



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 27 February 2019

Session 5



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FINANCE AND CONSTITUTION COMMITTEE
5th Meeting 2019, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)

Neil Bibby (West Scotland) (Lab)

*Alexander Burnett (Aberdeenshire West) (Con)

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

*Angela Constance (Almond Valley) (SNP)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Emma Harper (South Scotland) (SNP)

*Patrick Harvie (Glasgow) (Green)

*James Kelly (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ian Davidson (Scottish Government)

Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 27 February 2019

[The Convener opened the meeting at 09:30]

Common Frameworks

The Convener (Bruce Crawford): Good morning, and welcome to the fifth meeting in 2019 of the Finance and Constitution Committee. We have received apologies from Neil Bibby. I remind members to switch their mobile phones to silent so as not to disrupt proceedings.

The first item on our agenda is evidence on the United Kingdom common frameworks. We are joined by Michael Russell, the Cabinet Secretary for Government Business and Constitutional Relations, and Scottish Government officials Gill Glass, the UK frameworks unit leader, and Ian Davidson, the head of constitution and UK relations. I welcome our witnesses to the meeting and invite the cabinet secretary to make an opening statement.

The Cabinet Secretary for Government Business and Constitutional Relations (Michael Russell): Thank you for the invitation to be here today, convener. This morning, Gill Glass reminded me that I last spoke to members of the committee about common frameworks on 2 November 2018, which seems an age ago—it is certainly several meaningful votes ago.

It is indicative of what has taken place over the past almost four months that the issue of common frameworks has diminished in public interest and importance in that time. That is not by our choice; it is because the prospect of what we might call a negotiated compromise, or orderly exit, from the European Union has diminished during that time.

We are not in this position by choice; we are in this situation in relation to common frameworks because we face being dragged out of the EU against our will and, in those circumstances, we have tried to come to a rational and reasonable conclusion with the UK Government on some of the issues that were always—and should remain—within the devolved settlement. We are not opposed to UK-wide frameworks when they are in Scotland's interests—our actions over the past two years have shown that. At the base of our concern is the key issue that such frameworks should be negotiated rather than imposed. That is the policy that we continue to pursue.

Frameworks are not a policy objective of the Scottish Government; they are an unfortunate necessity, given where things were. Given the current circumstances, it is very difficult to say where they are now. I say that as an important preamble to our discussion today.

Discussions on frameworks have been conducted at official level, overseen by the joint ministerial committee on EU negotiations. There have been several rounds of intensive multilateral policy discussions, primarily focused on what became 24 policy areas, where it was thought that legislation might be required to implement frameworks—although there are now far fewer frameworks of which that is true.

Initial framework outlines in six areas were considered by the JMC(EN) in October 2018. It is important to note that that was before the supposed agreement between the UK Government and the EU. The areas that were considered were fisheries; animal health and welfare; nutrition; hazardous substance planning; food and feed safety and hygiene; and public sector procurement. The technical work by officials to complete outline templates is underpinned by the statement of principles that was agreed by the JMC(EN) in October 2017—a year before. That work is being taken forward by agreement and is without prejudice to the views of ministers.

Officials have analysed the draft outlines to draw out high-level messages and lessons that can inform the frameworks that are yet to be drafted, to ensure consistent approaches to governance questions. It was never the intention that frameworks would be in place by exit day, and, although there is a connection with the necessity for various pieces of legislation to be in place for exit day, that is only a connection and not an absolute link. Frameworks remain discrete longer-term arrangements that are to be put in place post-Brexit. They will be agreed only when there is clarity about the UK's final agreement, the future relationship with the EU and the situation in Northern Ireland. The progress on frameworks will therefore continue until the end of the implementation period, if that is December 2020—although, again, that is absolutely up for grabs.

Officials are now turning their attention to the frameworks in the non-legislative category. Work continues on the cross-cutting issues that are required to be worked through in order for frameworks to be finalised in the areas of domestic governance, international obligations, trade, the internal market and, where appropriate, future funding. We are committed to continuing to work collaboratively on developing those frameworks in specific areas, but, of course, we remain resolutely opposed to section 12 of the European Union (Withdrawal) Act 2018, and we

will not discuss a framework if a restriction is imposed on devolved powers.

In that light, it is good news that the second report on the withdrawal act and common frameworks, which was published earlier this month, confirmed that the UK Government has again concluded, with us, that it does not need to bring forward any section 12 regulations at this juncture. In my view, that proves that section 12 was and is unnecessary. The frameworks process has demonstrated that, and it vindicates the Scottish Government's position that section 12 is not necessary and should be repealed.

We will continue the process of engagement. We are keen to engage businesses and stakeholders, but, given the chaos at Westminster that they are presently confronting, they will not regard that matter as a priority at present.

The Convener: Thank you, cabinet secretary. Judging from your voice, you are obviously carrying some sort of virus that is going round. I hope that you are okay through this process.

