



OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Finance and Constitution Committee

Wednesday 17 February 2021

Session 5



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FINANCE AND CONSTITUTION COMMITTEE

6th Meeting 2021, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

*Tom Arthur (Renfrewshire South) (SNP)

Jackie Baillie (Dumbarton) (Lab)

*Alexander Burnett (Aberdeenshire West) (Con)

*Patrick Harvie (Glasgow) (Green)

*Dean Lockhart (Mid Scotland and Fife) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*John Mason (Glasgow Shettleston) (SNP)

Anas Sarwar (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

James Kelly (Glasgow) (Lab) (Committee Substitute)

Michael Russell (Cabinet Secretary for the Constitution, Europe and External Affairs)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Virtual Meeting

Scottish Parliament

Finance and Constitution Committee

Wednesday 17 February 2021

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning and welcome to the sixth meeting in 2021 of the Finance and Constitution Committee. I have received apologies from Jackie Baillie, and James Kelly will be attending as a substitute. Apologies have also been received from Anas Sarwar.

The first item on our agenda is to decide whether to consider our draft budget report in private at future meetings. Is that agreed?

I am guessing that that is agreed.

Brexit (Impact on Devolution)

09:31

The Convener: We move to our evidence session on the impact of Brexit on devolution, for which we are joined by Mike Russell, who is the Cabinet Secretary for the Constitution, Europe and External Affairs; and the Scottish Government officials David Barnes, who is deputy director, European Union exit strategy and negotiations; Euan Page, who is the head of United Kingdom frameworks; and Chris Nicholson, who is a solicitor and head of constitutional reform and external affairs. I warmly welcome our witnesses to the meeting, and I invite the cabinet secretary to make any opening remarks that he would like to make.

The Cabinet Secretary for the Constitution, Europe and External Affairs (Michael Russell): Thank you very much, convener, and thank you for the invitation to appear before the committee again. I do not know whether this will be true, but this may well be my last appearance at the committee in the current session; indeed, as I am not standing for election again, it may well be my final appearance of any session. Thank you for having me here on this occasion.

I do not think that anything I have to say will be a great surprise to anybody, as I have been appearing at the committee regularly over the past few years. The Brexit deal that was agreed by the United Kingdom Government is a bad deal. It will remove Scotland from the European single market and the customs union against our will, hitting jobs and the economy at the worst possible time. The post-Brexit relationship with the European Union could have taken any number of different forms, but the one that it has taken is very nearly the worst form. It was the result of a conscious political choice by the UK Government that was taken, as I said, firmly against the wishes of Scotland.

Of course, leaving the EU fundamentally changes the UK as a state. With the UK shorn of the EU's negotiating power and expertise, it will shine a spotlight on the inadequacies of the intergovernmental arrangements that exist within these islands. My preferred solution is well known to the committee, but even if that solution is not favoured by all members of the committee, there can be no doubt that there require to be fundamental changes in the structure of devolution. Regrettably, the UK Government does not seem to understand that, but instead appears to be keen to diminish devolution to further centralise control.

Significant changes will be required, for example, in the area of international treaties, because there are areas of devolved competence that are actively being discussed with others as the basis of those trade treaties. It is important that the Scottish Government is heard as the UK Government develops international ambitions so that we are not simply dragged along in a series of what you might call strategic imperialist visions, but that thought is given to our position as a small country in Europe. We need robust governance structures that include dispute resolution mechanisms so that we know with confidence how we can do business. There is also a range of other issues that require recognising, including the very important issue of alignment with EU priorities and regulations.

The United Kingdom Internal Market Act 2020 pushed that whole issue in the wrong direction. It was an assault on devolution, and it makes it difficult to see how we can get the type of agreement that we wish to have. The work that should be going on to produce a new intergovernmental review has by and large stalled, with the UK Government not willing to move on the key issues that still require resolution.

Those are all matters that I am happy to talk about and to discuss. There are issues with the frameworks, of course, that can also be considered, but I hope that that gives an indication, at least, of where I am coming from. As I said, my position will not be a great surprise to members of the committee, but I am happy to discuss it with them.

The Convener: Thank you for those opening remarks. I will come on to some of the alignment issues in a moment.

It is now six weeks since the trade and co-operation agreement came into force, and issues have arisen in areas such as fishing, costs for consumers have risen, and there have been significant logistical challenges. The UK Government contends that those are teething problems. What are your views on the impact of the agreement on the Scottish economy? Are they teething problems or are they more systemic and long lasting?

Michael Russell: It is interesting that even the UK Government has stopped referring to them as teething problems. I think that it recognises the reality of the situation. The reality is that the relationship between the UK and the EU has changed; it has changed, as far as we can see, permanently. The UK is now a third country, so its means of doing business with the EU is a means of doing business as a third country. Not only have I been saying this for the past few years but every commentator has been saying it—it was inevitable that that would lead to a change in how business

is done. A third country does not have access to the single market in the way that a member of the single market does. It will take longer. There will be more forms to fill in. There will be more inspections and checks. In some businesses, that will be, if not impossible to deal with, very difficult to deal with. For example, if you are dealing with live seafood, it is very difficult to encompass that within the time that is required to be taken.

