go through, at some point, all the committees under the old comitology procedure—it will be reformed, but it will still work in a similar way—the Council or Commission working groups and the regulatory working groups. I do not think that it is controversial to say that Europe is a regulated state. All Governments must be at the table when the regulations are being made.

The issue is not about symbolism; it is about day-to-day working, good governance and ensuring that the legislation and the details—the statutory instruments—reflect the various interests across the many jurisdictions of the 27 member states, some of which are within those states.

The Convener: Thank you very much for laying out what is constitutionally possible. It is now up to politicians to decide what they want to do within that. Your attendance is much appreciated.

15:33

Meeting suspended.

15:38

On resuming—

The Convener: I welcome our second panel of witnesses. We have Nigel Miller, who is the president of NFU Scotland, and Chris Bronsdon, who is the chief executive officer of the Scottish European Green Energy Centre. I am very pleased to have you here. I invite you to make short opening statements.

Nigel Miller (NFU Scotland): Thank you very much. I appreciate being asked along today. Europe is central to our industry and our organisation's whole being. For those of you who are not touched, or blighted, by NFU Scotland, I say that we have almost 9,000 members, who are working farmers or crofters. We cover the whole of Scotland. Agriculture accounts for almost 2 per cent of Scotland's economy. In Orkney, that figure is up to 11 per cent and in my area of the Borders and Dumfries and Galloway it is around, or just under, 10 per cent. It is significant in many parts of Scotland.

Europe has a profound effect on what we do in day-to-day terms. It affects us virtually every hour of the day, through legislation that determines who can spray crops and how they can do it, journey times for the transport of animals and the number of square metres that a hen or a pig requires in transport or in a building. There is prescriptive legislation from Europe, but there is also a significant support mechanism, which I guess is the one truly common plank of European policy. That support accounts for almost half of the budget and drives something like £550 million into the Scottish economy through agriculture every year. There is big spend in Scotland, which is very significant for us. That is why we are so pleased to be here.

In many ways, devolution has been a fantastic success story for the rural economy and agriculture. Every Government that we have had since the start of devolution has delivered for the rural sector, through openness of government,

ease of access to ministers and officials, the stakeholder environment and sensitivities to food production and the rural economy. That has been of real value to us and we have had a very good deal. Special mechanisms have been put in place to support agriculture. We have a robust less-favoured area support system, which, for a country with more than 85 per cent of its land area in LFA designation, is crucial. We are very different from the rest of the UK in that regard. We have different approaches to health and to our food policy.

There is an almost strange disconnection between that very integrated Scottish approach to agriculture and the fact that, in European terms, it is the UK minister who negotiates for Scotland. The relationship between the UK minister and Scotland is quite a strange one. Sometimes there has been a real divergence of approach and of policy. Way back, Nick Brown addressed the issue. He had a system whereby he chaired all the devolveds as the UK minister and appointed his deputy as the English minister. There was therefore a balanced forum in which to try to get a UK policy. That sort of mechanism has now failed—it no longer works. We have concerns about how that linkage works. We would like to see that sort of soft mechanism put back in place. We would be very keen to see the Scottish minister lead on certain areas. As 60 per cent of LFA land in the UK is in Scotland, it would make perfect sense for a Scottish minister to take the lead on LFA issues. There are other areas where that might be appropriate, too. Our confidence in the process would certainly be greatly increased by a Scottish minister or cabinet secretary being in the room.

That is where we are coming from. I hope that that gives us a useful baseline.

The Convener: Thank you very much. I invite Mr Bronsdon to make an opening statement. If the clerk would like to put Mr Bronsdon's name-plate in front of him, that would be helpful for anyone tuning in.

Chris Bronsdon (Scottish European Green Energy Centre): I thank the committee for its invitation to speak today. I offer brief apologies from my chairman, who was originally invited to attend but who is on business in Australia at the moment—a nice place to be.

It is not rocket science to say that energy underpins everybody's daily lives and that, at the moment, across Scotland, the UK, Europe and the wider world, there are significant challenges to repower ageing generation and bring on board more low-carbon sources of energy and ensure that we can connect effectively across market boundaries and different countries. We have choices to make about how we deliver on those commitments within a low-carbon agenda.

From our perspective, Europe is fairly critical in that process. Not only does it drive the legislative position that member states work to in the regulatory process; it is key to driving forward innovation, thinking about new ideas and supporting new technology. It is fundamental to supporting different areas of the research agenda right the way through to pre-commercial deployments. That is the area that I will focus on in telling you what we do and how it can reflect into the European space.

15:45

For those of you who are not aware of our organisation, I say that we were established in 2009 to deliver innovative low-carbon energy projects that bring benefits both to Scotland and to European partners. We are structured on a thematic basis and work in the areas of marine energy, offshore wind, renewable heat, smart grids to super grids, and carbon capture and storage. It is quite a wide remit. We are a very small organisation, with only seven people, but we have a balance of engineering, energy utility and finance experience. We are supported through the Scottish Government, the European regional development funds, Scottish Enterprise, Highlands and Islands Enterprise, Scottish Power and Scottish and Southern Energy, so we have a useful set of backers, which ensures that there is a high-level approach to what we engage in.

The approach that we take is to explore a range of funding options within Scottish, UK and EU public funding sectors and through more traditional routes in private equity and debt finance. However, our key focus is to engage with Commission stakeholders—primarily in Brussels, but we also work more widely—to support the development of future funding calls and to understand where existing funding calls may lie. We look at what is coming up, at the balance of technology spreads and at particular issues where we believe Scotland may have strengths that we can bring to bear in solving some of the problems. Within that, we work with stakeholders in Scotland and across the EU to form partnerships and consortia that can deliver against the requirements of the funding calls.

It is not rocket science. It goes back to when we were all at school: you read the exam question around what the finance requires, you look at the solutions that can bring forward a demonstration against that, then you build appropriate consortia. They are sometimes unlikely consortia; we work with a mix of traditional utilities, small and medium-sized enterprises and the research community, and we bring in oil and gas skills where we can.

The key innovation in what we do is to identify how the project and its partners can reduce technical risks in order for a project to proceed technically and how it can demonstrate that it will leverage funding to commercially de-risk the project. When you can leverage in European, UK or Scottish support successfully, you can unlock the private capital that sits behind the projects within the companies.

To give you an idea of what we have done in the past two years, I say that we have successfully delivered over €115 million in EU grants to projects in Scotland. If we include the capital expenditure from private companies, that means that we have leveraged more than €350 million in funding, which is a return on the investment of what it costs us to run of 175:1. Hopefully, that is quite a good model, and it gives a gross value added per employee of about €14 million. It is a good model, but the benefit of moving forward is that we are looking at a pipeline of projects and getting access and recognition in Europe. By looking at an effective delivery process, we can increase the delivery on the EU agenda and bring more opportunity to Scotland and our partners in Europe.

The Convener: Thank you very much for that and thank you, too, Mr Bronsdon, for preferring to come here rather than go to Australia—that is much appreciated. I should say at this point that the Scottish Fishermen's Federation would have been an obvious organisation to come to the meeting today, but it sent its apologies, saying that this time of year is particularly busy for it as it is the time of its annual negotiations, which is something that exercises everyone who ends up in Europe.

Stewart Maxwell (West Scotland) (SNP): Good afternoon, gentlemen. I will begin with a general question. Do you believe that the current arrangements for Scottish representation at Council meetings serve Scotland's interests well in your sectors?

Nigel Miller: The negotiations that take place in Europe have fairly broad frameworks. Until now, there has been in those frameworks the possibility of significant manoeuvre to implement a devolved approach in Scotland. The system has delivered until now and has given us scope to get the best outcomes in Scotland. There is more concern, as we move up to the next reform of the common agricultural policy, that there is greater divergence of approach to agricultural policy between Westminster and Scotland, so it may be more difficult to square that circle.

Chris Bronsdon: From the energy perspective, I think that there has been a good working relationship. I know that the minister from Scotland has represented the UK as a whole and that there has been close dialogue, even on matters where there are different views on how to proceed and present a single line on behalf of the UK. More generally, there is benefit to be had from engaging more widely not only in the ministerial process but in the working level groups beneath that, where more effort and more co-ordination on behalf of Scotland will deliver more value in return.

Stewart Maxwell: In your sectors, how effectively is the Scottish viewpoint taken forward when there is a divergence of opinion? Mr Miller mentioned that, going forward, you had some concerns about a divergence of approach on the CAP.

I agree with Mr Bronsdon's point about what happens below ministerial level, on the working groups and so on that we have heard about. In your experience, what occurs when there is a divergence of policy or a difference of opinion? How is the Scottish point of view sustained through any negotiations at a UK level when we disagree with the UK position?

Nigel Miller: In the instance that I highlighted, the UK minister articulated a UK position on CAP reform that was very much an English or a Westminster position, prior to negotiations taking place and prior to any meaningful dialogue with the devolveds. My interpretation is that that has almost compromised the UK's position. It is maybe the case that the UK's negotiating position is rather compromised generally, because it has taken such a strong line on budgetary constraint, which probably does not fit particularly well with other member states. It is also very strongly opposed to direct pillar 1 supports and wants to see all support phased into pillar 2 rural development funding. That is, again, very different from the position of other member states.