You have highlighted the second progress report, in which the UK Government says that there has been "significant progress" in regard to common frameworks. If that is true, it is good news. It is good that there has been progress in the development of common frameworks. However, that development has been taken forward with a pace of delivery based on the expected outcome of an agreement on the UK leaving the EU being signed off successfully and, beyond that, a period of transition—the common frameworks were seen as being required to be in place before the end of that transition period. Given that the UK crashing out of the EU without a deal is still a very live prospect, what would such a scenario mean for the development of common frameworks and the timescales within which the necessary work would be required to be completed, particularly given the evidence that we received from the Scottish Centre on European Relations, which states that a no-deal Brexit would likely result in discussions around common frameworks giving way to

"the crisis response that would be required to cope with the resulting severe legal, political and economic consequences"?

Michael Russell: That has already happened. It started to happen in November, it accelerated in December, with the cancellation of the first meaningful vote, and it has continued apace during January and February. Of course, by the end of this week, we will be into March. Unless you spend time in Whitehall, as I do, it is hard to realise just how the entire machinery of Government has been captured by the issue of no deal and the chaos that presently exists. The JMC(EN) did not meet in December; it met in

November, I think—I am struggling to remember now because there have been so many meetings in London. However, every meeting that I have been at in London since the middle of November has been pretty much consumed by discussion of a no-deal scenario. There may have been other items on the agenda, but they have been largely irrelevant.

I think that the issue of common frameworks will not re-emerge for proper attention unless and until there is an agreement on an orderly departure or until article 50 has been suspended—or, preferably, revoked—a no-deal Brexit has been ruled out and a referendum has been held. We are in a period of flux, and it is difficult to see common frameworks returning as an issue unless there is a continuation of the process of trying to secure an orderly departure. However, it is very difficult to see when that would be.

Adam Tomkins (Glasgow) (Con): Good morning, cabinet secretary. You referred to the October 2017 framework for common frameworks, which was agreed by the JMC that month. That framework sets out the principles that, it is understood across Governments in the United Kingdom, determine where common frameworks will be required. The first principle is:

"frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence".

Can you tell the committee what the Scottish Government's understanding is of the phrase

"the functioning of the UK internal market"?

Michael Russell: Yes, I can. I am not avoiding the question, but it is important, when referring to the framework, to mention principle 2 as well, which is:

"Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures".

Adam Tomkins: Absolutely.

Michael Russell: If there was an issue between the two Governments here—which there might not be—I think that it would be the priority attached to those two issues—that is, whether devolved settlements are the basis on which any new understanding of an internal market will be built or whether a new understanding of the internal market will change what devolution is and how it operates. I think that I am being quite dispassionate about that. That question is at the heart of the issue—if there is one—that is to be resolved.

My understanding is that the devolved settlements allow substantial, and sometimes complete, policy divergence on key issues and that an internal market would not overrule that. I

will give you an example. Damian Green made a remark about jam makers in Dundee and some other place. His understanding of an internal market is that it would have a set of rules that would apply—in this case, to jam makers in Scotland and England—and would allow the sale of jam north and south of the border. My understanding is that there might be circumstances in which there would be different rules for jam makers north and south of the border, which would be dictated by the requirements of devolution. For example, stronger food safety requirements for jam makers north or south of the border might be required. That would be an acceptable exercise of devolved powers.

The heart of the matter is that there may well be a different understanding of the internal market and how it operates depending on whether you believe that the devolved settlement and the different practices and divergences that have taken place are what should underpin what we do or whether you believe that circumstances have changed and a new set of rules and regulations should now operate—despite devolved competences—which should, in some cases, put aside devolved competences. I am genuinely trying to be helpful to you with that response.

Adam Tomkins: In relation to the specifics—although perhaps not in relation to the specifics of the manufacture of marmalade in Dundee—I understand that those discussions have taken place mainly at an official rather than a ministerial level so far. The paper that the UK Government published earlier this month—you referred to it in your opening remarks—lists seven policy areas in which there have apparently been what it describes as “standalone sessions”. Those policy areas overlap with, but are not identical to, the list that you gave the committee a few moments ago. The list is:

“Animal Health and Welfare ... Chemicals and Pesticides ... Plant Health ... Food and Feed Hygiene ... Nutrition Health ... Public Procurement”

and

“Fertiliser Regulations”.

Do I take it from that list that it is accepted across Governments that those elements of the UK internal market will require common frameworks post-Brexit?

Michael Russell: I want Ian Davidson to answer that, because he was at those sessions. As I indicated in my opening statement, any participation is without prejudice to the final outcomes. I am not saying that we accept the UK internal market in any of those areas; I am saying that discussions are being held and that those are key issues. I ask Ian to tell the committee how that work has operated.

Ian Davidson (Scottish Government): We have had discussed this a bit in previous committee sessions. It is not that those areas in their totality are subject to internal market arrangements; rather, it is that, in each of those areas—this potentially applies to any of the 153 areas of intersection—there are aspects of policy in which there may be internal market considerations and in which there may, indeed, be considerations drawn from other parts of the principles.

09:45

I do not have before me the detail of those aspects, but some obvious issues come up, such as approaches to, say, food safety. There will be discussion about the extent to which it is necessary or desirable to have consistent regulatory regimes and consistent standards and approaches as well as about where there might be legitimate scope for divergence and what the reasons for that divergence might be.