Of course, some of that will be exacerbated by trying to get used to the new procedures. You could—with some confidence, I think—expect that it will not always be absolutely as bad as it is at the moment, but then, of course, options also change. If a company in the EU is, for example, exporting to the UK as a small part of its market and it becomes difficult to do it and there are alternatives, those alternatives will be found. It is much harder for one country out of 27 to do that, but all 27 can make those choices.

Substantially, the change in relationship is the problem. The UK will have to get used to a different relationship. Some of the effect of that is being hidden by the fact that we are in a pandemic. I believe that that was the intention of the UK Government—it did not go for an extension of the transition, because it wanted to hide this away. We have not seen anything about increased difficulties for travellers at borders, for example, because people have not been travelling. If the change had taken place in normal times, we would have seen very considerable dislocation. People have not had the experience of, for example, being on holiday in the EU with the changed status and the issues that may arise from that, such as those to do with mobile phone roaming. There is a lot still to come on this.

Finally—I do not want to prolong my answer, convener—some changes are still to come, because we are still in a period of grace, even though the grace period is not being talked about. There are changes still to come in the spring and in the summer that will make things harder.

The Convener: If I understand it correctly, the way in which the trade and co-operation agreement works is that there are constraints that have been brought about by the level playing field requirements covering subsidies, tax, competition, labour and environmental standards, but that, at this stage, there is no commitment from the UK Government to maintain alignment with EU rules. I understand that, in the event that there is a serious divergence by either side from the level playing field, there are rebalancing measures in the agreement. Given the level playing field arrangements and the impact of the UK internal market policy on divergence across the UK, what do you think the effects will be on the Scottish Government's policy choices in devolved areas?

What does that mean in practice? What might it look like?

Michael Russell: You could hold a complete inquiry into that one subject. I think that it will be a dominant issue in the next session of Parliament. You are right to say that, essentially, the UK has freedom of action, but that has consequences for its relationship with the EU, and that is perfectly understandable. The UK made a conscious choice to do it that way.

How that affects the exercise of devolved powers and the freedom of action of the devolved Governments will be profoundly influential on what those Governments feel that they can actually do. If we then look at the possible constraining effect of the internal market act—an effect that is very likely unless we can defeat that in the courts, which I think is still a possibility—we see that the consequences will be severe. Your successor committee will have to look at that very carefully.

If we put that alongside what is an active agenda to diminish and undermine devolution—there can be no doubt about it now; that is exactly what it is—I think that a very serious set of circumstances will arise in the next session of Parliament, which will require substantial action. I will not labour the point. You know what my preference is; I think that it is no secret to know that it is also your preference. We can choose between a constant diminution and undermining of devolution or we can choose independence. That is the choice.

The Convener: Thank you, cabinet secretary. If I get time, I may come back and ask a question around the fiscal framework, but we will see where we are. In the meantime, we go to Murdo Fraser.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning, cabinet secretary. As you said, this might be the last time that you appear in front of the committee, so I would like to say how much I have enjoyed our exchanges and how much I will miss them in the future.

I want to ask about the issue of common frameworks. You helpfully wrote to the committee on 8 December with a summary of where we are with the common frameworks. It is clear that, with the pandemic, there has been some delay in putting those in place but that progress has been made, particularly in relation to stakeholder engagement and scrutiny by various parliamentary committees.

However, in your letter, you made the point—fairly, I think—that we face something of an issue in terms of timing. Given that Parliament will rise in a month's time and the new committees of Parliament will not be formed until well into May—in practical terms, we realise that committees do not really get their work programmes under way

until September—we are looking at a gap of some months before further work can continue. I am interested in any thoughts that you have about the timescale for the work in this area to progress and what that means in practical terms.

Michael Russell: Thank you for your kind words. I hope that this exchange will live up to the high standard that we have set ourselves over many years.

I am pleased to say that, as you know, three full frameworks have been to relevant lead scrutiny committees: nutrition labelling, composition and standards; hazardous substances; and food and feed safety and hygiene. I do not have to hand the exact list, but all the other frameworks have been provisionally agreed for the remaining policy areas—by that, I mean that they have been signed off by portfolio ministers across the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive, with two exceptions. There are two that have not yet been signed off by the Northern Ireland Government, and I am assured that that is nothing to do with their content; it is to do with process. The process is complete in terms of those frameworks existing, but their scrutiny by committee still has to take place. Essentially, they can operate as if they were fully in existence, but they require further scrutiny. That is to be regretted. You are right to say that the pandemic and other issues have affected that.

The question then is whether there would be any lacunae—any moment at which the lack of frameworks in existence would be a problem. I do not see it. I do not know of any such circumstance, and no such circumstance has been drawn to my attention. Were that to be the case, the frameworks could operate in provisional form. They are there and they are essentially available, with the exception of the two that have not been signed off by ministers. I think that that will happen; in my view, it is just a matter of process.

Murdo Fraser: Thank you for that response. To an extent, you have pre-empted my follow-up question. Given that the frameworks are not in place, we are in a lacuna at present. Given that there would be an issue only if there was divergence in regulations in different parts of the UK, is there, in effect, a self-denying ordinance in place that would prevent any divergence, pending the final completion of the current frameworks?