That is of particular concern to us given that more than 80 per cent of our producers are in a less favoured area. Our average payment per hectare is about €107, England's is about €270 and Ireland's is about €320. A significant movement out of pillar 1 supports and into pillar 2 funding would mean that a lot of our producers could not viably go on. It gives us some concern when the UK articulates that as its core policy prior to negotiation. We believe that, prior to that policy being articulated, there should have been a forum involving all the devolveds to ensure that the UK policy was, indeed, a UK policy.

Stewart Maxwell: That is very interesting. You indicate that the up-front position of the UK Government has been articulated prior to any discussions or negotiations with the various devolved Governments in the UK, and that that has made the position somewhat inflexible as we go forward, after representations have been made by the various devolved Governments. What is the

solution? Is it, as you seem to suggest, the creation of some sort of forum, which I presume would meet prior to any public statement of the position, or is it a legal right of representation for the Scottish Government and perhaps also the Welsh and Northern Irish Governments?

Nigel Miller: To be fair, that very hardline position was driven by the Treasury rather than the Department for Environment, Food and Rural Affairs.

Stewart Maxwell: It is still the UK position.

Nigel Miller: It is still the UK position and it is still unsatisfactory from our point of view. Under the present circumstances, our view is that a forum system should have been in place.

The Secretary of State for Scotland has a role and he has tried to bridge some of the gaps over the past few months, but we are not in a satisfactory place and, in the long term, if the situation cannot be resolved in a collaborative way between the devolveds and Westminster, some sort of direct representation is required.

Chris Bronsdon: I have been searching my mind for an instance in which there was a difference in view between the UK and Scotland on a position that Europe was taking. In short, I cannot think of one. Because the UK operates as a single electrically connected market, although Scotland has the devolved power to promote renewable energy technologies while other matters are reserved, even creating a stronger market position for Scotland—which has been done previously, and I support that—requires assent from Europe, and the UK has said, "Yes, we will support your application and allow you to do that." It is not even about allowing; it is that the UK has not required the permission level to be set. The UK has said, "This is the process by which it is agreed. You can go and make your case to Europe." On that front, it has worked effectively. From a legislative perspective, I do not think that, outside the energy market, Scotland has taken a different view from the UK. Fundamentally, a lot of it is about the regulated processes relating to pollution and emissions control.

As for areas of promotion, Scotland has made stronger cases than the UK Government may have made on specific energy technologies. We all know that Scotland is leading the UK in delivering on the low-carbon agenda and renewables in particular. Against that background, the UK would be unlikely to say, "We don't want you to go ahead and put in more capacity."

Stewart Maxwell: I accept what you are saying about the UK energy market position as it stands, but there have been some clear and very public disagreements on, for example, carbon capture and storage projects. Also, the tariff that we have to pay to get green energy from the north of Scotland on to the network contrasts with the subsidy that is paid in the south of England. Scotland and England have distinct positions within the energy market.

Chris Bronsdon: Yes, I agree, but that is within the energy market—it is not in a discussion with Europe at present.

Joan McAlpine: I want to pick up on the same point. It has often been commented recently that the Scottish Government and the UK Government are going in opposite directions on energy. The UK Government is going down the nuclear power road for England. I am surprised that you do not think that that will affect your area.

Chris Bronsdon: I will come back to the official positions on that. A previous witness mentioned that the discussion here is about whether you are seated at the top table and present at that level of discussion. At the moment, that is decided through the concordat—the memorandum of understanding. From our perspective, not being present at those top-table discussions is not a barrier to access. For instance, I was able to pick up the phone and arrange a meeting with the director general for energy at a week's notice. We sat down and had an hour-long discussion that covered a range of issues relating to both the opportunity for Scotland and what was happening within the energy market review in the UK. He provided his thoughts on those things. The UK Government is aware that there are different positions and it is more than willing to hear representations.

I return to your question about whether we are diametrically opposed to the UK position. The political position on nuclear power in Scotland is that, while the nuclear power stations are operating, they provide a valuable source of electricity, but the current Administration has taken the political decision not to renew them. In the rest of the UK, a significant proportion of the assets that are closing are either coal fired or nuclear powered, and there are a limited number of routes to bring that on. Ultimately, the market will decide what it can afford to put in. Government policy sets the framework, but it is the utilities that will have to put their hands in their pockets and invest. I do not agree that the two positions are diametrically opposed, but there is a difference, although it is not a difference that is being raised in Europe at the moment.

The Convener: I understand that Stewart Maxwell wants to come back on something that he missed.

16:00

Stewart Maxwell: I missed it, and it has just come to my attention that I did. Mr Bronsdon said that he could not think of an example in the electricity market. Neither could I, but I have now. Surely you remember the serious concerns that were expressed by Scottish and Southern Energy and Scottish Power about the EU proposals to unbundle the electricity market. Electricity generation, the grid and the companies are not vertically integrated in England but they are in Scotland. There was clearly a strong difference of opinion about the EU proposals, and there was a clear difference between what happened in Scotland and what happened in the rest of the UK on a European matter to do with energy. That takes me back to my original question about what the position should be as regards Scottish representation and how we are best represented in this area.

Chris Bronsdon: Yes, you are correct that concerns were raised. I shall give the abstract: the electricity sector is a very large set of institutions made up of a combination of utilities, engineering companies, finance and so on that is all interlinked and, at the end of the day, when large organisations are already structured for a commercial aim—and vertical integration has provided that before—changes to the regulatory sector have an impact on the business. That is no different whether you are sitting in Scotland or in Slovenia. The issue is that the change in process is deemed to be made for a good reason according to EU policy levels. Fair enough, the position in Scotland was to say, "We feel this could be detrimental to our activity," but businesses have moved forward to implement the business separation and they are still hugely profitable and very successful within the whole UK sector.

Stewart Maxwell: That is not the point I am making and this is not a party-political example. At the time, MEPs of all parties—Scottish MEPs—were arguing from the same position and were saying that Scotland should be given an exemption or some way of not being involved. We have moved on from that point, but surely my point holds good. There was a difference of opinion on the European proposal. I am still trying to get an answer from you on what would be the best outcome for Scottish representation and for how we solve those problems when there is a difference of opinion.

Chris Bronsdon: It is a complex answer, unfortunately. Ultimately, the markets operate best when they are uniform and large, which is one of the aims of European policy on the unbundling of the asset base to separate businesses across the vertically integrated companies. Yes, within that, Scotland could have said that we did not want it and that we wanted to protect our particular area of the market, but that would have created another layer of bureaucracy and process. Investors and the large utility companies end up asking where they can make their best return and that is the issue we see across Europe and across the UK. We have six large companies operating in the UK; only one of them has its head office and corporate registration in the UK, and that is Scottish and Southern Energy. The others are all European utilities.

I am trying to answer your question. We could have made the representation and said that we wanted to keep the market, but I think that we might have lost the investment of the utilities because of their attitude to an open-market position by politically taking a stance and saying that we would keep the structures.

Stewart Maxwell: I think that we are talking at cross purposes. I am trying to get you to address the point about the difference of opinion at that time. I accept that things have moved on and I accept what you are saying about the European market, the companies' headquarters and so on. It was an EU policy and there was a difference of opinion between Scotland and the rest of the UK, because of the type of markets that were operating. Even within the unified UK electricity market, they were operating in a different way. Irrespective of what is right or wrong about profitability and large-scale energy markets, if there is a difference of opinion, how do we resolve it? If the UK has one position and Scotland has another, how do we resolve it, irrespective of the outcome, what the markets might want or anything else?

The Convener: Do you want one last shot at that, Mr Bronsdon?

Chris Bronsdon: I will take one last shot at a response. The position is that there has to be an internal discussion first, but if the positions cannot be moved and if there is agreement on doing so, yes, you would take it to Europe.

Stewart Maxwell: I do not think that that answers it either, to be honest, but we will move on.

The Convener: Would Mr Miller like to have a go?

Nigel Miller: I do not think so.

The Convener: Okay, we will move on.

Willie Rennie: Part of what we are discussing is whether there should be a statutory right for Scottish ministers—and perhaps other devolved Administrations—to be involved or the current voluntary, goodwill arrangements. You both seem to have focused on the need to have proper discussion and debate with all the stakeholders in

advance, before positions are reached. However, I get from you that a lot of that happens already. Do you have a view on whether the arrangements should be statutory, or based on good will and honour?

The Convener: You are an honourable man, Mr Miller.

Nigel Miller: I do not think that anybody has said that before.

If it is going to work, I guess that there has to be buy-in from both sides—there has to be some framework that everybody wants to promote. Therefore the voluntary concept looks good, but my view, and probably the view of the union, is that some sort of statutory backstop, or safety net, is probably desirable to ensure that when those preferable mechanisms fail, there is a route to ensure that interests are represented correctly.

Chris Bronsdon: I concur.

Willie Rennie: That is nice and easy. That is the kind of question that you want to ask, Stewart.

The Convener: What did you say, Mr Bronsdon?

Chris Bronsdon: I said that I agree.

The Convener: Oh, you agree. I thought you said that you did not want to speak. You will have to speak louder.

Chris Bronsdon: Apologies.

