OFFICIAL REPORT
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Constitution, Europe, External Affairs and Culture Committee

Thursday 30 June 2022

Session 6

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Pàrlamaid na h-Alba

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
18th Meeting 2022, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Sarah Boyack (Lothian) (Lab)
Maurice Golden (North East Scotland) (Con)
*Jenni Minto (Argyll and Bute) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Stuart Anderson (Northern Ireland Chamber of Commerce and Industry)
Professor Kenneth Armstrong (University of Cambridge)
Declan Billington (John Thompson and Sons Ltd)
Michael Clancy OBE (Law Society of Scotland)
Dr Emily Hancox (University of Bristol)
Kirsty Hood QC (Faculty of Advocates)
Professor Tobias Lock (Committee Adviser)
Dr Tom West (Hansard Society)
Dr Lisa Claire Whitten (Queen's University Belfast)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 30 June 2022

[The Convener opened the meeting at 08:53]

Implementation of the Ireland/Northern Ireland Protocol

The Convener (Clare Adamson): Good morning and a very warm welcome to the 18th meeting in 2022 of the Constitution, Europe, External Affairs and Culture Committee. I apologise for the slight delay to the start of the meeting. We have received apologies from Maurice Golden MSP. Mark Ruskell MSP joins us online. I welcome those who are joining us online.

Our first agenda item is the implementation of the Northern Ireland protocol. This is the fourth in our series of sessions focusing on post-European Union exit constitutional issues. We are joined in the committee room by Stuart Anderson, head of public affairs, Northern Ireland Chamber of Commerce and Industry, and Dr Lisa Claire Whitten, research fellow, post-Brexit governance Northern Ireland, Queen's University Belfast. Joining us online is Declan Billington, chief executive, John Thompson and Sons Ltd. We are also joined in the committee room by our adviser, Professor Katy Hayward, from Queen's University Belfast. I welcome you all to the meeting. We have received apologies from John-Patrick Clayton, policy officer with Unison—we had hoped that he would be able to join our round table this morning.

We have four main themes that we hope to look at in turn. We will spend about 20 minutes on each theme. I refer members to paper 1 in our briefing papers.

Our first theme is the Northern Ireland economy. The most recent economic analysis in Northern Ireland shows that output seems to be outperforming that in the rest of the United Kingdom. What is the panel's view of the impact following Brexit on Northern Ireland in comparison with other areas of the UK? I will go to Dr Whitten first.

Dr Lisa Claire Whitten (Queen's University Belfast): Thank you for the invitation to speak with you this morning.

In determining the economic impact of the protocol, I think that it is important to set the context. It is very difficult to disaggregate the impact of the protocol specifically on the Northern Ireland economy from that of Brexit generally. That said, as you suggested, convener, good figures have been coming out on the overall status of the Northern Ireland economy. One of the questions in the preparation documents for today's meeting was about where to get the most reliable information on the Northern Ireland economy. It is important to recognise that we do not have all the data that we might want for determining exactly the protocol impact and, as I said, disaggregating the impact of Brexit and broader global events, given that the implementation of Brexit has occurred between the Covid-19 pandemic and now the impact and implications of the Ukraine war.

When putting together the picture of what the Northern Ireland economy looks like and its performance, it is important to hold in balance the different economic indicators that are available and to look at official statistics, such as Office for National Statistics data and Central Statistics Office figures, and information from trade bodies and industry. When you do that, you see that although there are positive things to say, there are still outstanding challenges. It is important to measure the different figures that are available. I will pass on to Stuart Anderson to go into detail about those, if I may.

Stuart Anderson (Northern Ireland Chamber of Commerce and Industry): Thank you and good morning, everyone. It is a pleasure to be with you this morning.

You will probably have seen on social media and through British and Irish media outlets in particular the presentation of what can seem, at times, a very confused picture of Northern Ireland. You will hear people say that the Northern Ireland economy is struggling, and then you will hear others say that Northern Ireland is doing exceptionally well. I think that there is a role for business, in particular, to play in bringing those narratives together and working through what the picture really looks like.

There is no question but that our exports are up year on year. We are seeing a rise of about 60 per cent across 2021 in exports to the Republic of Ireland. The most recent data that I have seen is from InterTrade Ireland, which says that in quarter 1 of this year, exports are up by 34 per cent, year on year. That is significant, but it comes with all the health warnings. One of the big ones is that a lot of that is pharmaceuticals—we have a lot of pharmaceutical firms in Northern Ireland that have been involved in the Covid response, for example. There is a need to be cautious about how well things are looking. They are looking well, and that is positive and needs to be protected. There is definitely a positive picture, particularly when comparing United Kingdom and Great Britain

exports to Europe with what is happening in Northern Ireland.

The challenge at the moment, with no Executive and the wider economic pressures—in particular, energy intensive industry's struggle with its energy bills and input costs—is that we are starting to see an impact on business confidence. The Ulster Bank purchasing managers index for the month of May indicated that business confidence in Northern Ireland for the 12 months ahead—a lot of this is linked to the uncertainty around the protocol—is the lowest in any of the 12 UK regions. Although things look quite optimistic from the outside, I think that there is a need to be cautious about the path ahead.

09:00

The Convener: You say that exports must be protected. Does protection mean keeping the protocol in its current form or does it need to be amended? What does protection mean?

Stuart Anderson: That is a good and deep question that could probably take us into a discussion about a dual regulatory regime. There is no question but that the protocol is working for our exporting community and, broadly speaking, agri-food. When I talk about protection, I am talking about protecting those sectors. There is a challenge from GB to Northern Ireland. It is the largest market, but it is inappropriate—I get tired of it—to draw comparisons between the importance of Europe and the Irish market, relative to GB. They are very different things. GB to Northern Ireland is largely consumer facing. Two out of every three goods that move to Northern Ireland are for retail or wholesale. The Northern Ireland consumer is firmly at the bottom of the UK league tables in terms of discretionary spend—we see that from the Asda income tracker—so there is a need to protect the Northern Ireland consumer.

To answer your question, we need the protocol to be retained to protect, in particular, agri-food and the all-island peace. However, there is an exam question that needs to be answered around we protect the Northern Ireland consumer, and there is further work to be done on things that currently apply, such as the at-risk test, and the customs burden.