Michael Russell: I do not want to bandy words around, but it depends on what you mean by “prevent”. The reality of the situation is that we have entirely accepted that there should be negotiation on these matters from the very beginning. Therefore, if Michael Gove were to say to me, “Here is an issue that requires the operation of the frameworks,” and we had a

disagreement on it, an attempt would be made to find agreement on it. It could then be asked whether “prevent” means that somebody could say at any stage in that process, “No—sorry, but I’m just imposing what I want.” The only people who could do that are the UK Government through the single market act, and that would lead to a breakdown in the operation of the framework, because we have said that we would not operate frameworks in those circumstances.

You called it a self-denying ordinance. I think that relying on the frameworks is the right thing to do. A step towards that was eventually taken in the House of Lords amendments to the United Kingdom Internal Market Bill. I still think that it is best to rely on the frameworks completely. I can see no reason why the UK Government should not do so. Therefore, rather than saying that it is a self-denying ordinance, I would commend restraint on the part of the UK Government on these matters.

09:45

Murdo Fraser: I am sure that restraint is always commendable.

Over the past few years, members of the committee have spent a great deal of time looking at the issue of common frameworks. We have produced a number of reports, and one of our key recommendations was that the common frameworks should always be agreed between all the parties and should not be imposed by the UK Government. It sounds as though you are saying that that has not happened and that the frameworks have been reached by negotiation and agreement.

Michael Russell: Absolutely, and that is why I believe that they should be relied on. That is why I believe that it was foolish to pursue the internal market bill, because it disrupted that process. I hope that that can be put to one side. Regrettably, that was not the decision of the UK Government and its supporters, but it might be the decision of the courts.

The Convener: I know that Tom Arthur has a couple of areas that he would like to cover around consent, and around musicians; we will come back to musicians later, Tom.

Tom Arthur (Renfrewshire South) (SNP): Good morning, cabinet secretary. I have a specific question around consent and the internal market act. When the Chancellor of the Duchy of Lancaster, Michael Gove, was in front of the committee back in September, I pressed him on schedule 2 and which services would be exempt from mutual recognition. At that stage, the United Kingdom Internal Market Bill contained provisions to allow the list of exempt services to be modified

via statutory instrument without any engagement with the devolved authorities. Indeed, there was a temporary made affirmative resolution provision in the bill. I understand that those provisions were removed prior to the passing of the bill.

What has now been put in place, at section 18(8) and (9) of the act, is described as a “consent mechanism”. My understanding is that that is not so much a consent mechanism as something that effectively obliges UK Government ministers to give one month’s notice of their intention to use the powers, because there is no need to obtain consent from any of the devolved Administrations. Have I missed something, or is that a fair understanding?

Michael Russell: No, that is a reasonable understanding.

The issue of consent has been at the heart of all the discussions that I have had with the UK Government over the past almost five years. It is a very simple issue. Devolution is a delicate dance around the idea of Westminster parliamentary sovereignty. You can dispute Westminster parliamentary sovereignty and the UK Government’s current understanding of, and heavy reliance upon, sovereignty, but someone who believes those things does not believe, in the end, that the Westminster Parliament can be gainsaid by anybody else, and certainly not by the devolved Governments and the devolved Parliaments. In these circumstances, “consent” is perhaps not the accurate word to use. As with legislative consent motions, if consent is refused but the action is still taken, the word “consent” is devalued and maybe is not the right word to use.

You are right: telling people that you will do something in the hope that they will eventually say, “Well, okay—that’s fine” is not a mechanism for consent. There is no requirement for the UK Government to say to us that it will do something to which we say, “No, you will not,” and then we have a discussion about it. When we come to discuss internal governance and the review of internal relations, that will be a major issue.

Tom Arthur: For all that there will be further reviews, is it not the case that it ultimately comes down to convention, as with everything in the unwritten British constitution? Ultimately, there can be no meaningful consent while the concept of parliamentary sovereignty—the Crown in Parliament—exists. There could be a meaningful consent mechanism only if there was a written constitution that was independent of Parliament. Is it possible for any meaningful consent mechanism to exist for devolved legislatures across the UK if the concept of parliamentary sovereignty is still predominant at Westminster?

Michael Russell: I do not think so, because we have seen how that operates in reality for a long time.

To be fair, Mark Drakeford has been very thoughtful about this, and he and the Welsh Government have published material that indicates that they see a way in which sovereignty would be held by each of the devolved Governments, and that sovereignty would be freely pooled among the four nations. We would all say that we were responsible, that we had sovereignty, that we were pooling it and that we were taking part. I suppose that you could construct that as federalism of some sort.

I do not see any willingness by the UK Government—of any hue—to move in that direction. It seems to me then that it is absolutely stark and clear that you then accept a system in which you can always be overruled. That did not happen for the first decade and a bit—maybe the first two decades—of devolution, but there was that potential. Then a UK Government arose that said, “We can do what we like with impunity”, and that is what we are now seeing. That seems to be, in the end, not tolerable and not stable. We need to move into a different dispensation, otherwise it will just happen again and again.

Tom Arthur: I have a final question. I do not want to overplay the valedictory air of this committee meeting, which is likely to be the cabinet secretary’s last appearance, but I ask him to reflect on his tenure over the past five years. How has his understanding of Scotland’s place in the UK and the relationship between the devolved Governments and the UK Government changed and developed? Has he been surprised or shocked, or have the views that he already had perhaps been confirmed? Is there anything that he knows now that he would perhaps have found difficult to believe or predict five years ago?