Nigel Don (Angus North and Mearns) (SNP): Returning to what Mr Miller said about the common agricultural policy negotiating position, I do not want to make any political capital out of that, but do you have a view on how that could be done better? This gets into a bit more detail about what Mr Rennie was just asking. Could you articulate a framework that would involve Scottish ministers, or whoever, in order to ensure that we do this kind of thing better, please?

Nigel Miller: I do not think that there is a quick fix. Part of the issue is the relationship between the devolved Administrations and Westminster. My view is that Nick Brown's approach, although he was before my time, surprisingly, was correct: if you have a UK minister, he should be a UK minister. We have a rather asymmetric devolution in the UK, with English matters being channelled through Westminster while there are devolved Governments or Assemblies in other parts of the UK. That is not helpful, but given that that is where we are, when UK ministers are dealing with devolved Administrations, there should be a UK minister and some sort of deputy who takes on the role of representing England. There should be an open forum to develop a UK line and those UK lines, at European level, will be quite high-level policy; they will not be particularly detailed and there will be room for a breadth of position that, hopefully, would allow most parts of the UK to function. If that is not being done, the system is failing, so that is the minimum that you should do before setting a policy position.

Nigel Don: Forgive me, but what you have said seems to be so obvious that I am wondering why it has not happened. Where is the failure, from what you have seen, without wanting to go into history? How do we make it better in the future? We have an opportunity here to discuss what we might change, although whether the Westminster Government will let us do so is another matter. I am looking for suggestions on how we can do better in the future what we have obviously not done as well as we could in the past.

Nigel Miller: I am handicapped by the fact that my experience is purely in my own sector.

Nigel Don: Forgive me for interrupting, but I think that that is fine. Agriculture is its own sector, you are here and we are talking about agriculture—you do not need to solve the problems of the rest of the nation.

Nigel Miller: That has not happened previously because the political dynamic has not been collaborative. There has been an overwhelming policy driver in Westminster, which has overwhelmed the wish to create a consensus. If that is the case, the system will fail—that is the reality—but it can be fixed. The system that Nick Brown used looks fine to me, but maybe it is necessary to have a more formal link between the devolveds and Westminster through which positions are arrived at. Maybe things need to be formally set up in such a way that if a devolved wants, it can call to account the UK minister and get an assembly of the devolveds to review policy positions.

Nigel Don: I have one thought on that. The UK minister is in charge—de facto, that is the case—but could we have a mechanism whereby a representative minister from the three devolved nations was present, as well as a fourth minister for England, because the agriculture there is quite different? Would some mechanism that recognises the four constituent parts of the UK be appropriate?

Nigel Miller: Yes.

Nigel Don: In the light of that discussion, which was about farming, does Mr Bronsdon have anything to add on his area?

Chris Bronsdon: When it comes to looking at how we can influence EU negotiations, which was the area that the question covered, I would broadly agree that it makes sense, when there are broad differences in the landscape—whether on energy or agriculture—between the UK and the devolved

Administrations, that there should be a process by which an agreement can be reached on the line that will be taken that gives an equitable position for all.

Broadly speaking, Scotland has played its cards quite well in some of the activity around direct negotiations. We have worked very hard with a range of groups, particularly in the Scottish public sector landscape, to position opportunities in areas in which Scotland has significant strengths. That has been done with the full knowledge and agreement of the UK, but a more formal process might be desirable, especially given the stage that we are at with the European financial framework. I assume that the committee probably knows more about some of this than I do, but the current multiannual financial framework is coming to an end in 2013. The next one is currently under deliberation. We are talking about expenditure of €80 billion across the EU. We should be engaged to ensure that we can promote opportunities that Scotland can benefit from within the UK position.

Alison Johnstone: Does either of you see any particular area in your fields as being a priority that Scottish ministers might focus their activities on in the Council?

Chris Bronsdon: The key issues when it comes to having a considered approach, which I suppose is what you are asking about, are that there needs to be a strategy, there needs to be some co-ordination of those activities in a plan and there needs to be consideration of implementation.

From my perspective, if you start by addressing the implementation issues at the high level in Europe, you tend to get a better hearing. The reason for that is that a lot of the European process, beyond the political aspects, is about how to demonstrate efficient spend of European public funds. In that context, if Scotland can present a case that we have the appropriate project partners, that we are delivering innovative technology and that all of those are delivering on the European aims, there is a strong chance that an award of those funds will follow.

The reason why that comes into play and why we should target it is that projects are located in specific places; they are not virtual activity. When there is a physical location, there is investment in the area, a supply chain develops and there is economic growth in the surrounding area and the supply chain. That is one thing that Scotland can target extremely effectively, but we need to have a strategic approach to identifying which areas are our strengths.

In my opening statement, I mentioned that we have a wide remit and a small number of people. There are opportunities in all of those areas and more. We are currently trying to focus down our activity, because we cannot deliver on everything.

16:15

Nigel Miller: I guess that, for us, the next couple of years in Europe will be dominated by CAP reform. We cannot escape from that.

There are probably three areas in which direct input from the Scottish ministers or the Scottish Government would be useful, one of which is the core area of converging budgets. Because the UK budget is near the EU average, that is not an issue for the UK, but because the budget of Scotland as a region is well below the EU average, it is an area of concern. It impacts not only on direct pillar 1 support, but on our rural development plan, which is probably the worst funded in Europe.

Those budgets will be defined in the future by historic draw-down. Because our historic draw-down has been very low, we are probably moving into the next funding period at a very low level, unless we use the convergence criteria. That is an area in which Scotland is, by all accounts from the Commission, a potential winner, but it may not be explored because the UK Government will not get benefit from it; indeed, it may lose money through Fontainebleau. The minister should definitely be involved in that area.

Because of its LFA designation, Scotland should probably have the lead in considering those issues under pillar 1 and pillar 2. There are mechanisms under the new CAP that the Commission has laid down for coupled support for some of the more fragile areas and for special, specific support for areas of natural handicap. That support might go to the islands—Orkney, for example—as a percentage of the budget. England is very unlikely to use those mechanisms. I think that some people in Westminster would see coupled payments as the work of Satan, but it is probably crucial that we use them in Scotland. Because of our huge land area and very diverse stocking rates, some sort of targeted support is vital if we are going to maintain the fabric of rural communities in the Highlands and Islands.

Those are areas of unique importance to Scotland, and the Department for Environment, Food and Rural Affairs does not really have an interest in them at the moment.

Alison Johnstone: Thank you for those examples.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): I want to follow up on the previous point. The involvement of the Scottish ministers has been discussed. Do you favour the Scottish ministers taking the lead in Council meetings in those areas? Obviously, there is a difference in

being engaged. We know, for example, that the treaty of Lisbon allows sub-state Government ministers to lead state delegations to Council meetings. Examples have been given of where it is hoped that the Scottish ministers would be able to take the lead. Is that correct? Are there other areas in your sector where that would be of benefit to Scotland?

Nigel Miller: Basically, yes. We would be comfortable if a Scottish minister took the lead in those areas. We believe that that would secure Scotland's best interests. There are good reasons why Scotland should take the lead on those issues, and the Scottish ministers are particularly important at other times—probably in some animal health and welfare areas in which Scotland has particular status and has driven things to a higher level than other parts of the UK have. Again, a Scottish minister would be of value to us in such areas.

Chris Bronsdon: I would make the same point. We should consider specific areas in which Scotland can demonstrate strength above and beyond that of the UK. Marine energy is a clear focus. We have the best conditions in Europe for wave and tidal energy, we have the European Marine Energy Centre, and pushing forward with what is required from Europe to help to grow that industry is a definite area of focus. The minister was out with us in Brussels for that very purpose two weeks ago, so a lead was already being taken that the UK Government was aware of. Tomorrow, we will have an event in Brussels on the position of carbon capture and storage. There has been a strong response to that from Commission officials in the directorate-general for climate action, for example. The minister is very aware of the opportunities that exist and is keen to provide support. It comes down to the specifics of the timing of opportunities and the particular projects that we wish to see promoted.

The Convener: Thank you very much for coming to the meeting, gentlemen. It is much appreciated.

I suspend the meeting briefly so that the witnesses can change over.

16:20

Meeting suspended.

16:26

On resuming—

The Convener: I welcome our third panel of witnesses. Thank you very much for coming. Dr Graham Gudgin is from the Northern Ireland economic reform group, and is senior research fellow at the centre for business research at the University of Cambridge. Professor Rosa Greaves is from the University of Glasgow, and Alastair Sutton is adviser to the UK Crown dependencies at Brick Court Chambers.

I apologise to our panel for the rescheduling of the session, which took place at comparatively short notice. Thank you for obliging us by changing your timings.

I invite the witnesses to give us some very short opening statements because I know that there will be a lot of questions during this session. Shall I start with the person on the left or on the right?

Alastair Sutton: I guess that he who has come from furthest away should start. I am the odd man out because I have come from Brussels to be here, and it is a great honour to be invited. Thank you very much indeed. Despite my first name, I am not Scottish, but I have an abode in Perthshire that I value greatly, so it is a great honour and privilege to be with you today to contribute to the debate. I also teach at the University of Edinburgh from time to time.