I will tell you a small anecdote. When we had a discussion in one of our early food safety deep dives, we discovered that water is not simply water: there is spring water, Highland water and tap water, for example. Various types of water are all possible under the existing EU regulatory regime.

There has been an awful lot of what I would call myth busting in those discussions so far, so that people understand the extent of the divergence that already exists within the EU regime and understand what that tells us about the future. It is no surprise that there is a general degree of anxiety about what the future of those arrangements would be on leaving the EU. There is a sense that, whatever divergence there is now, at least there is the comfort and certainty of an EU regulatory regime sitting behind it.

The process has been about trying to get to the heart of those areas where we need certainty that the Administrations will co-operate with each other, and those arrangements are a subset of the issues that come up under those areas. However, it is a very long and complicated discussion, to be honest, and an awful lot remains in dispute, with discussions on-going between the Governments about where consistency is necessary or desirable.

There are also concerns about the impact on agricultural subsidy in the future. The four Governments have different priorities in relation to agricultural support arrangements into the future, which are entirely legitimate and driven by the conditions of agriculture in the different nations. Although all Governments accept that each Administration should have its own approach to

agricultural support that is based on the conditions in the country, there is an anxiety about how those approaches rub up against each other, the impact on producers in different parts of the United Kingdom and whether there could be claims of unfair competition or subsidy regimes disadvantaging others.

Those are very complicated arrangements, but we have sought not to leap to the conclusion that uniformity should therefore be imposed across the UK, because that would be a significant backwards step from the current arrangements under the EU.

Adam Tomkins: Thank you. That is a very helpful answer, and I am grateful.

I have two follow-up questions, which I hope will both be quick. The first is on the seven listed items that I identified. Why are those the items to which discussions have turned first? Is that an indication that they are regarded by one Government or another as the most pressing issues? Are they the low-hanging fruit that is easiest to deal with first? Is it an indication of a sense that they are the areas that might need some kind of legislative common framework rather than a non-legislative common framework? Or is the list just random?

Ian Davidson: They are a subset of the 24 areas that we prioritised. Beyond that, it is simply because there are established, well-working, functioning arrangements that have made it possible for discussions to proceed more quickly than they have done in other areas. The list is not entirely random, but it does not indicate a priority ranking of those aspects over aspects of the 24 areas.

Adam Tomkins: Secondly, what are the other issues? I presume that, if we were looking at this in 12 months' time, the list of bullet points would be twice as long, or a bit longer. What other issues have not yet had their stand-alone sessions but are due to have them in the near future?

Ian Davidson: Each of the 24 areas has had at least one stand-alone session, but the seven listed aspects have benefited from probably half a dozen stand-alone sessions, and enough progress has been made to enable us to populate what is known as an outline template agreement covering all the governance areas that we have identified.

We are taking a phased approach. There is a strong project management arrangement across the four Governments whereby we monitor the discussions and identify phases of discussion. Our ambition is to conclude phase 2—which covers those areas—as soon as possible. Ideally, we would have liked to have concluded that phase by now, but I hope that we can do so within the next three months. Given what the cabinet secretary

said about the current circumstances, we must be wary about putting a fixed date on that.

Michael Russell: We have published the list of those 24 policy areas, so we are happy to have that list known.

The Convener: We have that already. I have a supplementary question. I am a simple person, so forgive me, but, given that those 12 areas and 24 other policy areas require to be discussed in order to make sure that the internal market, for want of a better description, can operate successfully, if we leave with no deal and no common framework in place on 29 March, how can that internal market operate successfully?

Michael Russell: That is an excellent question. I have no answer to it and nor does the UK Government. We have not seen statutory instruments that would give us the answer to that or to lots of other things. For example, we have not seen statutory instruments on possible tariffs after 29 March. Presumably, we would be in a position in which the UK Government would attempt to impose. I hope that that would not be the case, because we would not co-operate.

Ian Davidson: I will add a couple of remarks. Members of the committee will be familiar with the no-deal legislative deficiencies work—the fixing regulations that have been made. That is an extensive programme of introducing temporary arrangements to cover the deficiencies in EU law, in the event of no deal. As the minister said, that programme is far from complete, but an extensive programme has been under way, although those arrangements that we anticipate being in place in the event of no deal do not establish longer term foundations for frameworks.

In areas for co-operation that are not covered by legislative fixes, a wide range of pragmatic and practical arrangements will be required and will need to be negotiated. We are very clear that those must not set a precedent for future frameworks but must proceed on the basis of agreement between the Administrations—they are devolved areas and there is no reason why they should not proceed by agreement, notwithstanding the circumstances—and they must not jeopardise the future frameworks that will be required once the relationship with the EU is clearer.

The Convener: That helps me to segue nicely into James Kelly, because he is interested in the areas where we cannot find agreement and there is dispute.