Declan Billington (John Thompson and Sons Ltd): Good morning and thank you for the opportunity to address the committee.

You have posed an interesting question, convener. Normally whenever you change policy, you look at the base case and the consequences of change. The protocol is the base case, by which I mean that, whereas the rest of the UK has customs documentation—in agri-food, veterinary certificates are required with trade—Northern Ireland does not.

The real question about the impact of the protocol is what the impact would be if there was no protocol. The answer is that it would be a lot worse than where we are today. Benchmarking where we are today against the rest of the UK understates the value of the protocol. In three out of the four trade flows, it is working very well—Northern Ireland to Europe, Europe to Northern Ireland and Northern Ireland to GB. The only issue is GB to NI and, as Stuart Anderson said, that is a consumer issue and probably a consumer price risk for the Northern Ireland consumer.

We can go back to the work that was done on no deal as a proxy for what that would look like without the protocol. It was estimated that there are 24,000 microbusinesses—businesses with two, three, four or five people—in Northern Ireland that trade just with their neighbours across the border. If those businesses trade in food, they would need export health certificates for the processed food that they trade in. They would also need customs documentation. One could argue that today those requirements would be mild because the UK has not diverged from the EU on customs, tariffs and standards. However, in the next five to 10 years, as the UK diverges on trade, tariffs and standards, the burdens would get greater and greater. Without the protocol, what would that cross-border trade into Europe look like? Today, businesses in Northern Ireland are trading freely with Europe in the agri-food sector, selling food with three to four-year contracts and no paperwork or customs. Will that trade remain the same if suddenly customs declarations and export health certificates are required? I do not think so.

Honestly, we are at an early stage, because we need to disaggregate Covid from trade flows, but the base case is the current case and anything that affects our ability to trade unfettered into Europe is a step back.

The Convener: We will move to questions from the committee, the first of which is from Donald Cameron.

Donald Cameron (Highlands and Islands) (Con): Good morning to the panel. I think that Stuart Anderson is on record as saying that aspects of the Northern Ireland Protocol Bill may help consumer-facing businesses. Is that still your view?

Stuart Anderson: If you take the bill at face value and do not consider the potential consequences and the relationship with Europe—if you just take the bill as read and assume that it is an agreed mechanism—there is certainly value in the principles. However, there is a question that

needs to be answered and that is at the heart of the consumer-facing challenge: how do you manage divergence between the UK and the European Union?

There are various mechanisms to do that. You could have a veterinary agreement or you could look at the question of whether to facilitate divergence for goods for final sale to the consumer in Northern Ireland. For example, if consumer-facing supply chains and particularly retailers have such levels of sophistication that they can move goods to Northern Ireland for final sale there, so that there is, in practical terms, little or no risk to the single market, there is value in exploring that as a potential carve-out from the existing arrangements.

We have been clear on the issue with the UK and the EU. Over two years ago, the business community pulled together a collective report—it is important to underline that 14 business organisations with a diverse range of interests agreed on the questions that need to be answered to make the protocol work. At the heart of that was the need to have derogations and mitigations to make it work. We are two years on and, in many respects, those questions have not been answered by either side—many of the questions remain unanswered.

There is some discussion about what the baseline is. At the moment, it is fair to say that, under the current standstill arrangements, goods move relatively freely into Northern Ireland, and our supermarkets are still serving Northern Irish customers. However, looking ahead, if the standstill arrangements are removed, there is a question about divergence over time and where that would take us.

There are the seeds of a good idea in the proposal to have red and green lanes. However, although that may work for firms that move their own goods such as the big UK retailers, what might the commercial impact be for Northern Ireland businesses and Northern Ireland customers? There are protections for GB produce, but I have a question about the impact on commercial bargaining power. We know that strict compliance rules will be in place. Will GB suppliers say that they are not going to take that burden and so decide to push it back on to Northern Ireland customers? It could be counterproductive in that respect for businesses in third-party supply chains, which might decide that there is too much risk in Northern Ireland and that they will trade elsewhere.

Those are all open questions, and I am not drawing any definitive conclusions. There are a lot of questions about the bill still to be answered, so I would frame my response in questions rather than give definitive conclusions.

Donald Cameron: Sticking with consumers in Northern Ireland, I note that the Consumer Council for Northern Ireland has said that about 130 retailers have confirmed that they have stopped supplying Northern Ireland. I do not have any sense of whether that is a small or a large number. Can you comment on that aspect of the effects of the protocol?

Stuart Anderson: I have no comments on the scale. I know that the average supermarket stocks 40,000 to 50,000 products. As a result of the challenges of divergence—for example, titanium dioxide is being banned in the EU—maybe 30, 40 or 50 products could be removed from the shelves. Therefore, as a proportion, divergence is not creating a significant challenge at this time, but there are challenges already and perhaps more on the horizon. I take what the Consumer Council says at face value.

I hear mostly from Northern Ireland distributors who bring goods into the island of Ireland. There is a problem for the island of Ireland in that, if goods have to be made to a different standard, economies of scale will dictate that it is not worth supplying Northern Ireland. That was the issue with medicines as well. If you create a small market, is it commercially viable to supply Northern Ireland or the island of Ireland? That is the difficulty that we are trying to address.

Anecdotally, and as the Consumer Council said, some suppliers are stopping supplying Northern Ireland. One of the challenges is a lack of awareness. The UK Government did not prepare GB businesses at all well for trading into Northern Ireland. It is not a period of my life that I want to repeat but, on 31 December last year, guidance was being published right up to the 11th hour about how to move goods into Northern Ireland the next day. That was a really challenging and rocky period for Northern Ireland businesses.

The Northern Ireland Chamber of Commerce and Industry does a quarterly survey. In quarter 2 of last year, 52 per cent of businesses said that they were comfortable with the protocol and getting on top of it. That is not a great statistic—almost one in two businesses said that it was a problem. In quarter 1 of this year, the figure increased to 65 per cent, and only 8 per cent said that they found it extremely difficult. We are still teasing out the question of time and whether supply chains can adjust to the protocol. With all the confusion, I do not think that we are clear as to what the impact will be.