For a number of years, I have been an adviser to the Crown dependencies in Brussels. I should also point out that I was the legal adviser to Lord Cockfield at the formative time of the single market between 1985 and 1990. I worked in the European Commission for 20 years, but my final job was with Cockfield when we were setting up the single market. At this point, and by way of introduction, I will say only that tax was the most prickly issue that we had to deal with. From what I see today, it is still the most prickly issue, so this could be a very interesting discussion.

Before we start, I have one comment to make about the Crown dependencies. They are constitutionally in a totally different situation from Scotland. However, there might be some lessons to be learned or some analogies to be drawn—some dos and don'ts—from the experience that the dependencies have had of working with the UK Government, particularly during the past eight or nine years when tax has been at the heart of their relationship with the UK, the EU and the Organisation for Economic Co-operation and Development.

16:30

Professor Rosa Greaves (University of Glasgow): I have come from Glasgow, which is the nearest. I am a European competition lawyer and I specialised in that area. My purpose here today is to look at tax with respect to state aid when corporation tax is reduced. It is a particularly interesting time at the moment, as we have had three major cases in the European Court of Justice, starting in 2006 with the Azores case. That suggested that an infra-state or a regional

body with taxation powers under certain very strict conditions may be accepted as the right geographical area to test whether a tax is specific or general. We call that geographic selectivity. Following that case, there was another one involving the Basque Country. All of these cases have long histories. Just now, we are looking at the Gibraltar case, which also started a long time ago. The final judgment in that case will be delivered next Tuesday. Most of us are interested to know whether the European Court of Justice will confirm that there is the possibility of taking a region of a member state as the right geographical area—the right framework—to test whether a tax is selective or general.

Dr Graham Gudgin (Northern Ireland Economic Reform Group): Like my colleagues, I am delighted to be invited to the committee. Thank you. As I am originally from Aberdeen, it is always lovely to be back in Scotland, even this far south. I am now based in Cambridge, but my background, and my locus for being here, is that I was formerly the director of the Northern Ireland Economic Research Centre and adviser to the First Minister on economic affairs. I am also a founder member of the Northern Ireland economic reform group, which has been advising the Secretary of State for Northern Ireland on corporation tax. The group has been negotiating on his behalf with Treasury and Her Majesty's Revenue and Customs officials, which is an often frustrating matter. With colleagues, I am the author of most of the Northern Ireland work that is referred to in the Scottish Government's discussion paper on corporation tax.

The position in Northern Ireland is that negotiations on devolving corporation tax are now quite well advanced, and it looks as though that is going to go ahead. In its most recent form, the idea of devolving corporation tax has been promoted by the secretary of state, Owen Paterson, after having been rejected by the earlier Blair and Brown Governments. The idea of devolving corporation tax is supported by all the Northern Ireland parties and by all the business organisations in Northern Ireland.

Northern Ireland is in a tight economic fix. Economic affairs in Northern Ireland have been fairly tolerable for a number of years mainly because of the very generous regime of investment grants, which is approximately twice as generous there as it is in Scotland. The likelihood is that, under the EU state aid reforms in 2013, the right to make those grants will be taken away completely, leaving Northern Ireland in a difficult position. Corporation tax is the only alternative that most economists working in Northern Ireland can see to fill the gap. The situation in Northern Ireland is quite unlike the situation in Scotland in that respect.

As you will know well, Northern Ireland is close to being the poorest region in the UK. It is about 20 per cent poorer than the UK average and about 15 per cent poorer than Scotland. It has a very large public sector, about half of which is funded from Westminster rather than by Northern Ireland taxpayers. It receives a huge subsidy of something like £4,000 to £5,000 per person—about £20,000 for a couple with two children. It has a very weak private sector, which is much weaker than the private sector in Scotland. Only one plc, UTV, is based in Northern Ireland—when I go back and watch it, it seems very heavily subsidised by Government advertisements—and only two companies are listed even on the smaller stock exchange, the alternative investment market. There are still sporadic violence troubles, and Northern Ireland has a land border with the European country that has by far the most attractive corporation tax regime, the Republic of Ireland.

I will finish by saying two things about the Scottish position. It seems to me that the Scottish position is quite unlike that of Northern Ireland, as Scotland does not have Northern Ireland's weaknesses to anything like the same extent, although Scottish documents usually claim that Scotland's position is weak and that Scotland needs corporation tax. In the UK firmament, Scotland is pretty well an average region—it is just about in the middle. Very few of the Northern Ireland criteria that have persuaded the current coalition to support the devolution of corporation tax to Northern Ireland apply to Scotland.

My information, which I think is very reliable, is that a Tory-led coalition will not devolve corporation tax to Scotland under any circumstances. If Scotland keeps pressing this, it looks like the most likely outcome will be that the coalition will resile from it altogether and Northern Ireland will not get it either, so there is quite a responsibility on the Scottish Government in pursuing this. You could damage Northern Ireland quite a bit. You could also damage Scotland's long-term prospects for getting corporation tax. I do not think that you have any prospect of getting it in the short term but, in the long term, if Northern Ireland has it, the arguments are there to be made; if Northern Ireland does not have it, the arguments are not there to be made.

I am quite concerned—let me put this fairly strongly for effect—that the Scottish Government seems to be blundering into this. I share the Confederation of British Industry Scotland's frustrations with the Scottish Government's discussion paper on corporation tax, in that it is exceedingly one-sided. It says almost nothing about the costs of devolving corporation tax. Of course, any policy is probably good value if you are allowed to keep the costs out of it. My estimate

is that the costs of going down from 23 to 20 per cent corporation tax would be a loss of revenue in Scotland of something between £300 million and £400 million. If that came off public expenditure, it would lead to the loss of about 6,000 public sector jobs, to be replaced by something like 1,500 jobs a year, mainly in foreign direct investment. The cost per job would be enormous: about £200,000 per job. It is a very difficult calculation for Scotland.

In general, we can say that low corporation tax works well for very weak economies. When the Republic of Ireland started it in 1958, it was extremely weak. Northern Ireland is very weak now, but Scotland is not—it is an averagely strong economy. It could be stronger, of course, but it is not all that weak.

Unless the debate takes into account the costs in a proper way, it could be quite damaging for other areas.

The Convener: Thank you very much. Before I move on, I want to say, Mr Gudgin, that your views are very well respected, as are the views of anyone else who comes to give evidence to this committee. The committee will look at all that contradictory evidence when it makes its conclusions. We are charged with looking at the best interests of Scotland through the Scotland Bill.

Out of interest, what is the position of the Crown dependencies in setting taxes, such as corporation tax and the other taxes that they have in their basket? Are there any constraints on them at all that are set by the UK Government?

Alastair Sutton: The constitutional position of Jersey, Guernsey and the Isle of Man is that they are not devolved jurisdictions at all. Jersey and Guernsey have been autonomous and self-governing since 1204 under the charter issued by King John at that time. As the United Kingdom has said publicly in European Union fora, including the European Court of Justice, the UK has not attempted to legislate for Jersey, Guernsey or the Isle of Man, where the constitutional situation is a little bit different but similar, for hundreds of years. They are charged with running their own economy and managing their own budget without any financial intervention from the United Kingdom at all.

The situation has become complicated over the past eight years since the European Union has begun to take a bigger interest in direct tax issues. Of course we have had VAT and excises now for 20 or 30 years, which are harmonised and dealt with at EU level. However, direct taxation remains a hot potato. Both in the OECD and in the EU, the notion of harmful business taxation has been growing. There is an unresolved dichotomy. Everybody in the OECD accepts the statement that tax is a legitimate interest of national economic policy—you are entitled to fix your tax rates and tax structure in such a way as to give you the most competitive economy. That is uncontested. However, it is also uncontested that, depending on how you structure your tax—particularly if you ring fence it in order to attract foreign investment—that might be deemed to be harmful by the EU or the OECD. That is an unresolved dilemma and no one has quite decided where the line is to be drawn. Over the past eight years, the biggest problem for Jersey, Guernsey and the Isle of Man, which is still unresolved, is the fact that, although they are third countries that are outside the EU for tax purposes, the other member states have combined to persuade them to adapt their tax policies to conform to criteria that are enacted in the EU. That has been the source of a great deal of political tension between the three islands and the Treasury.

I listened with a great deal of interest to the part of the earlier session that dealt with the representation of interests in Brussels. That issue has arisen in very acute form for the British Crown dependencies, as they do not have the right to sit in EU councils, but their fiscal future is, in effect, being decided in a court of economics, politics and law of which they are not a member. That is not the Scottish case but, in any future constitutional arrangement, it is crucial that Scotland, if it is fiscally autonomous, be entitled to defend its own case in international fora. Experience demonstrates that there are difficulties when that task is entrusted to London.

That answer goes a bit further than your question, but I hope that it might stimulate some further questions.

The Convener: It did, but thank you very much.

James Kelly: Dr Gudgin, your opening statement contained a number of interesting observations that I am sure will provoke lively discussion. Your submission talks about the case for devolving corporation tax in Northern Ireland. I am interested in the basis for that case. In paragraph 10, you say that there is an absence of data about tax revenues and that, in their absence, you make certain assumptions about the cost of corporation tax. Have you carried out any modelling of the impact of corporation tax in the years following a decision to devolve corporation tax to Northern Ireland?