Michael Russell: It would take me far too long to answer that. I can simply say that I do not believe that the constitutional settlement under which we presently live can continue to exist for a long period of time because it is inherently unstable. I think that there is a clear choice for the people of Scotland—that is not a great surprise to anybody.

I had hoped that there would be a rational approach to this from the UK Government, and there has not been. There has simply been consistent and solid power play by the UK Government, in which it knows it can get away with things. That has been a huge disappointment.

The one thing that I would say is something that I have said before many times; it is not an original thought—I think that it arose from something that a journalist wrote about two years ago. If, at the very

start of the Brexit process, Theresa May had put everyone in the same room in Downing Street—she tried to do this but then did not listen—and said to the leaders of the Labour Party and the Liberal Democrats and the First Ministers of Scotland, Wales and Northern Ireland, “We all need to get something out of this. How can we compromise on Brexit so that everybody feels that they have something?”, we could have avoided the bitterness, the unpleasantness and the sheer damage that has been done. It became a right-wing ideological fixation that the hardest of Brexits had to be delivered, and that has led to the huge difficulties that we have and will continue to have because this form of Brexit is the hardest Brexit. I would not have supported a Brexit of any description, but it was possible to have a compromise in 2016 and early 2017, and that did not happen.

Patrick Harvie (Glasgow) (Green): Good morning, cabinet secretary. I will continue with the issue of consent. You have clearly set out your own view that the concept of consent is problematic. I think that everybody would accept that its meaning is contested, but things have changed, partly with the introduction into the relationship of additional elements of consent in the UK internal market act, and partly with the recent history of major legislation being passed that affects and constricts devolved competence without the consent, or against the refusal of the consent, of the Scottish Parliament and other devolved jurisdictions.

Towards the end of last year, the Welsh Government announced that it would initiate a legal process. On 16 December, Jeremy Miles said:

“We have therefore today formally notified the UK Government that should the UK Parliament enact the Bill in its present form, I intend to take immediate action to seek a declaration from the Administrative Court that the ambit of constitutional legislation cannot lawfully be cut down in this way and that the ensuing Act cannot be interpreted so as to have that effect.”

I think that you indicated on the same day that the Scottish Government would support and stand with the Welsh Government in that action. Can you give the committee an update? What has happened since 16 December? How actively is the Scottish Government engaging with the Welsh Government on that potential legal process, and, should your colleagues continue to form the Scottish Government after May, what are the intentions of the Scottish Government going forward?

Michael Russell: I am happy to give an update. Jeremy Miles made that announcement in December. I was aware of it and spoke to him very shortly afterwards. I made it clear that the Scottish Government would support the Welsh in that

action. They issued a letter in advance of action—I think on the same day—to the UK Government and had a response. On 19 January, the Welsh Government commenced formal legal action, in which it seeks judicial review to test the legality and principles of the internal market act.

The Welsh Government now has to seek permission to proceed. It has applied for permission to proceed, which has not yet been granted. I understand that the UK Government's answers to the initial step have now been lodged—they were lodged, I think, at the end of last week—and the court will then decide upon them. I think that the Welsh wanted an expedited process, but that has not been granted.

We have continued to liaise with the Welsh on that. We have indicated that, should they get consent to proceed, we will take an active role. Whether we join in the action or take some other step, I do not think that we have decided yet. However, we will take an active role and we strongly support the action. We are not yet at that position, but we will stand beside, in lockstep with, alongside and in support of the Welsh in that process.

We also reserve the right to consider other actions ourselves. That is an active process, but we decided that we would see what happened with the Welsh action first before we took any actions ourselves.

Patrick Harvie: You have not decided yet what the Scottish Government's active role will be, but when do you anticipate that decision being reached?

Michael Russell: It will be when we know whether the Welsh have permission to proceed, because then our choice is very clear: do we join ourselves to the action or not? Certainly, my view is that we should join ourselves to the action if they have permission to proceed.

Patrick Harvie: Unlike Tom Arthur, I take the view that it would be possible to have a clear legal definition of consent and of the exemption “not normally”, which usually applies to consent. It would be possible to reach a clear legal definition, which would constrain the actions of UK ministers and which would allow for proper interpretation of legislation in the courts if there was conflict or dispute in the future.

It is perhaps not for those of us who want Scotland to be independent to demonstrate for the convenience of others that consent could be properly legally defined, but do you see any interest in that from those who are seeking to persuade the people of Scotland that the current constitutional arrangements are appropriate? Do you see any interest from them in achieving a change that would properly define that concept of

consent, which, ultimately, is fundamental to the relationship between Scottish popular sovereignty and the sovereignty of the UK Parliament?

Michael Russell: No. I see no willingness to accept that. It is tied very closely to two other things. One is the recognition that if the people of Scotland decide that they wish to vote on their future, they should be allowed to do so. If you deny that, you are getting yourself into all sorts of extraordinary hot water. It seems to me that if that is not accepted, and if there being an element of equality and equity in consent is not accepted, we are in a very difficult place when it comes to negotiating with people who just do not accept either of those two norms.

10:00

I have quoted before at this committee—let me quote it again—a remark that I remember the then Taoiseach, Leo Varadkar, making at the British-Irish Council about what trust was. He said that trust between the nations of the EU was based on the fact that it was legally enforceable. If you fell out about something, there was a framework of law through the European Court of Justice and the arrangements that you could appeal to. If you have no framework of law and if you do not believe in popular sovereignty and the rights of people to make decisions, it is pretty difficult to have a conversation about how we can move this stuff forward, because you are not doing it from a position of any principle or any firm ground at all.