Dr Whitten: I have a comment on Mr Cameron's point about the Consumer Council for Northern Ireland's figure that approximately 130 retailers have stopped supplying Northern Ireland. I will need to check, but I think that in an earlier similar review, the figure was more like 300, which

affirms the adaptation aspect. I can get you the actual figures. However, that begs a question about adaptation to any new arrangements if we get UK divergence in future.

Donald Cameron: Thank you for that.

You have all been clear in evidence today and in your written submissions about the effects on business in Northern Ireland. A particular focus for us is Scottish businesses that trade into Northern Ireland. I am sure that you will all have contacts and relationships with Scottish businesses, particularly in the south-west perhaps. Do you have any observations on the effect of the protocol on them and their trade in or out of Northern Ireland?

Declan Billington: To add to the comments of my colleagues, before Brexit, if you went on Amazon and tried to order goods for Northern Ireland that were freely available elsewhere in the UK, in some cases you did not get them. The reality has always been that we are serviced less by GB businesses than any other region. The protocol puts extra burdens on that trade. One criticism from the Northern Ireland business Brexit working group is that the UK Government prepared GB businesses for trade with Europe but did not educate them on trade with Northern Ireland. How much of the trade that has been lost by those 130 businesses is down to lack of knowledge as opposed to cost?

On trade from Scotland to Northern Ireland, we were afraid that, in a no-deal exit, we would not be able to trade in agricultural products from Scotland. In the agri-food sector, we buy a lot of barley from Scotland. The trade and co-operation agreement solved that problem. Up to the 11th hour, I was looking at having to resell Scottish barley back to Scotland because of tariffs. The TCA was a useful document that eased burdens on trade between the UK and Europe and therefore the UK and Northern Ireland.

There is bound to be a bit more difficulty in trading from GB to NI. I do not have any first-hand knowledge about that, but I know that my trade in the agri-food sector is unchanged. Scotland is still a very good origin for our agricultural products. I know that the farming base has issues with things such as seed potatoes coming from Scotland because of the sanitary and phytosanitary rules. In niche sectors, there are restrictions on trade arising from the sanitary and phytosanitary controls that did not exist before.

Dr Whitten: Forgive me for slightly dodging the question, but I think that this conversation generally would benefit from more regionalised trade data as a result of post-Brexit realities to inform the debate. I say that because I would not want to answer the question, as I do not have the necessary data to rely on to inform my answer.

Donald Cameron: That is fair enough. It is a slightly unfair question, because it is really one for Scottish businesses. However, Mr Anderson, based on what you hear from the people who you represent or speak to, do you have any final comments?

09:15

Stuart Anderson: I agree with Dr Whitten and thank her for dodging the question.

On the issue that Declan Billington touched on, there are anecdotes and case studies that come to the fore. Without question, the one that we hear the most about and that we would like to be resolved is that of seed potatoes from Scotland for the agri-food sector. I guess that it could be resolved through some sort of SPS arrangement between the UK and Europe, but we see no indication of that being on the table at this time.

To go back to the idea of red and green lanes, there is potential for Scotland to have much better, easier and smoother access to the NI market if that were to come to fruition, be agreed to and become a stable framework for trading into Northern Ireland. However, I guess that it will depend on what type of goods you are moving in, and we are yet to work out the detail of what is meant by “qualifying movements” under the Northern Ireland Protocol Bill. The big question is about intermediate goods in particular. If it is not known whether goods are destined for Northern Ireland or Europe at the point of entry, what lane will they go into? There are a few unknowns at this time.

Sarah Boyack (Lothian) (Lab): I thank the witnesses for their evidence. I want to follow up on an issue that is raised in the written evidence and that has come out powerfully today. It is about the need for information to be able to predict and plan, and about communications on changes that are happening, particularly for the agri-food and dairy sectors. What is the solution? There is the Northern Ireland business Brexit working group, but what other communication networks are available? You do not have the Northern Ireland Executive to talk to or to push what needs to happen with the UK Government or the EU. What political structures can you lobby? Transparency is one of our concerns in holding our Government to account. Who do you talk to? How do you make this work, given that it is a changing situation?

Stuart Anderson: That is a good question. My first answer is about the operation of the protocol as it stands. One of our challenges is that more than 300 pieces of legislation apply to Northern Ireland under the annexe to the protocol, which is

very complex and challenging. One question that we put to Government is about how it is making that accessible to business. For example, who is the competent authority in the UK for managing the administration of a particular piece of legislation? If that legislation will be subject to any change, reform or amendment in the foreseeable future, how do we engage in that process? We do not have that access. In many cases—I know that Declan Billington will have examples of this—we rely on discussions directly with officials in UK departments and the Republic of Ireland's departments and officials. It is not an ideal situation for the existing implementation of the protocol.

In the negotiations or discussions—call them what you will—we engage a lot with the UK task force and the EU Commission. I have to say that there is an open ear for Northern Ireland business at the Commission and in the UK task force, but questions remain. The evidence from the past two years shows that we have seen some good progress on things such as medicines. Also, the UK standstill arrangement has secured those consumer-facing supply chains, so we have seen positive moves from a trade perspective, albeit that the standstill arrangement is temporary, to bring us to this point. However, as I said, it is more than two years since we put questions to both parties about what we felt was required to make the protocol work. The difficulty is that, today, many of those questions remain unanswered, so we find ourselves in the situation that we are in today.

Sarah Boyack: That is useful. Mr Billington, do you want to come in on that? It is one of the issues that come up in your written evidence.

Declan Billington: The structure of the committees on the protocol is based on representation from Whitehall and Brussels, so where is the voice of Northern Ireland in the protocol, given that it governs us? That is one major concern.

The second concern in the business community is about even figuring out who is the competent authority to talk to. I have one or two worked examples that have been described as case studies—because we are moving from the abstract to where the rubber hits the road. For example, because of issues in Ukraine, the EU has decided to relax some of the maximum residue limits of pesticides in agricultural crops, which creates the opportunity to source from wider origins when you cannot source from Ukraine. Who takes that decision for Northern Ireland? Spain and Italy have already done something and the Republic of Ireland is in the process of doing something. Who takes the decision for Northern Ireland? We are keen to relax those constraints to provide our farmers with the best possible access to commodities. It took a week of engagement with Belfast and London to find out that, in that matter, it was Belfast. However, with organics, which is another piece of agricultural policy that I am working on, there is a special unit set up in the Department for Environment, Food and Rural Affairs to deal with that. I do not know why that is the case, but it is very difficult to engage.