Dr Gudgin: We have done extensive modelling for Northern Ireland. The figures that I suggested for Scotland come from the same approach. The figures that we get are pretty well in line with the University of Strathclyde's figures, which are in the Scottish Government's document.

Because of the way in which tax revenue is collected, it is difficult to get an idea of the costs. It is not collected on a territorial basis that would allow HM Revenue and Customs to just add up the figures. Our estimate is that there would be a net initial cost of about £200 million in Northern Ireland and that the situation would start to improve after that, as companies came in and started to pay tax. The fiscal situation depends very much on which taxes are allowed. Corporation tax, over, say, a 20-year horizon, would always involve a loss of something like £100 million in Northern Ireland. However, if you add in income tax, VAT, national insurance and other things, the revenue starts to add up as new jobs are generated.

To a certain degree, the nub of the negotiations in Northern Ireland is the extent to which some of those taxes can be included in the calculations, to set off against the block grant. Under the Azores criteria, the Treasury will take an amount off the block grant, at the point of devolution of corporation tax, and then Northern Ireland can set whatever tax rate it wants to. However, any losses would have to be borne by Northern Ireland. We have presented the view that, because what the revenues and losses would be is so uncertain, there would be merit in devolving the tax and seeing what revenue came in. We would then know the position and be able to negotiate sensibly. However, that might not be practical politics. The extensive consultation that is going on between the Treasury and the Northern Ireland Executive probably involves negotiation on the size of the hit to the block grant. Does that answer your question?

16:45

James Kelly: Did I pick you up correctly in saying that the model covered 20 years?

Dr Gudgin: Yes. We ran the model up to 2030. If most of the taxes that I have talked about are included, the fiscal situation is quite positive at the end of that period. About 55,000 new jobs would be created in Northern Ireland over that period, which would generate a lot of income tax, national insurance and VAT. If all the taxes are included, the benefits are quite large. However, a cost is incurred at the beginning, which worries the finance minister in Northern Ireland and would worry finance ministers anywhere.

James Kelly: How many years did your model estimate that it would take to break even? As you say, such a policy has understandable costs at the beginning. Its supporters argue that economic growth would turn that position around over time.

Dr Gudgin: If we are talking about only corporation tax revenues, it would take more than 20 years to break even. If we include income tax, national insurance and additional local rate income, the period is something like seven years, which is much more favourable.

The Convener: If Professor Greaves or Mr Sutton would like to respond to any question at any time, they should just indicate that to me.

Professor Greaves: I will clarify the Azores case and the effect of deducting corporation tax from the block fund. The Azores situation is much more similar to that of Scotland, as the Azores is an autonomous region, which was set up in 1978 after the Portuguese revolution. In considering geographic selectivity, the issue for the European Court of Justice was whether the Azores are sufficiently autonomous. The test for that, which was upheld by the General Court in the Gibraltar case, is whether a region has institutional, procedural, and financial and economic autonomy. The third aspect causes the problem, because we are still trying to determine what having economic and financial autonomy from the central Government means to an infra-state or an autonomous region.

The Portuguese Government lost the Azores case because the internal constitutional arrangements included a solidarity clause. If the Azorean Government got it wrong and did not have enough money to administer the Azores, the solidarity clause would kick in and the central Government would make up the difference. That link is dangerous. It has been repeated that no offset must be available for any potential loss. If a region takes autonomy, it takes it with the positive and the negative—that is exactly the point that Dr Gudgin made.

The Convener: That was interesting.

Alastair Sutton: Member states and regions of member states must be aware of a double jeopardy in the EU. Professor Greaves talked about the state aid jeopardy, but the code of conduct on harmful business taxation is another factor. That has been applied extraterritorially to Jersey, Guernsey and the Isle of Man, but it is also applied between member states. It involves a system of peer review—everybody in the member states notifies each other of regimes that might be considered harmful.

The issue is delicate. It is not—at least in the EU's eyes—a legal matter but a political arrangement, whereby we all look at one another's arrangements and try not to have a beggar-thy-neighbour tax policy. More than 300 measures have been considered in the past 10 to 15 years and member states have amended more than 70 measures nationally as a result of the peer review process.

In Brussels, we are seeing an intensification of the discussion on tax competition being led by Germany and France. We see it particularly in the euro zone at the moment. The French and the Germans, and probably the other euro zone members, are being led to look at setting minimum rates for direct taxation for company tax. That would be rejected out of hand by the United Kingdom, but it is not in the euro zone. You can see the way the wind is blowing. There is increased scrutiny of taxation, and the Germans and the French are looking particularly at territories such as Liechtenstein and Iceland, which are offshore. They are also increasingly looking at onshore arrangements in places such as Slovenia, Luxembourg and Estonia, for example.

It is important to understand that, at the moment, the theory is that tax rates are completely a matter of national sovereignty. However, we also increasingly hear it said that anything that approaches zero taxation is unfair and should not be used. The debate is beginning on where the minimum rate of corporation tax should be set. I am that old, so I recall 20-odd years ago when the EU said, "We will never set minimum rates on VAT." Ten minutes later, we had a 15 per cent minimum, and I see the debate going that way now. Not only has the recent crisis provoked an avalanche of financial services regulations, it has focused on the need to raise taxes and fiscal revenue. If states apply low taxes, the EU will do everything that it can to raise the rates and impose a harmonised structure. The Commission has recently made a proposal for a CCCTB, which is a co-ordinated common corporate tax base.

When you have to set your own corporate tax policy, you might well find that there is a European directive that the UK might or might not accept, given that there is a great deal of talk about enhanced co-operation, which is to say that these measures will be adopted by only, say, two thirds of the member states. Scotland will therefore have some important questions to answer about how it proceeds, bearing in mind the state aid dilemma. To meet the state aid rules—to add to what Professor Greaves said—you need to be almost a sovereign state in terms of managing your economy. You have to manage the budget and control revenues and expenditure, and central Government cannot intervene directly with the content of your budget or, as Professor Greaves said, offset any loss of revenue with aid or subsidies. You must be on your own. There must be no solidarity clause and no possibility of cash injections from central Government. The bar has been set very high indeed.

Professor Greaves: I have one footnote. Alastair Sutton is absolutely right, but

"The fact that there is a transfer of funds from the central government is not sufficient to deny autonomy."

That was said by the European Court of Justice in the UGT-Rioja case, which dealt with the Basque Country. It is about the link and we do not know the answer to the question of what breaks that link.

The Convener: Thank you. I am sure that that is clear to everyone who is sitting here.

Joan McAlpine: I am interested in what Mr Sutton and Professor Greaves think of Dr Gudgin's assertion that devolution of corporation tax would be good for Northern Ireland but bad for Scotland.

Professor Greaves: I do not know; I am sorry. It is not my area. I have no idea.

Alastair Sutton: I would not make an economic judgment; that is Dr Gudgin's field. However, I will say two things. A quasi-independent Scotland that is still within the UK but has virtually complete control over its economy will need to have control over all aspects of taxation. It is very difficult to manage just one aspect of taxation when the others are being decided on in London or Brussels. You have to have control over the economy as a whole. There is increasingly international scrutiny of how states set their tax regimes to conform to international criteria that are aimed at preventing so-called harmful tax competition.

You would have to be very careful, because I have read in your papers that one of the aims of being able to set corporate tax in Scotland is to attract investment in Scotland. That is fine, but that is precisely when you run into the possibility of the Germans, the French, the Swedes or the Belgians saying, "Ah! Scotland is taking investment away from us, because the rates of tax are too low"—or because the structure is ring fenced or for whatever reason; they may allege that it is harmful. It would be crucial that you could defend that in the appropriate international fora. The point that I made earlier was that Jersey, Guernsey and the Isle of Man have not been able to defend themselves in that way and have been excluded. There is a problem of natural justice, due process, fair hearing—call it what you will.

When I was listening to the debate here over the past two hours, the thought constantly came to my mind of the way in which the European Union deals with sovereign states, which is—I have got to be careful—that it is not legally interested in talking to sub-states, whatever the Lisbon treaty says. The EU is an organisation of sovereign states and it is for such states to decide how their views are put across. You may have a Scottish minister and Scottish Government civil servants in the formative process, which is more important

than the ministerial meetings. That is the thing: you want civil servants, diplomats and people from the United Kingdom permanent representation to the European Union negotiating in Brussels on your behalf. Of course, they can be negotiating in London, too, to ensure that you are on the same page as the UK. However, as long as you are not fully sovereign, that will be the rather difficult situation that you are in. The Commission, the Council, the Parliament and the European Court will not want to talk to you directly, even if Mr Energy can go and speak to the directorate-general for energy—that is fine. That is all informal discussion. However, when it comes to formal things, it is the UK voice that matters, and that is it.

Joan McAlpine: Are you saying that Scotland would be better off as a sovereign state in Europe?

Alastair Sutton: That is for you to decide. A serious answer to your question is this—

Joan McAlpine: You are making a very good case for it, if you do not mind my saying so. [*Laughter*.]

Alastair Sutton: Well, I do have a certain vested interest.