I suppose that that is a very long way of saying that it is possible to envisage a formal constitutional structure that guarantees consent, but I think that the current UK Government, previous UK Governments and most likely future UK Governments do not have a scooby about how they would do that, nor have they any desire to do it.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning, cabinet secretary. This morning, the BBC—it might be BBC Wales—is running an article about EU citizens who are eligible to stay in the UK and the concern that they are at risk of slipping through the net as a result of difficulties in getting support with completing the application. Campaigners are warning of a Windrush-plus. Is that a worry in Scotland? Has the Scottish Government picked up on it?

I know that we are in a pandemic, but could you also comment on future travel arrangements for EU nationals?

Michael Russell: Mr MacGregor asks a very appropriate question. I am aware of one case in my constituency of somebody who is in Scotland perfectly legally but, because they arrived

comparatively recently and because of the pandemic, they are finding it difficult to get a national insurance number, for example, and to get an appointment to be assessed by the jobcentre as suitable for a job. They have a job lined up but the jobcentre is being very slow in processing them because of the pandemic. A number of things have come together that are making things difficult for some EU citizens. There also continues to be insecurity because people do not get a physical document that says that they have settled status. It is all highly unsatisfactory.

My colleague Jenny Gilruth has responsibility for migration and EU nationals. As a Government, we continue, first, to try to keep EU nationals informed and, secondly, to look at whether we can provide assistance in individual cases as they arise. I highlight that we have supported citizens advice bureaux in making sure that it is a place where information is available.

There are structures under the withdrawal agreement that are meant to look at how not individual cases but generic issues are being handled. We are making representations and trying to make contact, but the situation is highly unsatisfactory. It is so unnecessary, because EU citizens in Scotland and the UK are vital and are very welcome. It is just utterly unnecessary and unpleasant.

Fulton MacGregor: I appreciate the work that the Scottish Government is doing to keep EU citizens informed. We will continue to need to stay on top of the issue, particularly as we come out of the pandemic.

I turn to a different line of questioning—it is my final one, convener. We have seen the news that, unfortunately, Scotland's bid to remain in the Erasmus+ scheme has not been successful as we are not an independent nation. Erasmus+ was a very positive scheme for us. Does the Turing scheme, which the UK Government has put in place, have the capacity to match up to Erasmus+? Is it likely to match or exceed Erasmus+, or do you have concerns about our losing something for our young people?

Michael Russell: I would not give up on Erasmus+ yet. What the President of the Commission said was factually correct: Erasmus+ is a scheme for nations to be a part of. That is why Jeremy Miles and I pressed the UK Government so hard through the joint ministerial committee process. We made representations to ensure either that the UK stayed in Erasmus+ or, if the UK did not stay in, that arrangements were negotiated to allow the UK's membership to devolve to the devolved Administrations. That would have been, in my view, negotiable and I am surprised—well, I am not surprised; I am disappointed—that it was not negotiated.

However, let us not give up. There may be all sorts of possibilities that we can look at. It is a loss—it is a substantial loss. The Turing scheme does not deal with youth work and with youth issues, which were a huge part of the Erasmus+ scheme that was very important to Scotland.

People are now being told what the Turing scheme is going to be about, but there has been no meaningful consultation about what it should be about—even right down to its name. It just appeared. Work was clearly being done on it and we were not being told about that work, which does not give us huge confidence in it.

I continue to argue that we have lots of friends in the European Parliament who are very keen that we continue to have some association. We can see that Ireland is taking Northern Irish young people under its wing—they will be associated with the scheme through Irish institutions and organisations. We need to continue to think about what we can do.

Two things are shameful about the situation. First, it is utterly unnecessary. We could have remained part of Erasmus, and it is ridiculous that that has not happened. The second thing is the manner by which it was done. The UK Government knew perfectly well the devolved Governments' view on the matter, and we were not told the truth about it. We were never shown the value-for-money assessment that was undertaken and, right up until virtually the end, we believed that the UK Government intended to stay in, or at least was trying to stay in. That was shocking.

Dean Lockhart (Mid Scotland and Fife) (Con): Good morning, cabinet secretary. This might be our final exchange at committee, but I look forward to our debate tomorrow on the citizens assembly.

My question relates to the Scottish Government's plans for keeping pace under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 and parliamentary scrutiny of how that power is exercised.

In response to a freedom of information request on 23 December, the Scottish Government confirmed that internal impact assessments would be prepared in relation to keeping pace with future EU laws. As the cabinet secretary will recall, such assessments were formally rejected when we considered the bill. I requested that impact assessments be part of the legislation, but they did not make it into the final act. Will the cabinet secretary publish impact assessments that are prepared by the Scottish Government so that the Scottish Parliament can scrutinise them?

The second point that came out from the freedom of information response was that the Scottish Government will also undertake

consultation on keeping pace with EU laws with bodies such as the European Movement, but no mention was made of consultation with trade bodies such as NFU Scotland and the Confederation of British Industry. Again, we tried to have such consultation reflected formally in the legislation, but that was also rejected. If the Scottish Government plans to consult groups such as the European Movement, will the cabinet secretary also undertake to consult trade bodies such as the NFUS and the CBI?