James Kelly (Glasgow) (Lab): When legislative consent for the European Union (Withdrawal) Bill was being sought from the Scottish Parliament, one of the issues was dispute resolution. There was a reasonable objection to the dispute resolution process that was in place. In

discussions with the UK Government and other devolved Administrations, what progress has been made on the arrangements for the 24 areas where there is disagreement about how they will operate?

Michael Russell: That is a good point. At present, we rely on the memorandum of understanding on devolution, which, in order to avoid disputes, emphasises good communication and transparency. There is neither good communication nor transparency; therefore, there is undoubtedly the potential for dispute. However, if you lean on the only dispute resolution process that exists within the JMC, in the end, you come to a process in which the UK Government makes the decision and the devolved Administrations cannot challenge it. For example, the vexed question of that £1 billion payment to Northern Ireland as a result of the Democratic Unionist Party's support for the Tories was raised by the Welsh Government under the dispute resolution process. It said that the money should be Barnettised and should not be paid in the way that it was. That became a non-dispute, because the UK Government decided that it was not a dispute. In a court in which the UK Government is the judge and jury, dispute resolution runs into the sand. Presently, the UK Government does not accept any system that would trump that. That is the issue and it goes on to the wider issue of intergovernmental relations, of which this is part.

There has been no significant progress—indeed, in my view, there has been no progress at all—on intergovernmental relationships and how to get them onto a new footing, given the weight of devolution. That remains unresolved. During this process, we aim to be in a position to resolve issues by negotiation and consensus. I pay tribute to Ian Davidson and his colleagues south of the border but, in the end, that is up to politicians. When these issues go from the level of officials and are escalated to the level of politicians, there is no satisfactory mechanism whereby you can get resolution. The devolved Administrations know that.

James Kelly: You said earlier that this is the first time that you have come before the committee since November, and you are telling us that the issues around intergovernmental relations and how to resolve disputes have been going on since then without any progress, and, obviously, the clock continues to tick down to a potential withdrawal on 29 March.

Michael Russell: We and the Welsh Government—Northern Ireland, regrettably, does not have a functioning Administration—believe that intergovernmental relations require urgent attention if we are to resolve the issues. That is the case whether you believe in devolution or, as I

do, in independence. However, that has not happened.

There is a process under way that is, in my view, not moving at any pace. We would like it to speed up. We have a particular urgency in relation to the Sewel process—we are now straying fairly well away from frameworks—which we believe is broken and requires to be fixed. I have written to the Chancellor of the Duchy of Lancaster, David Lidington, about the matter on two or possibly three occasions recently and have discussed it with him on a number of occasions—in fact, a JMC does not take place without me raising it—but nothing has yet happened. One might argue that ministers in Westminster have bigger fish to fry—as I said at the start, their absorption in the chaos that exists around Brexit is total—but it is a concern.

There has to be a willingness to address the issue. It is a hard one for the UK to address because it requires the UK to accept, or at least allow some understanding of the fact, that the UK Parliament is not sovereign. It is not a hard issue to address in governmental terms, because devolution is not about a hierarchy of Governments; it is about a hierarchy of Parliaments. However, in my view, there is a strong reluctance to address the issue.

Angela Constance (Almond Valley) (SNP): I will pick up on the issues around intergovernmental relationships and the mechanisms that support that. I heard with interest what you said about the work around common frameworks being a long-term piece of work that was never intended to be done and dusted by Brexit day. The Royal Society of Edinburgh picked up on the assessment of the Public Administration and Constitutional Affairs Committee in Westminster that the mechanisms that support intergovernmental relationships in the UK are “not fit for purpose” and recommended the establishment of an independent secretariat to manage and help develop common frameworks. What is your view of that suggestion, given that, I assume, you would prefer a more formal arrangement as opposed to ad hoc ones? Is the Scottish Government developing a proposition to put to the UK?

Michael Russell: To some extent, we have that independent structure anyway, because, officials were tasked with taking the matter forward by the JMC plenary in—was it last summer?

Ian Davidson: The preceding December.

Michael Russell: More than a year ago, officials were tasked with taking the matter forward, but it has not happened. However, the problem lies not with the civil service but with politicians. The issue requires to be addressed as

a matter of urgency, and it is politicians who need to address it. Politicians must make that a priority. I have suggested, first, that the Sewel convention, which is a barrier to giving legislative consent to any Brexit legislation, could be addressed separately from this process by means of a temporary fix. I have put forward ideas on that, but nothing has happened. That is an issue for politicians and, as nothing happens in the UK Government without the Prime Minister saying so, the problem clearly lies with the Prime Minister. Until the Prime Minister is prepared to accept that change is required, change will not take place, so no matter how helpful the suggestions from the Royal Society of Edinburgh, it should address them to the Prime Minister rather than to anybody else.

10:00

Angela Constance: You say that politicians are the problem, as opposed to the civil service or Government structures. I assume that we would not want local government or stakeholders in civic Scotland to be treated in the way in which this institution and we as parliamentarians have been treated in the past and have objected to.

Notwithstanding your saying that the priority for many stakeholders is the more fundamental issue of the chaos that we are in, what are your views on the roles of civic Scotland, the third sector and, in particular, local government in relation to informing and advising in a formal or more ad hoc way on common frameworks in the longer term?