Jersey, Guernsey and the Isle of Man are, to all intents and purposes, sovereign states, but the United Kingdom has responsibility for their international relations and defence, although let us forget the latter for the time being. The representation of those islands' interests in international fora is a very difficult issue.

The issue of state aids is an example. The Isle of Man has, over many years, intervened in its agricultural and fisheries economy more than Jersey and Guernsey have done in theirs. However, there have been issues to do with the compatibility of state aid grant in the Isle of Man with EU rules, because the island is in the EU for state aids to agriculture. However, those who are legally responsible for the state aids granted by the autonomous Government of the Isle of Man are the people sitting in London. In other words, if the EU finds that an aid given to Manx fisheries is illegal under EU rules, it is the UK that will be ordered to recover that money, even if constitutionally it has no mechanism to do so. That does not matter to the EU. The internal arrangements in a state are a matter for that state.

As long as Scotland is not formally independent, a great deal of thought is being given and still needs to be given to the nexus of Scotland's relationship with the United Kingdom and how that plays out in Brussels. At the end of the day, the UK carries the can legally in the European Court of Justice for its autonomous regions.

The Convener: Thank you. I am aware of the time and that a lot of people obviously want questions to be answered, so I ask the panel to be briefer in their responses, interesting though they may be.

John Mason: I have a question for Mr Sutton, whose evidence I have found very interesting. We have tended to concentrate so far on corporation tax, but clearly there is a wide range of taxes in Jersey, Guernsey and the Isle of Man. Which ones are perceived by those islands, or by you, to have most helped their economies? Is it corporation tax, other taxes or a package of them all?

17:00

Alastair Sutton: I will be very brief. We are talking about direct tax; on the whole, the islands do not have indirect taxes, although in recent years they have introduced a minor sales tax partly because, as everyone else is, they are under economic pressure and have had to raise more money in order to be self-financing.

The question is interesting. The island jurisdictions have had to deal with issues that would not be faced here, including being labelled by many people in the EU as tax havens. Basically, there are two issues to consider, the first of which is the personal tax rate, which has attracted private wealth. The islands have come under the spotlight because of money laundering or because they have attracted money from investors or savers from the EU and elsewhere, and the EU has been very concerned to ensure that the interest on those deposits in, say, Jersey banks are taxed where they should be taxed—namely, in the country of residence of the investor or saver. In 2004, the EU enacted the tax on savings directive, which applies within the EU and requires banks to exchange information on individuals who are resident in another territory where they should be paying interest.

Such issues would not concern Scotland. Actually, what has been responsible for the islands' prosperity has been the inward investment in the corporate tax field, not the low personal tax rate. That is where the code of conduct has kicked in. Scotland could gain by becoming a very attractive destination for foreign capital. People would come to Scotland not because of the tax rate or the tax structure but because of all the other services that you provide.

John Mason: I was interested in some of the comments in the Northern Ireland report, particularly those in paragraph 14, which says that although giving Northern Ireland power over corporation tax

"would give rise to administration costs for HMRC"

that would not be a major problem. Indeed, the report suggests that profit shifting

"can be satisfactorily policed without incurring significant extra costs".

Moreover, in paragraph 17, the report refers to

"compliance costs, which need not be significant".

Other witnesses have warned us that the practical costs will be horrific, horrendous, terrifying and all the rest of it but the tone of your report seems to be a bit different in that respect.

Dr Gudgin: It is. I picked up the same point when I looked at the evidence from CBI Scotland, which would scare the pants off you.

The view of the economic reform group in Northern Ireland, which comprises economists and two accountants—one from KPMG and the other from Ernst & Young—whose day-to-day jobs are in managing tax administration, is that there might be problems but they can be dealt with through, for example, changing computer systems. However, I will send the CBI Scotland report back to our accountants and ask them what they make of it because I absolutely agree that it directly contradicts our views. I certainly cannot resolve the contradiction; all I can say is that our accountants believe that there is no great problem. They are always at great pains to argue with the Treasury people that they are overemphasising the difficulties in this respect, but I should point out that I am not an expert in this area.

John Mason: You do not think that the rest of the UK would particularly lose out if Northern Ireland had a lower corporation tax rate; in fact, it might well benefit from it. Have you looked specifically at how Scotland might lose out? Given that we are only 20 miles away from Northern Ireland, some of us might feel a little nervous if it had a lower corporation tax rate.

Dr Gudgin: We do not think that many firms would move from Scotland or anywhere else. After all, they can already go to Dublin or even Dundalk, which is only 50 miles south of Belfast; you can get on the Stranraer ferry to Belfast and 40 minutes later you are in the Republic. It is not obvious whether, if Northern Ireland came into the game, it would make a great deal of difference. The bigger question is profit shifting, which is a matter for the Treasury rather than for individual regions. Again, our accountants believe that that can be managed to ensure that the Treasury does not make huge losses.

That said, it is clear that a great deal of the global taxation of foreign direct investment and multinational companies in the Republic gets funnelled through Dublin. For example, that is what happens with all Google's global revenues outwith the United States—I do not assume that it took that decision because of the weather there.

The Convener: That was interesting.

Stewart Maxwell: Dr Gudgin, I believe you said that the Treasury has overemphasised the difficulties with lowering corporation tax.

Dr Gudgin: That is our accountants' opinion on the administrative matters. As part of the Treasury, Her Majesty's Revenue and Customs administers and collects the taxes, so it is not surprising that it sees many difficulties in changing a well worn and well established system. We should certainly take its concerns, particularly with regard to profit shifting, very seriously. Nevertheless, it is probably underestimating the amount of profit shifting into the UK. If Northern Ireland and/or Scotland had lower corporation tax, American and other companies would start to shift profits into those parts of the UK. That would be an advantage to UK revenues—although not, of course, to American or other revenues.

Stewart Maxwell: That was helpful. I want to ask about the Treasury paper that you mentioned earlier, the costs that you said would be involved in Scotland's gaining power over corporation tax and what it might—hypothetically, of course—do with corporation tax rates, depending on which Government was in power or when such a move might happen. I have to say that I was slightly surprised to hear you refer to Treasury papers and the Treasury position, given that the Treasury minister, Mr Gauke, accepted and admitted to the committee that the Treasury paper in question includes costs but excludes benefits. Does not that undermine the Treasury's argument and the argument that you advanced earlier?

Dr Gudgin: The Treasury's expertise is mainly on the cost side. My advice to you in Scotland is to get your economists to crawl over anything the Treasury says about benefits, because that stuff is not at all good. The answers that it gets are very much governed by the assumptions that it puts into the model rather than by anything in the real world. For instance, it tends to assume what economists call 100 per cent crowding out—in other words, any job that comes into Northern Ireland or Scotland as a result of these moves will destroy another job in the same area through rising wage and property costs.

We can say with complete confidence that that view is completely inappropriate in Northern Ireland; I imagine that it is also almost completely inappropriate as far as Scotland is concerned. It also rather raises the question why, if the Treasury models are saying that there is almost no benefit in lowering corporation tax, George Osborne and the UK Government are reducing UK corporation

tax from 30 to 23 per cent. I have to assume that the Treasury does not believe its own models.

Stewart Maxwell: You have anticipated my very next question, Dr Gudgin. I, myself, believe that the Treasury does not believe its own model.

I am paraphrasing, but you suggested earlier that cuts to corporation tax are essentially for weak economies. In that respect, you were referring to Northern Ireland—and, indeed, Ireland in the past. Has the UK Government cut corporation tax because it believes its economy is weak or for some other reason?

Dr Gudgin: Clearly the UK economy is facing short to medium-term difficulties, so the more growth the Government can achieve, the better. It is all part of a global race to the bottom. It is a quite worrying tendency for countries to bid corporation tax down. You, in Scotland, should take that into account. It is all very well for countries that are in great difficulties to reduce corporation tax in order to get out of those difficulties, but if moderately prosperous countries take part in that race to the bottom, that only puts pressure on other countries to retaliate, in the end. A country might get an advantage for a few years, but—

Stewart Maxwell: I am not aware of any international evidence or research that proves the statement about a race to the bottom, which several people have made. Would you count Switzerland among those countries? Switzerland has devolved corporation tax.

Dr Gudgin: Some Swiss cantons have virtually no corporation tax, so they are certainly part of that. Internationally, in the past 30, 40 or 50 years, all countries have tended to reduce corporation tax. The UK has taken a rather big step in that race towards the bottom. It is hard to see how the other big European countries cannot retaliate, although I have not seen any evidence or suggestion that they are planning any retaliation.

Stewart Maxwell: You referred to evidence from the CBI, although you said that the CBI tends to "scare the pants off" people, and I understand why you said that. However, you did not refer to the evidence from the Federation of Small Businesses or to that from Jim McColl, who is a well-respected and successful international businessman from Scotland. They take exactly the opposite view from the CBI. Do you agree that there is not a unanimous view in business about whether corporation tax should be devolved to Scotland and that it is incorrect to portray the situation as being that business is against such a devolution of power?

Dr Gudgin: Yes—I agree that there is a diversity of views. My understanding is that, in political circles inside Government in London, the fact that the CBI is not on board and does not back the Scottish Government is being taken seriously. That lies alongside the fact that Scotland was offered tax reform under the Calman commission and opted for income tax and not corporation tax, and only later asked to add in corporation tax. All that does not look very impressive or important from a London perspective.