Another problem relates to the Northern Ireland Protocol Bill. Somewhere along the line, between four years ago and now, a lot of knowledge has been lost in Whitehall. The same issues that came up four years ago about the risks in legislation are coming up again now. Previously, we could engage and communicate with the civil servants and, when they understood an issue, they refined the policy to manage that. However, engagement now involves an agenda that is set by Whitehall at a time set by Whitehall, and it is very difficult for us to put up our hands and say, "Yes, but what about this? We are having practical difficulties." There is a vacuum in the communication and engagement with both parties.

One frustration that I and my colleagues feel is that, even when we engage with the UK and Europe on aspects of interpretation, we get different answers on the same regulation. How the heck can we decide the right thing to do if there is a difference of opinion between Europe and the UK on interpretation of something? There has to be a vehicle through which we can engage directly and get a quick determination on such issues. In advance of changes, we should be able to share our concerns, just like any other part of Europe not in the EU that is subject to European law; we should at least be consulted on change.

There is a deficit in the arrangements. Maybe there are just teething issues, but we are struggling to engage with the UK Government on implementation. I am never sure whether that is because of late communication about changes from Europe or whether the civil service machine is still trying to establish its internal channels of communication, but there is a deficit.

Sarah Boyack: That is helpful.

Dr Whitten, do you have a perspective on oversight, from having looked at the structure?

Dr Whitten: The existing architecture for scrutiny and oversight of the implementation of the protocol was not updated to reflect the fundamental change from the backstop protocol arrangement—which was meant to be temporary and not to be used, or to be used in conjunction with a deepened special relationship kind of agreement, which is not what the TCA offers. Notwithstanding the draft legislation, we now have a relatively permanent arrangement for Northern

Ireland in the text of the protocol. However, the governing architecture was not revised at that late stage in negotiations when the shift was made.

As to how it is operating, the joint consultative working group, which is the lowest tier of implementation under the protocol between the UK and the EU for the exchange of information, now seems to be into a rhythm of operating quite well. As Declan Billington and Stuart Anderson have said, Northern Ireland businesses and representatives do not have a formal role there, but observers—Northern Ireland officials—have been attending. The political relationships in the specialised committee and the joint committee, which are the higher tiers, is not such that they are operating to the fullest extent possible. There is a deficit at that higher level.

On the communication of practical challenges with the operation, I spend a lot of time—possibly too much—considering what dynamic alignment under the protocol looks like substantively and tracing relevant changes in EU law down to UK law and how that flows through. In doing that, you can identify where changes are happening, such as how maximum residue levels for plant protection products have filtered down to a statutory instrument for GB retained EU law and what that shift means. You can read that and it takes a lot of time, but I cannot tell you what it means for the agri-food industry in Northern Ireland, because the nature and substance of the subject tend to be very technical and get very technical very quickly. You need stakeholders in the room to tell you whether something matters or does not matter and how and why.

One positive aspect of UK-EU talks before they broke down was that there was consideration of how to integrate Northern Ireland voices into the process of implementing the protocol. That is clearly necessary.

Sarah Boyack: That is helpful. That is one of the big issues that we need to record and think about.

Alasdair Allan (Na h-Eileanan an Iar) (SNP): It has been very interesting to hear from the panel today and get the voice of business. I am keen to get more of that voice, because we are accustomed in Scotland to hearing political opinion from Northern Ireland about the protocol but less accustomed to hearing the views of business. What does having access to two markets feel like for business? Notwithstanding all the problems that you have described, that is something we look on with some envy. Is it something that business values and would have a view about if it were to be taken away?

Stuart Anderson: As Declan Billington said, it has to be seen as the baseline, particularly in view of the Good Friday agreement and the level of integration in some of the key agri-food subsectors. The reality is that, if access were removed, they could not survive, or would certainly be in a lot of difficulty, and environmentally it would pose significant challenges. It would be existential.

We find that a lot of our exporters are doing very well. I have had discussions with a number of our banks in recent weeks, and they have said that a lot of exporters are building up deposits and withholding investment because of the uncertainty, as well as the uncertainty in the macroeconomic picture that is looming. Their difficulty is that they do not necessarily want to raise their head above the parapet, and that is the same for those who are struggling with aspects of the protocol because, invariably, it is politicised for the gain of one side or the other. The role of the business community is to look at the evidence as best it can and try to bring those competing narratives together.

From a business perspective, things are going relatively well. There is some degree of caution. As I mentioned, the Ulster Bank PMI is of some concern whenever Northern Ireland is at the bottom of the league table for business confidence looking 12 months ahead. There is also the challenge of having to reassure our European customer base that the publication of the bill is not a change of law and that it is very much business as usual. There are still challenges with access to the single market. For example, Northern Irish firms do not have access to EU free trade agreements, which has posed some difficulties when we are dealing with all-Ireland supply chains.

On unfettered access to GB, our own Northern Ireland chamber survey shows that, on balance, more firms are serving the UK customer base than those that are not since the protocol has taken effect, so dual market access is working, as distinct from dual regulation, which causes some concern for indigenous Northern Irish firms.

09:30

Declan Billington: I will break it down into two or three levels. The first is Northern Ireland's trade with Ireland, which is part of the EU, and Northern Ireland's trade with Europe. The reason I break it down is that the business model that evolved on the island of Ireland is one in which businesses are competing in scale processes. That is the only way to deliver low-cost trade with GB into the supermarkets. A third of the milk from Northern Ireland is processed in southern dairy creameries, because they have the scale investment there; they draw from their catchment area and their catchment area crosses the border. If there is an

SPS border, we lose access to processing facilities.