Michael Russell: I can assure Mr Lockhart and set his mind at rest: no consultation would be complete without it showing that the right people were consulted. If an issue affects agriculture or the environment, for example, it would be inconceivable, in my view, not to consult the NFUS. I do not think that he needs to worry on that score.

Unless there is a reason—to do with confidentiality or whatever—for not publishing the assessments, I cannot see any reason why they should not be published. Indeed, I think that they would be FOI-able in any case. I do not think that anything will be done in secret. We have not yet moved to use the 2021 act, but when we do, as I am sure that we will, it will all be open and above board. We will act in accordance with the legislation, and will even go further. Despite what happened with the amendments—which Mr Lockhart did not want—we are nothing if not helpful. I am quite certain that a reasonable person, which I am sure that he is, will be satisfied with our approach.

Dean Lockhart: That undertaking to be transparent is welcome, cabinet secretary. To an extent, you have anticipated my supplementary question. Do you have any plans to use the keeping pace powers—do you anticipate using them—in the current session of Parliament?

Michael Russell: I do not rule out using them in this session of Parliament, but I have no current plans to do so. Should we decide to do so, I would make that very clear early on. As of today, I have no such plans, but—just in case—I do not absolutely rule out using them.

Dean Lockhart: Thank you. My final question relates to EU structural funds. I think that John Mason will ask about the UK shared prosperity fund, so I do not want to pre-empt his question on that. However, I want to ask the cabinet secretary about how EU structural funds have operated over the past couple of years. My understanding, which is based on responses to parliamentary questions and the Scottish Parliament information centre briefing, is that the level of EU structural funds has been reduced in recent years by approximately €70 million. The reasons given for that reduction, as I understand them, are that it reflects

underspend by the Scottish Government, it reflects some non-compliant bids for EU funding and, overall, it reflects the complexity that this committee and other committees have heard about in relation to how EU structural funds operate. What is the cabinet secretary's understanding of why EU structural funds have been reduced in recent years.

Michael Russell: European structural funds are very complex, and that is one of the problems. I cannot glibly tell Dean Lockhart why there has been any reduction. I would need to see all the figures and to understand them. I have been dealing with EU structural funds for many years in many different guises, and I am aware that there are many reasons for an individual project not proceeding or being delayed, for example. We would need to look at that in some detail.

In terms of simplicity of operation, I agree with Mr Lockhart that we need simple procedures. Over the years, I have constantly argued for simpler procedures, in relation to not just funding but a variety of other things.

I am sure that Mr Lockhart will forgive my slight scepticism that the UK Government will be able to operate simpler procedures, because that has not been my experience. However, I hope that, whatever happens, we will have simple and approachable procedures that make sure that money flows and that it flows at or above the previous level. There should be no detriment. I hope that we would all sign up to that and insist not only that the moneys at least match, if not exceed, previous budgets, but that they are spent with the fullest of consultation with all interested parties, up to and including the Scottish Government, which I suppose reflects Dean Lockhart's previous question.

The Convener: It is grand that we have agreement between Dean Lockhart and the cabinet secretary. It is just a pity that we do not have enough time left in this parliamentary session to make that a habit.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I want to ask a little bit more about intergovernmental relations and the structures for that. You and I have both served on joint ministerial committees, cabinet secretary—those are hours of our lives that we will never get back. Could you explain to people watching who do not know how intergovernmental committees work how the agendas are set, who chairs them and, in your view, how effective they are as institutions?

10:15

Michael Russell: You have suffered the JMC process as I have suffered it. I will use the JMC (European Union negotiations) as an example. To

date, there have been 28 meetings of the JMC(EN). I have been at every single one of them—regrettably, I have to say. Of those, only two were chaired by non-UK ministers, which was a real innovation for the JMC. I chaired one in Edinburgh in October 2019, and I think that the Welsh First Minister chaired one in Cardiff at the end of January 2020. Therefore, 26 of the 28 meetings were chaired by UK Government ministers. All but those two were held in London, with the exception of two or possibly three that were held in the margins of British-Irish Council meetings that we all happened to be at.

The agendas are ostensibly put together by the JMC (Officials group), but, in fact, the agenda is what the UK Government wants to be on the agenda. Papers do not turn up until the very last minute—sometimes they do not turn up at all. I was at the meeting that discussed the famous group of issues on joint competencies between the UK, the EU and the devolved Administrations. We turned up at the meeting without having seen the paper; the discussion started and we still had not seen the paper. Things are chaotic.

A JMC is not a meeting of equals. It is not a decision-making body. Even the JMC(EN), which had an agreed remit, allows the UK Government to say what it wants in the way it wants and to behave in the way it wants. The May Administration and the Johnson Administration set great store on the meetings being significant moments in the involvement of the devolved Governments in decision making, but that is simply not true. The more meetings there were, the less people got to know. You have been at JMC on Europe meetings, which no longer exist, and those meetings were the same.

The JMCs can be lifted and laid by the UK at will. The memorandum of understanding that governs the JMC (Plenary) means that it has to meet at least once a year. I think that I am right to say that it has not met since December 2018. The JMC(EN) may not now exist—I do not know. The view of the UK Government is that it ceased to exist on 31 December. There has been no subsequent meeting and no replacement for it. The last meeting was, I think, on 28 December.