Stewart Maxwell: I am slightly concerned by those comments. The UK Government has told us that its mind is not made up, that the discussion is open and that there is a respect agenda in relation to the Scottish Parliament and the work of this committee. You seem to be suggesting that the UK Government's mind is already made up. In an earlier comment, you said that you have heard from sources close to the UK Government that under no circumstances will Scotland get corporation tax. That rather negates the language that UK ministers have used. That is concerning not only for the Parliament and Scottish Government, but for this committee, which has spent many hours in serious examination of the issues. Does that not rather undermine the idea of a respect agenda?

Dr Gudgin: I am afraid that I do not know what UK Government ministers have told you, but I have told you clearly what they have told me privately.

Stewart Maxwell: That is very disappointing.

The Convener: Are you saying that UK Government ministers have told you privately that this committee is wasting its time talking about corporation tax?

Dr Gudgin: Yes. That is the short answer.

The Convener: That is highly concerning. I ask the clerks to send the *Official Report* of this meeting to the appropriate UK ministers to ask for comment.

I call—

Stewart Maxwell: I am sorry to interrupt, convener. It is not normal to interrupt, but this is an important point.

The Convener: Absolutely.

Stewart Maxwell: I suggest that we send to the appropriate UK ministers not only the *Official Report*, but a letter from you on behalf of the committee about what has been said.

Richard Baker (North East Scotland) (Lab): I am not here to defend UK Government ministers, but they have been pretty clear at the committee and publicly that they are not convinced by the argument to devolve corporation tax. I am therefore perplexed by the great sense of surprise in the committee.

The Convener: Although we have had the Secretary of State for Scotland and others here, who have said that they are not convinced by the idea of devolving corporation tax, they have never told the committee at any time that it will definitely not happen, which is what we seem to be hearing now. It is right that we express concern about that, so I will write to UK ministers on behalf of the committee. After all, we have been promised a respect agenda. As convener of the committee, it seems to me that not a lot of respect is being shown, if what we have heard is true. We will find out.

17:15

David McLetchie: I will ask Professor Greaves about the Azores judgment and corporation tax, state aid and so on. You clearly explained that the problem—if you can call it that—with the Azores was the solidarity clause in the constitutional arrangements between the Portuguese Government and the Azores autonomous region. In effect, as I understand it from your explanation, there was a constitutional underwriting of the financial stability of the Azores. Was that because of the mere existence of that power in the constitution rather than the exercise of it?

I would like Professor Greaves to enlighten us or speculate on another point, too. We do not have any such constitutional underwriting and if we had an offsetting reduction in our block grant relative to a corporation tax rate-setting power, for example, what would happen to the block grant thereafter would have absolutely nothing to do with the revenues for corporation tax, but with levels of spending in comparable departments in England, according to the Barnett formula. There is no link between our block grant and tax receipts or non-receipts and it is determined by an entirely different set of characteristics and formulas. In such a situation, what relevance, if any, would the Azores judgment have for us? Can you speculate on what might happen if our situation came under scrutiny?

Professor Greaves: Yes. In the Azores judgment, the case was between the Portuguese Government and the Commission, which had refused to allow a certain kind of aid to that region, and the fact that the solidarity clause was there was sufficient for the European Court of Justice to rule that there was not sufficient autonomy. That is why other cases have gone to the European Court of Justice. The Basque Country cases, in particular, are interesting, because there is a transfer of some funds to the Basque Country, which acts almost as an agent of the Spanish Government in collection of some taxation. There are also historical reasons for that. We do not know what the judgment means for such cases.

In the Gibraltar case, which is before the European Court of Justice, Spain, as an intervener, has argued that the fact that the British Government has a financial responsibility for defence and could intervene would be sufficient, but my view is that that is not the case. The solidarity clause in the Portuguese constitution was very clear that that Government would help to bail the Azores out of financial difficulties. I have written on this and speculated and it seems to me that what the court has said can be repeated in the Spanish case: there must not be a direct link between a reduction in whatever is transferred to the region and the loss of the corporation tax. In my view, what is important is that there can be a block transfer—that has been confirmed by the court—but there must not be a direct link and there must be a transparent formula based on objective criteria. I have suggested factors such as the size of the population and so on—things that can be tested and that are robust and are not linked in such a way.

David McLetchie: So, the Barnett formula would be—

Professor Greaves: I do not know enough about the Barnett formula to answer on it.

David McLetchie: In essence, that is what the formula would be. For the moment, the Barnett formula is the mechanism that determines our funding from the Treasury and, if it is free-standing and not related to the tax reduction, we should not be negatively affected by the Azores judgement. Is that correct?

Professor Greaves: I think that that is probably right.

Dr Gudgin: May I just add a small point? The legal advice that the Northern Ireland Executive has received supports the burden of Mr McLetchie's point. If corporation tax is devolved by the Treasury to Northern Ireland, the Northern Ireland Executive has to bear the fiscal consequences of that transfer, including any change to the rates, but nothing else is affected. The Barnett formula would carry on, as it were. As regards Northern Ireland, we have said that the consequences would impinge on income tax, national insurance and so on, so we want that to be counted in any calculations on the hit to the block grant.

David McLetchie: Is that on the revenue side?

Dr Gudgin: Yes. There would be nothing on the expenditure side.

The Barnett formula is quite a nice protection in a sense, because it is a formula and it is reasonably transparent. If it was to go, that would make life more difficult, because there would be

more scope for under-the-curtain payments of various sorts.

David McLetchie: I will ask Dr Gudgin a couple of questions about his report. The February update on the report states:

> "widespread is the consensus in the Republic that the 12½% rate of corporation tax has been critical to its success in attracting such a strong flow from the higher end of foreign direct investment".

A research paper by the excellent research service in the Scottish Parliament, suggests that in the Republic of Ireland that was not the case and that, in fact, as a factor in the previous economic success of the Republic of Ireland, the rate of corporation tax ranked well below factors such as the infrastructure, political stability, labour-force skill levels, labour costs and access to markets. If I am not mistaken, the report might have been written by some of the same people at Ernst & Young who are advising your group. Is that correct?

Dr Gudgin: I do not think that your last point is correct, but your main point is correct.

I find the situation quite amusing. I worked as an economist on economic policy in Northern Ireland for 25 years and for something like 23 of those years every politician in the South and pretty well all their economists told us exactly what you have just said. In the North we all thought that that was rubbish, because it was almost a control experiment. There is very little difference on either side of the border in climate, infrastructure, education and culture, but there was one huge difference as you crossed the border: until recently the corporation tax rate was more than double in Northern Ireland. The American multinationals would come right up to the border. They would often go into Dundalk and they would tell us that they wanted to get to the more efficient port facilities in Belfast but, as they needed the lower tax, they would locate five miles south of the border.

Ernst & Young tend, when they do an international survey, to ask companies why they go to certain countries. Almost no company will put tax at the top of its list; they usually put it sixth or seventh. That is pure public relations. If you look at what the companies do rather than what they say, they go for the low tax. If they can get both low tax and low wages, as they often can in Eastern Europe, they are on to a winner. No company will go into a country and say, "I am here for your low taxes."

David McLetchie: So you think that the Republic of Ireland is having us on. That is interesting.

Dr Gudgin: Allow me one more comment on the matter. The situation changed when the Germans and the French started to put huge pressure on the Dublin Government. They said: "Look, if you want a bail out, we want you to put your corporation tax rates up." Suddenly, every politician in the South said, "But this is the cornerstone of our economic development." They completely shifted their position when the pressure was on them and they now do not say what the report that you cited suggested. Your researchers just got a slightly out of date report. It is true that that is exactly what they used to say, but it is no longer what they say.

David McLetchie: Maybe something else is out of date in the evidence that we had.

Dr Gudgin: I was not being critical.

David McLetchie: No, no—the researchers are very good people. I think that I am correct in saying that evidence that a predecessor committee which looked at the Scotland Bill received, from an academic colleague whom you may know—Professor Iain McLean from the University of Oxford—was to the effect that Northern Ireland had—I think that I am correct in saying this—control over corporation tax in the 1950s and 1960s under the old Stormont regime. According to him, that power was in effect removed because it was found that it was being exploited for tax avoidance purposes. If I remember his evidence correctly, he specifically cited in that context the Vestey family, which most tax lawyers will know is a family that had a remarkable string of successes in avoiding payment of taxes to the Inland Revenue and the courts over the years. Are you familiar with the situation that, according to Professor McLean, used to pertain in Northern Ireland and with the rationale that he gave for why that power was effectively removed or abandoned?

Dr Gudgin: I am pretty sure that that is wrong. I do not think that Northern Ireland has ever had that power. If you want to send me that evidence, I would be happy to look at it.

David McLetchie: We will, because it was very illuminating. I will put you in touch with Professor McLean in Oxford, and you can have an Oxford-Cambridge contest on the question of who is right about what happened in Northern Ireland.

Nigel Don: I was struck by Mr Sutton's view that, if you are going to have taxation, you need the whole basket of taxes. It is tempting, of course, to go for the political endgame, but I will resist that for the moment. Could you comment on the legality of Scotland being given control of some taxes but not others? How would Europe view that, in terms of competition and hazardous taxation?