That is a problem that is unique to Northern Ireland in the UK. It is a bit like a Scottish dairy farmer selling milk to an English creamery—how would he feel if he could not do that any more? That is the problem that we face if we do not have access to both markets. In the pig sector, a third of the pigs that are needed for the minimum viable throughput of one of our Northern Ireland factories come from the south. Where you have an island, goods move freely and easily on land but the sea is a barrier. We would have major challenges if we lost access to the European single market or traded with it on the same terms as any other part of the UK, because we do not have access to the processing facilities and we do not have alternatives to those processing facilities.

The second issue of trade into Europe is that it is unfettered. We do not have the paperwork and we do not have the SPS requirements that the rest of the UK has, which makes us attractive. I used to work for an American manufacturing company that had one factory in Northern Ireland servicing the UK and Europe. Under that model, if the factory was in England, it could service the GB market but would have to complete customs declarations and its global sourcing would be restricted because of the concept in trade of rules of origin, whereby only so many third-country components can be used in your goods. If the factory was in Europe, it could trade freely in Europe, but it would have customs procedures and rules of origin restrictions on its global sourcing into GB. If it was in Northern Ireland and any third-country goods passed through the sea border, we would have unfettered access to GB and any additional tariffs paid could be reclaimed, so we would have the same cost set as a GB business, and trading into Europe we would have the same cost set as any European business.

I am aware that the Government departments that are charged with inward investment had a large stockpile of interested businesses from around the world that wanted to set up manufacturing locations in Northern Ireland to service both markets, so we were a very attractive proposition, but the uncertainty means that we are only a prospect and not a reality yet.

Alasdair Allan: On a slightly different subject, I will ask Dr Whitten for a business perspective on the current difficulty—let us call it that—between the EU and the UK Government as it might affect business in Northern Ireland. I appreciate that you are in a different predicament, but in Scotland we are beginning to be very concerned about the prospect of economic retaliation from the EU if that relationship breaks down completely. Is that a live debate in Northern Ireland?

Dr Whitten: Yes. I will qualify my answer by saying that I am not speaking for business, but if I might talk to public opinion even, there is concern about a breakdown. If we entered into a trade war and if there was a continued decline because of the implementation of the Northern Ireland Protocol Bill, if that becomes law, that would have a negative effect across the board and, as has already been stated, there are vulnerabilities for Northern Ireland.

To the broader question about the experience of the current arrangement, we hear a lot of discussion and have a sense of the majority understanding that there is potential for Northern Ireland to benefit, but that is contingent on implementation and legal certainty. From polling that we ran in the project that I am involved in at Queen's, together with colleagues Katy Hayward and David Phinnemore, we see high levels of support from the Northern Ireland public for an agreed outcome between the UK and the EU and a sense that the majority do not think that UK unilateral action is justified. It is difficult to allow that data to set the broad picture of opinion in Northern Ireland together with the business experience of what is going on now with the trajectory that the UK Government is on and the trajectory that UK-EU relations are on, which could, ultimately, if they continue in the direction they are in, lead to a trade war. That said, I think that we are not there yet and we need to be as measured as possible.

Alasdair Allan: Dr Whitten has very diplomatically described it as "UK unilateral action". I will undiplomatically describe it as the UK breaking international law. Is that something that is a live issue as far as the business community is concerned, Mr Anderson?

Stuart Anderson: There is a degree of caution from the business community about getting involved and providing a live commentary on that aspect. The UK Government says that its position is legal; the EU says that it is not. It is the reality of the dispute between the two that is the problem for Northern Ireland and the business community. While the UK's legal advice says one thing and the EU's says another, there is a dispute over trading in and through Northern Ireland, and that is not a comfortable place for the business community. We put a strong sense of responsibility on both that, in these times, they need to start engaging with each other. One of the most regrettable things that I have seen over the past six months, particularly given the level of engagement that we have had with both sides, was the publication on the Monday of the bill with the UK proposals and, 48 hours later, the publication of EU proposals on some of the same subject matter. That is an indication of where the relationship is at, outwardly looking, and that makes us very uncomfortable as

a business community, because until both sides get in the room and stop talking past each other, this will continue for some time.

There is not yet any agreement on the issues to be solved even at a technical level. One of our leading asks, and one that we have been laying down for some time, is for the UK technical team, the EU technical team and experts from business, to get into a room at the one time, in a non-political environment, to bring integrity to the conversation and work out, almost as a due diligence exercise, where the red flags are or where things are operating well and at a joint committee level agree on what that looks like. That ask is, unfortunately, meeting some resistance but, ideally, that is step 1 and we could decide from there where we need to move on to.

Declan Billington: I read the briefing note in advance of this meeting and the first paragraph is very important. It says that the purpose of the protocol was to

"protect the Belfast/Good Friday Agreement",

and we hear that again and again in Parliament. It was also

"to avoid a hard border on the island of Ireland and to protect the integrity of the EU's single market."

The border in Northern Ireland is an inconvenient truth, like global warming. If you choose to deny that there is a problem, you do not need to put policies in place to mitigate it. Time and again in our engagement over the past four years, we have heard MPs in London saying, "What is the problem?" The problem, like global warming, is not a problem for today; it is a problem for five or 10 years hence as changes continue to happen.

In that light, you have to remember that the protocol was a prerequisite for the TCA. Once there was an arrangement in place that made Europe feel that it did not have to put in a border to protect the single market, it moved forward with the TCA. If the UK disassembles that element of the protocol that gave the assurance that Europe would not have to impose customs and SPS procedures in its trade with Northern Ireland, you would have to ask yourself how, if it dug its heels in to require that prerequisite, it will respond in the TCA if we unpick it.

To me, that leads to the inevitable outcome that maybe there is no border now but, eventually, with the divergences that will happen, there will be a significant challenge and Europe will have to respond unless it dig its heels in now and goes back to the justification for the protocol, which was that there could be no TCA without the protocol. If there is merit in what the UK is doing, it is about scope and risk, actions and consequences. By design, the UK has to deliver an outcome that does not threaten the single market, which is the commitment of the protocol. If the UK does not pay attention to that, in my mind Europe will have to respond; otherwise, eventually, the only option will be to implement customs and SPS controls on goods from Northern Ireland.