Michael Russell: I am absolutely open to that. If those frameworks are, in the end, to be established—we are speculating about that because who knows what will happen tomorrow, let alone in a month or three months—it is important that everybody understands how they operate. Transparency is a key issue in their operation, so the engagement and involvement of bodies and organisations is crucial.

I have spent time briefing on and discussing the issue with a range of bodies and we will do more of that. We are in phase 3 of this process. It might be useful to remind ourselves what that is. Phase 1 was the principles and the proof of concept—Adam Tomkins referred to the principles earlier. That phase went through. Phase 2 was the detail and the development of that detail, which has by and large happened. Phase 3 is the consultation with stakeholders, among others, which is now under way in these areas. Phase 4 is final proposals and phase 5 will be post-implementation—if we ever get to implementation.

We are in the middle of the process and stakeholders at every level, whether they are other elected representatives, the third sector, business

or business organisations, need to be engaged in it. Of course, not all organisations are involved in everything. If we look at those that we have already mentioned, that list of stakeholders is fairly obvious and they will be involved.

The Convener: It makes sense to move on from intergovernmental relations to scrutiny. We will come to issues around trade deals and the environment, which others are interested in, but first Willie Coffey wants to ask about scrutiny.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Cabinet secretary, you know that the committee has been interested in the scrutiny of the framework process for some time now. I invite you to gaze forward a little. Is there anything on the horizon that helps to crystallise how this committee or the Scottish Government or indeed any level of government might be able to scrutinise what is going on here? If they are shared frameworks, we would assume that there will be shared scrutiny.

Michael Russell: Yes, and we have agreements with the Parliament about how this should take place—there are information arrangements and there is the ability of the Parliament to question. I wrote to the convener last year about shared work on ensuring that we were involving others. I am absolutely open to scrutiny. I think that we should have it.

If the frameworks are eventually in place and if there is—as there should be—transparency about what they are, there should be a clear set of scrutiny arrangements to allow people to understand what is happening within the frameworks and to question that process.

We have existing scrutiny arrangements for ministers and their actions, which are there to be used, but I want to make sure that people understand how this will operate. If it happens—again, I am speculating—it will be part of the machinery of government. It needs to have democratic oversight, just as the JMC process should have democratic oversight. Therefore, we should find a way for that to take place. So far, trying to get the JMC process on to a democratic footing has proved hard enough but I am keen that that should happen.

Of course, the intention is to have a number of bodies that engage with the implementation of the European Union (Withdrawal) Act 2018, but the involvement of the devolved Administrations in those is far from guaranteed. We have seen with, for example, the Trade Remedies Authority that there is no structure in place to allow input to the membership of that from the devolved Administrations, even though both Wales and we have made it absolutely clear that that is essential. We will see the same thing with the

implementation authority. There does not appear to be an acceptance that to have the confidence of the devolved countries, it is absolutely essential to have that type of involvement. That has been fought off on the basis that everything must be controlled by the Prime Minister. That is not only a fallacy, but a dangerous and self-defeating fallacy, which makes it particularly stupid.

I want to see much greater openness from the UK Government and an understanding that if there are to be new democratic structures, democratic scrutiny should be built into them.

Adam Tomkins: I am very struck, cabinet secretary, by what you said about phase 3—the consultation process—because there does not appear to be any reference to that in the UK Government paper published this month. Are those consultations public?

Michael Russell: They have not happened yet, but the intention is to have in phase 3 a three-phase structure involving policy development, stakeholder engagement and then some conclusion. Perhaps Ian Davidson will say a word about that, because he is at the heart of it.

Adam Tomkins: I will just clarify my question for Mr Davidson. When there is stakeholder engagement, will there be draft common frameworks to give to stakeholders to engage with? If so, will parliamentarians have sight of them as well? We have not seen any working or draft common frameworks.

Michael Russell: If there are frameworks, you will see them and it would be wrong if you did not. Ian Davidson will explain what is intended.

Ian Davidson: We are coming to the conclusion of phase 2. We discussed earlier the list of areas where we have made the most progress. The conclusion of phase 2 is that ministers are invited to note the progress that has been made in those areas and to sign off the next phase, which is to move to some stakeholder engagement. Ministers have therefore not yet seen that material, in the main, either.

It is important at that phase that we have a controlled process of stakeholder engagement, given the wider context that we are in. We are therefore developing between the Administrations under phase 3 a plan for that multilateral engagement, which will be tested in a couple of areas first. We have not yet determined what those areas will be, but they are likely to be from the list that we discussed earlier. It is obviously important that parliamentary committees are able to participate in that process as well. We would want to discuss with this committee whether it would be this committee or some of the subject matter committees that would wish to be involved.

Alongside that, we would like to do bespoke Scottish consultation on those areas. What we are talking about under phase 3 is a joint process of all the Governments with stakeholders. We will follow up that discussion with the committee clerks, but I am happy to explain more at this stage.