Alastair Sutton: The point to keep in mind is that, outside the area of indirect taxation,

European law leaves a great deal of freedom to member states to fix rates and set structures. That is the case at the moment, although, in three or four years' time, there may well be a European directive to harmonise tax structures for corporate tax.

Practices in the field of direct taxation vary enormously across the 27 member states. There is increased scrutiny of distortions of whatever kind, whether through the state aid mechanism, the code of conduct mechanism or various other mechanisms. For example, are national systems discriminatory? Do they prevent the free flow of capital across borders? Do they allow a company to repatriate profits or offset losses? European law kicks in much more now than it used to but, essentially, member states—and therefore their regions—have a great deal of freedom with regard to indirect tax; there is not much intervention or prescription at European level.

Professor Greaves: The difference is to do with undertakings. The provision in the treaty forbids any aid that is granted by a member state or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. Because those undertakings would be based in Scotland, they would involve geographic selectivity.

With regard to my area of state aid and the competition rules, the issue is not really focused on income tax or any of the other taxes; it purely concerns assistance and undertakings to corporations that give them a competitive advantage vis-à-vis other member states. The way the situation is perceived is that the United Kingdom is giving the Scottish undertakings special advantages vis-à-vis not the English or Northern Irish ones, but those of the other countries in the European Union.

Nigel Don: We would not be allowed to change our tax rates anyway, because that would favour us as, undoubtedly, the Scottish economy is different from others.

Professor Greaves: Only states are recognised in this regard. The UK can change its corporation tax.

Nigel Don: Yes, but that is not the issue. The idea of devolving corporation tax to Scotland or anywhere else is that that administration can change the numbers and make a difference.

Professor Greaves: I was looking at the issue only from a state aid point of view. It might not be the case in Scotland, but the state aid rules also provide for a notification to the Commission to ask for a particular exemption for a particular time. There are regions that benefit from the arrangements in that manner. I do not think that Scotland is one of them, at the moment. I presume that Northern Ireland is.

Alastair Sutton: Rightly or wrongly, for the purposes of today's meeting I have come at the issue from the point of view that I expressed a little light-heartedly earlier on, which is that, if you are to have fiscal autonomy and you want maximum protection from state aid rules and other interventions, you really need the fullest degree of independence possible in order to meet the criteria that are set by the Court of Justice, as Professor Greaves has been saying—the so-called Azores test. You need to be virtually masters of your economic and fiscal house. If there is a gap through which transfers can come from the United Kingdom, you are lost. You need to go the whole hog, otherwise state aid rules kick in and differential rates start to be looked at in the light of the treaty rules, as Professor Greaves was saying. If you are autonomous, as the Republic of Ireland was, you fix the rate where you want it to be fixed and, because there are no international rules on rates, you are free. To do that, however, you have to satisfy the Azores test.

17:30

Nigel Don: Independence is a very obvious way of satisfying that test.

Alastair Sutton: Well, yes—

Nigel Don: Sorry, I would like to pursue that. What level of not being independent would suffice? Which of those independent powers could you give away and still be okay? Defence appears to be included, for example. We talked about that in the context of the Crown dependencies. You also seemed to say that external affairs were not an issue in that context. What other things can you give away? Maybe Dr Gudgin wants to answer.

Dr Gudgin: As my colleagues said, Europe's locus of interest is purely to do with state aid. All that Europe is looking for is whether the UK Government is giving additional subsidies to Northern Ireland or Scotland, because it has control over subsidies. If the UK Government can prove that it has devolved corporation tax to Scotland and Northern Ireland and that the regions take the full fiscal consequences—if they change the rate, they get less revenue; that is their look-out—then Europe is not involved.

You can, however, devolve just one tax—I think that that was your original question. As I have already suggested, that tends to start to drag other taxes in as well. In Northern Ireland we say that, if we attract a lot more investment and that generates more income tax, that is a consequence of this devolution. As a first approximation, you can devolve one tax to a devolved region such as

Northern Ireland with no further constitutional consequences at all.

Alastair Sutton: I will make one point, which is something of a warning drawn from my experience with Jersey, Guernsey and the Isle of Man. They are fiscally independent, they run their own economic ship and, as a function of that, they set their own tax rates and structures and so on. However, I have said three or four times now that we are living in an international tax environment in which there are certain minimum standards appearing at international level under the heading of harmful tax competition. That debate is going on all the time in the OECD.

While the United Kingdom recognises the fiscal independence of Jersey, the fact that the United Kingdom is the sovereign Government which has to speak for Jersey in the OECD, or in Brussels—because they do not allow Jersey to speak for itself in Brussels—means that it has been vital for the Government of Jersey to sit down with Her Majesty's Treasury in London and try to agree on what the Treasury is prepared to defend in Brussels. I shall limit myself to saying that that has been a very difficult process. One of the important bridges that you will have to cross, even if you are Azores autonomous, if I can put it that way, is that the UK will still speak for you in the Economic and Finance Ministers Council, where issues of harmful tax are discussed. Whether you have a Scottish minister there or not makes no difference. It is a UK delegation, for which the spokesman will be from the Treasury; it will be George Osborne with Treasury civil servants who work in the code of conduct group, in the COREPER, in the tax policy group, up to ministers.

You must be aware that fiscal independence for Scotland will necessitate a very strong dialogue with the Treasury in London. Of course, it is ultimately a political matter. What has happened with Jersey, Guernsey and the Isle of Man is that they have had one phone call from the Chancellor to say, "We do not like that system," for whatever reason. The United Kingdom may want to attack Slovenia or Estonia for having a zero-rate system, or a zero-10 system—you do not know—but the power-politics situations with those jurisdictions that I have represented has made it extraordinarily difficult. They were not allowed to set their own tax policy, they were sometimes not told why the Treasury in London did not like their system and they were not allowed to say in Brussels, "Hang on a second. There are five criteria in the code of conduct. Which of those does our system breach?" The truth is that none of those criteria was breached but, because the UK did not like that fiscal regime, for whatever reason, they could not defend it internationally, and you, as a sub-state entity—if I can put it that way—would face that same challenge, albeit that it would carry a different political weight.

Nigel Don: Thank you. That is roughly where we came in.

The Convener: Time is moving on. Thank you for your patience—we started a bit late.

Richard Baker: I want to ensure that I understand Mr Sutton correctly. We are discussing the corporation tax rate for Scotland when across the EU, at the extremes, there is quite a wide variation in rates. I think that what you are saying is that the direction of travel of the OECD and the European Community is such that, in the future, it is likely to be the case that the extent to which even sovereign states can set varying corporation tax rates will be restricted—or, at least, you are suggesting that there might a minimum level at some point.

Alastair Sutton: I said that we see that clearly in the euro zone, because Germany and France call the shots. There is a great deal of resistance to that among the small member states that depend heavily on the deployment of such economic weapons to attract foreign investment.

Richard Baker: Yes, but that is the direction of travel—a state in the euro zone is unlikely to be able to resist that.

Alastair Sutton: Yes.

The Convener: Thank you for your brevity, Mr Baker—it is much appreciated.

Richard Baker: I am happy to have obliged.

The Convener: Do you have a question, Mr Rennie?

Willie Rennie: The discussion has moved on; I do not have a question.

The Convener: You do not have anything to say.

Willie Rennie: Nothing at all.

The Convener: That brings us almost to a conclusion, but I have a quick question for each of you, if that is all right.

Mr Sutton, what you have told us has been really interesting. I am sure that when the committee discusses further how things work in the Crown dependencies, more questions might well arise. Would you be happy if we wrote to you on some of those?

Alastair Sutton: Yes, please do—in fact, I would be more than happy to write down some of the points that I have made, in the interests of accuracy.

The Convener: I read the "Crown Dependencies" report 2009-10, which was very

interesting, but am I right in thinking that, in general, in financial terms the dependencies raise their own money and pay for certain services?

Alastair Sutton: Yes, they are completely financially independent of the UK.

The Convener: They pay the UK for certain services that they wish to have.

Alastair Sutton: Do you mean services such as health, roads, transport and education?

The Convener: No, I mean that they pay the UK for things such as defence, which I think you mentioned.

Alastair Sutton: Yes, that is right—they make a contribution.

The Convener: Professor Greaves, do you have an idea of when the judgments that you mentioned will be made? You said so earlier, but could you tell us again, for the record?

Professor Greaves: The final one—the Gibraltar one—will be made next week.

The Convener: Are you sure?

Professor Greaves: I was told by e-mail this morning that it would be made on 15 November.

The Convener: Thank you. That is interesting.

Dr Gudgin, is there anything else that you have been privy to in your discussions with the UK Government that you would like to share with the committee?

Dr Gudgin: Thank you very much for that kind invitation, but I think that I have said enough.

The Convener: Thank you all very much for coming along—it is much appreciated.

Just before we move into private session, in case anyone missed it in their e-mail, I re-emphasise that we have apologies from Dr Campos and Professor Bird, who could not appear before us today, either in person or by videolink, due to last-minute travel problems and illness.

17:38

Meeting continued in private until 18:17.

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