I had to resist very firmly the view of the UK Government that, for example, the intergovernmental review should be removed from discussion at the JMC(EN) and there should be some separate, unspecified, arrangement for it. Oliver Dowden, who was then the Minister for the Cabinet Office, was sent to see me to tell me that. I told him, “This does not belong to the UK; this is a shared responsibility”, but I do not think that the point was taken.

Dr Allan: That sounds horribly familiar. I recall one meeting when we did not get the papers until

the night before, and it turned out that one paper was on the subject of how to involve the devolved Administrations more effectively in meetings of the committee. It does not sound like much changed.

There have been proposals for change from both Wales and Scotland—you have touched on those already. Do you think that there is any scope to progress some of those proposals? For instance, Wales and Scotland have talked about respect for legislation that is passed by the devolved legislatures. You have also talked about that, and you have mentioned dispute resolution mechanisms. I am not quite clear whether you feel that such things will be meaningfully progressed.

Michael Russell: I am very sceptical as to whether there is an intention to make the system work in a way that would be equitable. We have taken part in the discussions about a new intergovernmental system—I think that May will mark the third birthday of those discussions. However, it is not impossible to reach an agreement. In my view, it does not compromise independence to be able to continue to operate in a way and to have some formal structure for working together that is at least not detrimental to the devolved Administrations and the UK Government.

We are in my view pretty far away from a resolution. There are a number of sticking points. One of them is the role of the Prime Minister. The current proposals seem to eliminate the Prime Minister as being above everything—a position that was never the intention of the discussions. The JMC (plenary) consists of the Prime Minister and the leaders of the devolved Governments, and I do not think that that can be avoided.

I suppose that the most significant issue is the perpetual issue of the UK Government being judge and jury in its own cause. That is particularly important when dealing with finance. When the Democratic Unionist Party received the £1 billion bung, we and the Welsh objected under the existing structures and said that that should not have happened without the sum being Barnettised and money going elsewhere. Of course, what we got was a decision by the UK Government via the UK Treasury, which said, “Nothing to see here—move along, please”. That decision was made by the people who had made the payment. That is really not feasible. There has to be a system of equity and an independent element in any dispute resolution. If that is not accepted, there is no point in having a new agreement because it will be as flawed as the old agreement.

Dr Allan: You and I both represent fishing constituencies. I do not want to suggest for a minute that the structures that we are talking about could in any form have dealt with some of the fallout from Brexit, but have the joint ministerial

committees engaged in any meaningful way on some of the problems for fishermen in Scotland as a result of the Brexit deal? Have those committees offered any insight into that at all?

Michael Russell: I remember that, in relation to the famous Chequers meeting of 2018, I asked David Davis whether anything that we said at any stage made it through the impenetrable system, and he assured me that, at that Chequers meeting, he had raised the points that I had made on islands and supply chains—he mentioned Colonsay in particular, which I had raised—and fishing interests in my constituency. I have no idea whether he did so.

It is obvious that the system has not worked and continues to not work. The UK Government's approach is to pretend that it is not happening. The number of EU exit operations committee meetings has been reduced and continues to be reduced. The number of meetings in which Scottish Government, Welsh Government and UK Government ministers can at least discuss some of the problems that have emerged and continue to emerge is diminishing. Again, the attitude appears to be, "There's nothing much to see here; let's just move on." That is simply not real. I do not believe that you solve problems by putting your head in the sand, but that is what is happening.

John Mason (Glasgow Shettleston) (SNP): As Dean Lockhart said, my questions are on the UK shared prosperity fund, which will follow on from the EU structural funds. The EU structural funds have been important for Scotland—in many ways, they have been more important for Scotland than they have been even for Wales. There has been concern, in the committee and elsewhere, about where we would go on the issue once we left the EU. Can you give any update on where we are with that now and how it will work in practice?

Michael Russell: I can certainly give you the limited information that I have. The most significant point is that it is now clear from the UK Government that there will not be a Scottish devolved involvement in the shared prosperity fund. Steve Barclay indicated in a recent letter that Scotland and the other devolved Administrations will not be involved in administering the shared prosperity fund.

The shared prosperity fund is extremely important. The moneys that have come to Scotland through EU mechanisms have been very important. As you might be aware, in November, we published a plan for how we believe the fund should operate in Scotland. A steering group of experts considered the issue and came to a conclusion about how the fund should operate in Scotland, but that has been completely and utterly ignored. The UK Government is now consulting on the shared prosperity fund, but that is on the basis

that it will control the fund and will run it according to its priorities. I do not understand how such a fund can be centralised, but the UK Government is doing so.

We asked to have input into the questions that were posed in the consultation, but we did not get that input—we saw a draft version only on the afternoon before it launched. There is no genuine intention even to consider the Scottish Government's views. The consultation closes on 31 March, and we will respond as a Government before the pre-election period. We will bring forward our proposals but, personally, I expect that the UK Government will just bulldoze ahead.

I do not see how the approach that is being taken can meet the aim, which should be to reduce economic and social disparity, not just between the bits of these islands but in Scotland. We know how to handle that, we have handled it and we will handle it, but the approach seems utterly wilful. It has also been incredibly slow. The money should have been flowing. There will be a huge period between the end of the European funds being available and the new fund coming on stream. Of course, we do not have guarantees that anything like the sums of money that were being spent will be spent. Scotland will be severely damaged by what is taking place, and that is a result of wilful action of the UK Government.