The Convener: I want to tease that out a bit further. In a framework discussion for any decision that would be made between the UK and Scottish Governments, there could be some constraint of devolved powers through agreements. It is, therefore, not just about consultation, is it? It is also about the Governments seeking agreement from Parliaments—this Parliament, for the Scottish Government—to agreements that might constrain devolved powers.

Michael Russell: I think that I made it clear at the beginning—I say this without prejudice to such decisions—that I would not sign up to a decision without coming to Parliament for that discussion. In fact, I am highly unlikely to sign up to the decisions, anyway. This is about what we will have to do non-legislatively and how we will take forward such decisions. However, it is absolutely essential that that process involves the committees, among others.

Ian Davidson: I clarify that the intention at this stage is to use the outline framework-template agreements that have been developed, which identify the scope of where we think that frameworks might be required, the extent to which co-operation would be necessary or desirable, and the outline of the initial thinking to date on the associated governance arrangements. At this stage, the templates are no more than a playing out of the thinking that has been done between the Governments.

Any constraints on the exercise of competences would be entirely voluntary and associated with delivery of frameworks. As we have made clear throughout the process, none of the framework templates constrain devolved competence because they are documents in which we proceed by agreement. Parliament would be free to choose to legislate in any of those areas, of course, although there would obviously be reactions from others to that.

Michael Russell: Any impositions would immediately cease the process.

The Convener: I apologise to Murdo Fraser if my question strayed into the area that he wants to ask about.

Murdo Fraser (Mid Scotland and Fife) (Con): It did, actually, but I have a question directly for Mr Davidson on what he has just said, which was interesting.

If we have a non-legislative framework that is created by a memorandum of understanding, there is nothing to prevent this Parliament or the Westminster Parliament from subsequently legislating in a way that is contrary to that. What would be the impact of that?

Ian Davidson: That is, indeed, the case, because the areas are devolved. It is about mutuality of interest, with Governments agreeing and choosing to co-operate. As the UK Government's section 12 report demonstrates, the devolved Administrations have made it clear that we will continue discussions and will not arbitrarily make changes in devolved law. This is all based on trust and on proceeding by agreement: in that respect, it is quite novel. However, absolutely nothing in the process constrains the legislative competence of the Scottish Parliament, and we would not proceed if it did.

Murdo Fraser: In effect, it is a self-denying ordinance, without any legal impact.

Ian Davidson: Indeed.

The Convener: I apologise again for straying into Murdo Fraser's area.

Tom Arthur (Renfrewshire South) (SNP): One of the principles that the JMC has outlined is that it will facilitate implementation of trade deals and international agreements. What do you understand the consequences of that to be for devolution, and what particular areas of devolved competency would be affected?

Michael Russell: There is a subject connection between some of the frameworks that we are talking about and issues of trade. Trade also presents wider issues that were addressed in our paper "Scotland's Role in the Development of Future UK Trade Arrangements: A Discussion Paper", which we published last August, I think, and which sets the context for how we want the UK Government to deal with trade. There is no direct link between the frameworks that we are talking about today and the wider issue of how trade deals are arrived at, although the subject issue is extremely important.

There is also the wider context of how countries operate trading links. Trade is not just about one person selling something to another; it is often about how to encourage one person to sell something to another, the types of societies in which they both live and how they grow together in that regard and encourage good practice. We want those issues to be part of the process.

We are keen to see a change in how the UK Government approaches issues of trade. In the current chaos, the debate on trade is immature and is based entirely on supposed trading advantages that will come from Brexit, when there

are none. It is based on a lack of reality or a falsehood. Call it what you will.

In the circumstances, we want to continue to influence the debate by saying that, although we do not believe that any new trading arrangements outside the EU will be advantageous, they must still pay attention to the requirements of the devolved Administrations and the wider issues of the devolved settlement, rather than just the narrow issues.

Tom Arthur: You talked about paying attention to requirements. It is well documented that, in trade negotiations that the European Union has undertaken, there have been modifications and delays in implementation as a consequence of the objections of sub-state Parliaments—for example, that of Wallonia. Given your understanding of the UK Government's position, do you envisage the Scottish Parliament being able to exercise such influence within the UK?

10:15

Michael Russell: I say with respect that the UK Government's reading of the comprehensive economic and trade agreement process takes the wrong lesson. The lesson that should have been learned is that by putting in the same room all those who have responsibility for issues that are connected with trade, to negotiate a trading agreement, we will get a trading agreement. However, if we neglect to do that or forget something in that process, we will run into difficulty. The UK Government has taken the example of Wallonia and the CETA treaty as a fright and said, "Keep them out of the room, or they might want to say something!" That was the wrong thing to do. It should have taken the lesson—it still could—that it should involve the devolved Administrations to the greatest degree possible, because of the areas for which they are responsible and to ensure that they are part of the discussion. That would be the right lesson to take.

If the UK keeps taking the wrong lesson from CETA, it will do the wrong things, which will make it harder for it to get the trade treaties that it wants. Some of the treaties that it wants are simply impossible; it will not have the treaties that it wants.