Jenni Minto (Argyll and Bute) (SNP): Mr Anderson, in the point that you made in response to Dr Allan's question about the way you think things should move forward, you twice referenced the 12 suggestions that you have made and you went on to expand on how you could bring some pragmatic solutions to issues. I am interested to hear a bit more about how you think businesses could be more involved in the process.

Stuart Anderson: The first point that I want to make is crucial, and it is that business is not a negotiator in this process. It is not our role to come up with a framework or to engage in the politics. Our role is simply to test the framework and give clear evidence as to business sentiment and the commercial viability of the arrangements.

For a starting point, we go back two years to when the discussion was quite live. We were faced with a challenge and we met the European Commission—this was reported on by Tony Connelly in February 2020, so I am not disclosing anything that is not known. We were looking for some degree of pragmatism around application and some degree of derogation and mitigation to make the protocol operate well. At that time, the EU was clear that it had been agreed, that it was as it was and that it would need to be implemented. On the other side, it felt as if the UK was almost in denial at that time about the reality of what had been signed up to and, even right up to the point at which the protocol took effect, was very much downplaying the protocol, despite what business was saying, in particular about key products such as food and medicines that were moving across the GB to NI channel.

Now we find ourselves in the situation that we are in. Business is not minded to look back and point fingers. We very much need to be constructive and look ahead, so the first step that we believe needs to take place is an agreement about what the problems are, and that is a role that business can play. We find it very challenging when we engage with both sides on the same subject matter and they draw conclusions that are surprising to us, because they are often in conflict or not perhaps the full picture of what was disclosed.

09:45

The tripartite discussion is essential to bring some integrity to the conversation. That is the starting point from where we need to move. Some

excellent work has been done by the likes of Professor Katy Hayward, David Phinnemore and Dr Whitten on the role of business and other stakeholders if we get to the point of an agreement. It is important to recognise that this is not just a business issue and that other Northern Ireland stakeholders are involved in the process in a representative capacity, but we are not in that phase yet. Our calls are for engagement. We want to see that happen as a first step. It is hugely frustrating that we hear the UK Government say, "Our preferred outcome is a negotiated settlement," and the EU say, "Our door is open any time," but when we say to them, "Okay, where is the process?", we still do not get a clear answer on that. We are open and willing to play our part in that process.

Dr Whitten: I will pick up on the other stakeholders' involvement. If we are talking about involving Northern Irish voices and the sustainability of implementation, it is important to recognise that, although conversations about the protocol tend to focus on trade, because that has been the most prominent issue, it is not just about trade; there is a quite significant rights element to the issue, and there are also things that are discussed less, such as the operation of the single electricity market. However, if you look at the approach of the UK Government at the minute, it is putting all of the protocol on the table when there are aspects of the protocol that are in not part of the problem in anyone's assessment.

I entirely agree about the different definitions of the problem and how difficult that makes reaching any kind of solution. However, if we are talking about involving businesses and also involving other stakeholders, it is important to widen that out and recognise that this protocol is not just about trade across GB and NI but is broader than that. It is very difficult to de-link those issues. For example, north-south co-operation is one of the protected aspects in the draft bill, and north-south co-operation is broad in scope. The cross-border delivery of healthcare is quite significant in certain areas. Healthcare provision relies on medical devices and medicines travelling freely across the island of Ireland, but that sits under the customs and trade elements and the regulatory alignment element of the protocol. Even when you start to separate out those issues, you get tensions within it, which is why I think the conversation needs to be broader than where it is at the minute.

Jenni Minto: That is helpful. The idea might be to treat everything consistently, but some areas are working well changes that are made could throw up other issues and have unintended consequences. Mr Billington, do you have anything to add?

Declan Billington: First, business does not have a vote on the protocol; only society had a vote on the protocol. Secondly, business is not involved in the negotiations. We try to provide input to the process and we try to define problems that need to be solved. Our focus is always on trying to make whatever framework we are given work. From that point of view, at the moment, there is a feeling that the parties to the negotiations are standing on principles rather than trying to deliver outcomes. By that, I mean that the UK command paper is a position paper that basically says that Northern Ireland should be no different from the rest of the UK. However, as I said, actions have consequences, and you cannot ignore the consequence on the border area of the circulation of goods of a different standard and price.

The desire in the business community is to set aside the rhetoric and concentrate on solving the problems. There are goods at risk and goods not at risk. Goods not at risk would be defined as goods that have passed through an express lane, in the European definition, and goods that have passed through the green lane, in the UK definition. I do not really care what label you hang on it; let us get down to solving the remaining problems pragmatically with a workable solution and then you can hang whatever label you want on to it in relation to the command paper or in alignment with EU law. We are so focused on rhetoric and high principles that are mutually exclusive when, in fact, we should be focused on outcomes that get us across the line.

The Convener: I will move to our second area of questions, which is around dynamic alignment with the EU, which has already been mentioned by Dr Whitten. I was struck by a comment that Mr Billington made earlier about the lack of knowledge or a loss of knowledge in Whitehall. We know that there are plans to reduce the number of civil servants in Whitehall quite significantly. One of the things that we are struggling with in a Scottish context is the Scottish Government commitment to keep pace. We have the keeping-pace power, which has not been used yet, but we know that some issues being introduced through secondary legislation, which is a bit opaque to stakeholders in particular and is also a bit opaque to the Parliament. Legislation has not kept pace in certain areas, which sometimes can be almost as important.

Do you have any thoughts or lessons that we might learn here about what that means and how the dynamic alignment is working in Northern Ireland?

Dr Whitten: You might have to stop me talking about this, because I can go on for too long about it. On how the dynamic alignment is working, it

comes through two processes and provisions in the protocol. Article 13(3) allows for the 300 or so EU instruments that apply to Northern Ireland under the protocol to apply as they are amended or replaced automatically. That is quite unique; it is an automatic update, like the setting that automatically updates apps. That involves tertiary legislation—implementing legislation—and also applies when a primary EU act or secondary EU law act, which is equivalent to a primary act, is revised or replaced.