John Mason: You talked about guarantees and the amounts of money that might be involved. I previously asked Ivan McKee whether we were guaranteed any money at all. He laughed a bit although, obviously, he trusts that the UK Government will give us some money. Have there been any indications as to how much we might get?

Michael Russell: The current seven-year European structural funds programme is worth £758 million. It is a bit difficult to be entirely accurate, because there are currency fluctuations and, as Dean Lockhart pointed out, there have been programme delivery issues. However, let us say, among friends, that it is around £700 million over the seven years. There are no guarantees and, if there were, we could not enforce them. No matter what the UK Government says today, and no matter what largesse Steve Barclay promises, frankly, until I see the £700 million in Scotland, I will not believe it.

John Mason: My final point is on the way that the money is spent. We might, for example, want to move towards more investment in active travel or in railways or ferries, but the UK Government might favour roads. If there was a tension there, how would that be resolved?

Michael Russell: That is a crucial question, and it is one reason why there has been no spend by

the UK Government in devolved areas. That is entirely sensible when you think about it. First, it avoids waste, because it means that there is no duplication. Secondly, it recognises the primacy of a devolved Administration in devolved areas. The intention is just to ride roughshod over that. Alister Jack might well want a new road in his constituency, but that should not override the common sense of making sure that devolved areas are the responsibility of the devolved Government. We will not see that; frankly, we will see pork-barrel politics from Tory politicians. I do not think that pork-barrel politics work in these circumstances, so that is wasteful, and I think that it will also turn out to be very stupid.

Tom Arthur: I want to ask the cabinet secretary about an issue that is dear to my heart and that I know he cares a great deal about: the impact of Brexit on the music sector. I appreciate that this is perhaps more within the purview of other committees such as the Culture, Tourism, Europe and External Affairs Committee or perhaps the Economy, Energy and Fair Work Committee. However, the cabinet secretary will be aware of the deep concerns shared by many across the music sector. I have asked questions in the chamber on the issue and I led a members' business debate nearly three and a half years ago on what were then the forecast impacts that Brexit would have on music. I am sure that he will be aware of many musicians in recent days raising their voices about the impact that Brexit will have on their ability to work and to tour across Europe once restrictions are, we hope, relaxed as we move out of the pandemic.

In the context of the current devolution settlement, what options are available to the Scottish Government? How does the current devolution settlement limit the Scottish Government's ability to respond to issues that are created as a direct result of Brexit, over which we have had no say, such as the impact on the music sector?

I remind members that I am a member of the Musicians Union, which has been campaigning on the issue, and that I have a professional background in music.

10:30

Michael Russell: I am sorry to say that it is clear that the Scottish Government's power to resolve the issue is limited. The UK Government appears to have got itself into a complete mess with the issue. The UK culture minister's evidence yesterday to the Digital, Culture, Media and Sport Committee was confused and nonsensical. It is, in my view, obvious that the approach is ideological. It was designed—perhaps not consciously, because there were so many of the issues that

perhaps they just all passed by—to limit any involvement in Europe from anybody, and it has misfired badly. It looks as if the UK Government will have to negotiate—if it can—individual agreements with all 27 member states, unless the EU takes some unilateral action, and there has been some discussion of that.

As a Scottish Government minister, I would love to be able to give people a letter of passage or whatever that would allow them to ignore the issue, but I cannot do so, because we do not have power in those areas. That indicates that, if we are to be effective, we should have control of all those areas. The fact that this has been done to Scottish musicians, as well as musicians and performers elsewhere, suggests an inevitable solution, which is that we should not put ourselves in a position where such things can be done to us.

Tom Arthur: Is there any way to resolve the issue while Scotland remains part of the United Kingdom? Given that the reality is that the current UK Government does not seem to want to move on the issue and that it would be difficult for a Government to be elected to the UK Parliament in Westminster on a prospectus of relaxing restrictions on freedom of movement, do you see any opportunity for Scottish musicians to start working again in Europe freely, as they were doing before 31 December, without Scotland rejoining the European Union as an independent nation state?

Michael Russell: The individual issue might be resolved by the UK or the other countries, but it will take time. Of course, it might not be resolved. The best solution is to restore freedom of movement more widely, which requires us to be an independent member state. Freedom of movement has been immensely successful for Scotland. There is not a member on the committee whose constituency or region has not benefited from it. There are no downsides whatsoever to freedom of movement in Scotland. The fact that it has been removed is shocking, in relation to people coming here and people going to Europe. The life chances and opportunities for our young people have been diminished by that and by the ending of participation in Erasmus, and the expectations that we have of being able to work together have been dashed, for no reason.

The Convener: Thank you for your evidence, cabinet secretary. As you said, in all likelihood, this will be your last time appearing before the committee. Therefore, I thank you for your contributions over the past five years. You and I will both be taking leave of Parliament shortly, so we will not get a chance to do this again—it has been fun.

Michael Russell: It has. Thank you.

The Convener: That was our only public item today, so I now close the public part of the meeting.

10:34

Meeting continued in private until 11:01.

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Official Report
Room T2.20
Scottish Parliament
Edinburgh
EH99 1SP

Email: official.report@parliament.scot
Telephone: 0131 348 5447
Fax: 0131 348 5423

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