All that Liam Fox has achieved so far is continuation of the present arrangements with half a dozen countries. This week there has been discussion about a trade treaty with Turkey or a continuation of the existing arrangement. The Turkish Government is saying, "You'll get that by making concessions on migration." That is no surprise: it is where the Indian Government has been for a long time.

The issues in trade are complex; they need to be addressed with political maturity and understanding such as we have not seen from the UK Government.

Tom Arthur: When the committee began its work on common frameworks, it was on the assumption that there would be a transition or implementation period during which the frameworks could be devised and consulted upon with a great deal of engagement. However, the pall of Brexit uncertainty has grown, and we might be in a scenario—either four weeks on Friday or at the end of June—in which the UK will leave the European Union without a deal and, consequently, with no implementation or transition period. In that case, it would be necessary for the UK to seek the most expeditious trade deals possible. With no common frameworks agreed, would there be a mechanism for this Parliament and the Scottish Government to be in the room for trade deals? Has there been any indication that the UK Government would, in that scenario, be willing to accommodate the devolved Administrations?

Michael Russell: No, there has not—although I think that, in those circumstances, nobody would know where the room would be or who would be in it. We are completely without guidance as to what would take place. Many countries would step back from such a scenario. In the unspeakable situation that Tom Arthur has described, many countries would, in the initial period, simply step away from engagement on continuing or new arrangements. They would want to allow the situation to settle down before making a judgment on how they should engage. If there is no deal on 29 March—please God that that is not the case, because it is a terrible prospect—I would not expect progress on trade deals in the short term or, even, in the medium term.

The trade deals that have been reached—with the Faroe Islands, Palestine, Israel and one or two others—would continue, but I do not think that there would be anything new. The UK would become a third country in EU terms, so imports and exports would have considerable difficulties for a time. That is simply the reality; it is no exaggeration.

The Convener: Patrick Harvie is interested in that area.

Patrick Harvie (Glasgow) (Green): The trade issues that I wanted to raise have been covered, with the exception of environmental issues.

The Convener: Kick off on the environmental stuff now, in that case.

Patrick Harvie: The contents of trade agreements and issues that might touch on devolved competence relate in large part to environmental governance and regulation, and a

great deal of the concern about loss of environmental governance functions at EU level relates to devolved areas.

The Scottish Government has said that it wants to agree common approaches in such areas, where appropriate, but it also wants to avoid diminution of the very strong constraints on EU member states that exist. However, it seems to me that that is becoming increasingly difficult. The UK Government has published its proposals on environmental principles, but they are severely limited in their application. For example, they will have no application to

“taxation, spending or the allocation of resources within government”,

which seems to suggest that the Treasury simply wants no truck with the business.

The new office for environmental protection will have limited scope; indeed, it will have nothing to do with novel changes in policy or anything that is not strictly to do with environmental law. To what extent does the Scottish Government feel that it will be possible to achieve common approaches in environmental governance and regulation, where appropriate, and to avoid the diminution of environmental standards on which the UK Government seems to be dead set?

Michael Russell: The prospect of common approaches producing continuity of standards is limited, and is becoming more so by the day. I do not think that such continuity is the UK Government’s objective. I believe that in fact, and no matter what is being said, its objective is to diminish environmental standards over time, just as I believe that its objective is to diminish human rights and employment standards. I do not believe any assertions to the contrary.

I was interested to note that in an interview on the new BBC Scotland channel the Icelandic President expressed her very clear view that being part of European environmental standards has been important for Iceland. Although we are at a disadvantage in that we were not involved in setting those standards—indeed, that is why Scotland should be an independent member of the EU—it is very important that they be observed. I and the Scottish Government continue to believe that it is right that we continue with EU environmental standards. My colleague Roseanna Cunningham is, rightly, consulting on environmental governance.

As Patrick Harvie knows, there are still possibilities with regard to keeping-pace powers, which were among the many parts of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill about which the Supreme Court was happy. How we apply those powers and take forward the issue is a matter for

discussion among the parties, but I am sure that Patrick Harvie will want to bring the matter to the table. In seeking a way of using the powers, he will have my sympathetic support.

I want to ensure that if there is an interim period in which Scotland is not a member of the EU—in my view, that is not inevitable—we maintain the standards and do not diminish them in any way. It would simply not be possible to take action parallel to that of those who seek to diminish standards.

Patrick Harvie: You have touched on the Scottish Government's actions on this matter. To whatever extent there will be a common approach, the issue is the actions that both Governments take. As you have said, the Scottish Government has published its consultation on principles, but it is open ended and does not include any specific proposals on governance. The expert round-table that the Scottish Government convened agreed that for most EU governance functions, there are no equivalent domestic bodies at present. Again, in order to know whether it will be possible to meet the objectives of maintaining standards and achieving some common approach, where appropriate, we need not only to hear a critique of the UK Government's proposals but to have clarity about when the Scottish Government will come forward with its proposals on not just the principles but the governance structures and how those structures will exercise robust powers, particularly at those times when Government might not want them to.