Change happens very often, particularly on the level of implementing acts in EU law. From spending a lot of time looking at what the substance of dynamic alignment looks like for Northern Ireland, we have learned that there is a clear requirement for Northern Ireland to monitor those changes. Because of the nature of integration and the interdependency of our two legal orders, there is also a requirement for Scotland and for the rest of the UK to monitor, as far as possible, changes in EU legislation that have direct or indirect implications for the development of post-Brexit UK legislation, because there is then the trade-off divergence dynamic. Divergence is sometimes perhaps too strong a word but there is a need to see what is happening at an EU level, what is happening at a Northern Ireland level in relation to the EU and what is happening at a GB level and at devolved levels as well.

The one lesson is that monitoring is crucial and there is a need to set up systems for that, and that there is a need to scrutinise changes in UK retained law and GB retained law. There are examples of small shifts that represent technical changes in what is GB retained EU law that is protocol-applicable EU law in Northern Ireland. When you read—if you have all the time in the world—the explanatory memoranda of the statutory instruments that are produced by the UK Government, you see that there is not always an acknowledgment of the potential implications for Northern Ireland. Again, that speaks to the importance of having a process for communication with stakeholders and good connection between Whitehall departments and, in this case, Northern Ireland departments for the actual implications of any of those technical changes. Although they are niche, they can be important for some stakeholders in the industry.

Scrutiny processes and monitoring processes are the two main lessons, as well as there perhaps being a need to recognise the divergence dynamic, which involves the potential trade-off between alignment with EU legislation and EU legislative developments and the implications of that for Scotland's place in the UK internal market and the operation of the UK internal market.

I will flag an example that we have seen so far in a lot of this, especially in relation to the substance of Northern Ireland alignment. First, though, it is important to say that, in the first year of alignment, only three of the changes that were made at primary law level in the EU—that is, acts that apply under the protocol—were agreed after the UK left, because of the slow pace of change. They were all agreed beforehand. That shows that the divergence potential has not yet been realised, but that is the potential diverging path that we are on, and Scotland, under the continuity commitment, is potentially opting into the same divergence trajectory.

The example that I will flag from the Scottish perspective is the single-use plastics provision. That is a decision to align with a ban at EU level that is under, or partially under, the Northern Ireland protocol but has come about through an exclusion provision in section 10 of the UK Internal Market Act 2020 concerning the common framework agreement. That process is potentially a fruitful one if Scotland is planning to legislatively align with EU law provisions in order to avoid undercutting in a situation in which there is no alignment across the rest of GB and some alignment in Northern Ireland under the protocol. The common frameworks process is interesting but we must also recognise that all of this is happening in a very fluid environment legislatively in the UK and the EU is looking forward in quite significant ways in relevant areas.

As I say, I can talk for too long on that, so I will stop there.

The Convener: Mr Billington, do you have any comment on how the dynamic alignment is working or not working?

Declan Billington: There are two levels: immediate and over the distance. I also need to think about the perspective that I would have if I was in Scotland rather than in Northern Ireland. Starting off, there was a backlog of EU amendments to the 300-odd regulations and statutory legislation attached to the protocol. That took some time for the UK Government to work through and communicate. It is beyond the capacity of business to track that, so we are heavily dependent on the UK Government figuring out what is and is not relevant and how it interprets it, but I have had some different views on how it interprets the laws that are being passed to us. It is hard to keep pace with it, especially for a population of 1.8 million people.

There is then an issue of interpretation. I have strong views on that, as I think that the UK Government has interpreted some things incorrectly, and there are other areas where I just do not know if it has interpreted them correctly. That relates to your previous question about who

we can raise our objections with, since there is no vehicle for that.

The challenges are there, but there is another more important thing. We talked about red lanes and green lanes. For example, the UK divergence on pesticide residues, which I mentioned earlier, presents a problem for Northern Ireland under the proposals as it means that there will be goods that do not comply with European law. Under the UK current proposal, the first importer says, "I am going to sell them in Northern Ireland; what is the problem?" However, if we are talking about wheat, for example, the importer sells it to a business like mine, I process it and sell it to the merchant, and the merchant sells it to farmers. If you are talking about import for final consumption, I can see how the UK proposals could work well in that area in a green lane channel with an appropriate trusted trader requirement. However, the situation is different with goods for intermediate use, where they are in free circulation and they have avoided taxes or they are working to a different standard.

The one that scares me most over a five to 10-year window is growth promoters, either in relation to products that are brought into the UK in its trade deals with America and Australia or in relation to the application of them in food production. How could Europe feel comfortable about trade flows through Northern Ireland to Europe when those goods are circulating in Northern Ireland? You do not make those standard changes unless there is value, which means that you create a lower-cost product that naturally will migrate to a higher-priced market.

I struggle to see how a dual standards system will work. I can see how it works with a kitemark or a CE mark and reciprocal recognition, but I do not see how it works on SPS and my fear is that you cannot have goods that Europe is incredibly sensitive to—for example, unapproved GM products and growth promoters—circulating in Northern Ireland as freely as they circulate in GB and expect there not to be consequences for our trade into Europe.

10:00

On dynamic alignment, the challenge for Scotland is, how do you follow regulations when you are under the UK single market rules? You can impose a requirement on your own businesses that reduces their competitive ability to trade in Scotland or the rest of the UK, but you cannot deny products from the rest of the UK entry into your market under the UK single market rules. The principle will work in places but in other places it will be significantly challenging to apply a set of rules for indigenous production when you cannot apply those rules to the goods being brought into your region. That is a big challenge.

Stuart Anderson: I think that the issues have been quite comprehensively covered but I will emphasise the point on capacity and resource. The role of business in trying to interpret and navigate its way through dynamic alignment has been challenging to date and it will continue to be so. There is an obligation on the UK Government to work harder to be able to support business in tracking that. As I said, the first step in that is some form of database that is accessible and enables us to see, in the first instance—Declan Billington has given an example of this—the competent authority in the UK that is responsible for managing the particular regulations and then gives a clear indication about what is happening with the respective regulations, perhaps over a five-year or 10-year window, because there is no clear visibility on that.

With all of the challenges that businesses have to face now, that is one that they need help with and support for. Particularly, as Declan Billington said, if you are working with a jurisdiction of 1.8 million or 1.9 million people, where is the capacity and resource even within Government and even within Stormont to manage that? Those are questions that are open and which we will be pushing the UK Government on.