Michael Russell: As an ex-environment minister, I am familiar with both sides of that concept. It is important that the Cabinet Secretary for Environment, Climate Change and Land Reform addresses those issues herself, because I cannot and should not speak for her on areas of her policy. However, I am convinced that her objectives are the same as mine and are about maintaining the highest standards, ensuring that they are enforced and not allowing any drift or determined drive downwards. Those objectives should lead to decisions on the areas that you are talking about.

The cabinet secretary will be mindful of what you have asked me—I will make sure that she is aware of it—and I am sure that she will want to respond.

The Convener: I will bring in Alexander Burnett next.

Alexander Burnett (Aberdeenshire West) (Con): Patrick Harvie has covered the questions that I was going to ask.

The Convener: I apologise for not bringing you in earlier.

Emma Harper (South Scotland) (SNP): I am interested in getting some clarity about how protected geographical indication status fits with common frameworks; it might be an internal market issue. PGI status is about promoting the provenance of produce, such as Scottish beef, lamb and salmon—and whisky, of course. Our food and drink industry contributes £14 billion a year, and it is important that we protect our rural Scottish economy, jobs and everything.

Cabinet secretary, you talked about the progress that has been made on food and feed hygiene and safety law and animal health and welfare. Progress has been made.

If there is no deal, there will be no protection at all for products that are currently protected by PGI status, which are provided for in the current withdrawal agreement. People tell me that that would be devastating for their businesses. Can you offer assurances about there being equivalent schemes? Where are we on that?

Michael Russell: I would be interested to hear such assurances, too. The UK Government has offered no such assurances. It published some proposals last week or the week before, without consultation.

This is a serious situation. The European PGI system has been extremely good for the businesses that you mentioned—and for Stornoway black pudding, Arbroath smokies, and Dunlop cheese. These are products of the highest reputation and standard, which have benefited from European protected geographical indication status. It is yet another example of how mad this process is that that will be thrown away in the circumstances—and it would be even madder if there were to be no deal and the protection were removed.

I am not saying that there are hordes of people who are ready to fabricate false black pudding, but we are talking about an important part of the market, and it is easy to diminish it. There is a serious issue, for example, about what American producers of whisky might want to call their product, in order to sell it as something that it is not. That is what this is about: people should not sell things on a false prospectus when they are unable to match the quality, taste and provenance of items.

If there is no deal, one of the things that we will require to do—urgently, obviously—will be to try to find some protection. However, it will be difficult for us to secure protection immediately, because our system will not have the reputation that the European system has. The European system works for two reasons: it has a reputation that is Europe wide; and it is enforceable, which is a key issue. Someone cannot just falsely call their

product something that has PGI status; if they do so, they are in trouble.

We would want to do what we could to help, but the situation illustrates how the issue goes down to every level. A cheese maker in Dunlop will be disadvantaged by the chaos that has been created at Whitehall.

Emma Harper: I am aware that the American beef lobby has said in a consultation that the beef trade from America to Europe has flatlined, and that it is seeking to reduce welfare standards. That means hormone-injected beef, which we do not want in this country, as well as other approaches—I am aware that somatic cell count is an issue in dairy farms. Having PGI status in the wider European context would protect our produce.

Michael Russell: There is a high standard in food safety and in terms of reputation and provenance. That is really important. That approach has been built over many years, and over the past 12 years of Scottish National Party Government, the issue of Scottish food and drink and the sector's exports has become a huge one. The percentage of the economy that is devoted to food and drink is much greater in Scotland than it is south of the border—that is true for Wales and Northern Ireland, too.

In those circumstances, we should do everything that we can to support and develop those industries, and we should roundly condemn actions that do not do that. We should also refuse to accept lower standards. Patrick Harvie talked about lower environmental standards, and the food and drink standards issue is part of the same argument. How on earth have we got to a situation in which we are actively trying to negotiate lower standards in every part of our national life, including trading? How on earth could we get there? That is where we are today.

The Convener: Let me ask a final, sweep-up question. You referred a number of times to the freezing powers in section 12 of the European Union (Withdrawal) Act 2018. Have you had discussions at any stage with the UK Government about the nature and type of progress—we have been hearing from Ian Davidson about progress on common frameworks—that might give the UK Government sufficient comfort to enable it to repeal those provisions?

Michael Russell: As we do not regard the powers as legitimate and do not accept that they are necessary, we have not said in any formal way in recent months, "Please repeal these"—at least, I cannot remember doing so. What we have said to the UK Government is that if it uses the powers, that freezes our co-operation; we stop co-operating with it on that issue, immediately.

So far, so good. There is a half-empty, half-full glass here—in the wider context of there being a drought on all of this. There is a small amount of positivity about the fact that we have been able to agree two quarterly reports on the basis that the UK Government has not used the powers, does not need to use them and does not anticipate using them. That is good news.

It is up to the UK Government whether it keeps the withdrawal act or not—the act is dead to us and we do not acknowledge its legitimacy.

The Convener: I thank you and your officials for giving evidence this morning.

The committee previously agreed to take the next item in private, so I close the public part of the meeting.

10:31

Meeting continued in private until 10:35.

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