Mark Ruskell (Mid Scotland and Fife) (Green): On that, from the business perspective, how important is it that Stormont gets up and running again? If you take an issue such as gene editing, it is possible that there could be a distinctive position on gene editing in the European Union, a separate position at UK level and other positions in the devolved Administrations around the UK. When you are thinking about those issues, where do you place the work of Stormont and the committees of Stormont on that specific bit of scrutiny?

Stuart Anderson: On Stormont, even if we get the reappointment of a speaker, the statutory committees will not be reappointed and it will be up to the discretion of the whips, I understand, to decide whether they appoint ad hoc committees in the absence of an Executive. There is a significant challenge at the moment at a political level. We had three years of no Government in Northern Ireland and we are now face another period of upskilling our elected representatives with regard to their obligations. The administration of the application of the dynamic alignment is an issue that requires some further work.

Engagement with professionals within the Department of Agriculture, Environment and Rural Affairs—Declan Billington can speak to this more than I can—is good, and the officials within that NI department work hard to try to understand the issues. Again, there are capacity and resource issues there, particularly with its officials being

required to effectively man the checks and controls now. If those checks and controls were to be implemented in full, managing that would create another significant problem for Northern Ireland at an administrative level.

Dr Whitten: I echo that and emphasise the capacity challenge that is presented to Northern Ireland institutions and the political conversation in Northern Ireland because of the nature of the differentiated arrangement that Northern Ireland has in the post-Brexit context. There is a challenge raised to scrutinise and monitor new areas of legislative development, even just on a basic level in terms of the drafting of secondary instruments that would implement the dynamic alignment aspect. Previously, because Northern Ireland is a different jurisdiction, there was a copy-and-paste aspect, as there was across the UK. That situation has now shifted, so Northern Ireland Government lawyers will have to develop those skills and create time for doing that. That is one example of what that is substantively looking like in terms of official capacity. Also, on the institution in Stormont, it would be useful to have, for example, a dedicated committee set up to look at the implementation of the protocol. However, we are very far from having that conversation and setting up that infrastructure. When you look at the nature of the changes that have been made, what I have said is very reasonable.

The Convener: Mr Billington, do you want to come in? I am afraid that I can see only one person on the screen at a time, so I am not getting any cues from people if they want to speak.

Declan Billington: I have a couple of points. The first is that, over the distance, Northern Ireland's position is weaker than it could have been, because we did not have an Executive representing Northern Ireland in any of these discussions with a united voice. I know that the Executive is fractured but we previously had a First Minister and Deputy First Minister who could agree a few points in relation to a no-deal Brexit that needed to be addressed by the UK Government. We have been continually weakened in this debate by not having the local voice at the table and by the lack of an Executive. Also, within the UK single market, each devolved Administration has the right to object to UK divergence but, without the Executive in place, I wonder whether Northern Ireland has the ability to object to UK divergence alongside with the other devolved Administrations or to raise views in relation to the impact assessments and risk assessments that are used to justify those divergences.

In answer to the question, under the current situation, if Europe goes one way on gene editing and parts of the UK go another way, Northern Ireland would not be able to accept the gene editing, but we would argue that the damage to Northern Ireland on that basis is such that it should be reflected on before the UK diverges. Then, other devolved regions that are keen to avoid such procedures could also raise their objections. There are mechanisms. I am not sure that those mechanisms will deliver significant outcomes, but we do not even exercise those mechanisms in Northern Ireland because we do not have a functioning Executive to exercise the objection mechanisms effectively.

Sarah Boyack: It feels like we are at an incredibly tough impasse. We have already debated in this committee how on earth you monitor the alignment process, but we are at least able to sit here and do that. Are there alternative sources that you have to get your voice heard as businesses or consumers, either through individual elected representatives or through cross-UK business networks where you can at least get these concerns on to a level at which they might reach the people making decisions, whether it is the UK Government, civil servants or even UK parliamentarians? It feels like there is a real gap here. We get that the politics are really difficult but, if we were not even able to be here, I do not know how our businesses would be able to begin to get their voices heard, never mind consumer groups and environmental groups. Are there ways that you can at least get your issues raised or be seen?

Stuart Anderson: One of the most important things that the business community in Northern Ireland did when we had no Executive shortly after the protocol was signed was come together. It is a privilege for me now to convene that business Brexit working group. That is difficult. It is a group that comprises all ends of the agri-food supply chain from the farmer through to the retailer and includes microbusinesses as well as public limited companies, all of which have a diversity of interests but an agreement on outcomes and on the direction of travel. When you bring 14 trade associations and business representative organisations together and work through all the details of the various positions—which is difficult and challenging to do—it becomes quite a powerful voice to speak to the challenges.

The team in Queen's University has monitored voter sentiment in Northern Ireland about the actors and the process. Consistently, the business community comes out on top and is, I believe, the only actor in the process that is respected by the majority of voters to be trusted to do the right thing in the process. The most recent polls put the figure for that at around 60 per cent. That has been a consistent figure and I understand that it is rising. With that trust comes a lot of responsibility. We have been engaging intensively with UK

Government. When I listened to the debate in the second reading of the Northern Ireland Protocol Bill on Monday, I was disappointed for two reasons: first, the lack of reference to the risk and the shifting of risk on to Northern Ireland businesses; and, secondly, the lack of reference to the risk for Northern Ireland indigenous produce. There was not much discussion around those issues at all, and that is the democratic deficit issue that we have now and which Northern Ireland has always had, until the devolution settlement.

These are issues on which we work closely with back benchers across a number of parties and in relation to which we always have an open ear. Earlier this week, we met Liz Truss on Monday and then we met the German ambassador in Belfast on Tuesday—that was the first place he came to in the UK following his appointment, and we had an hour and a half with him. All 27 member states have met with us, and we are in regular conversation with the US. I have no doubt that our voice is reaching into places that we are incredibly privileged for it to reach into. The difficulty is that the politics are perhaps dictating the impasse at the moment and, as I said, until we get to a position where both parties are in a place to sit down and agree on what the issues are, we will just have to continue to keep making our case.

Sarah Boyack: That is really helpful. My observation is that, if you look at this committee, we do not all have the same politics, but we usually find that it is possible to agree on things that we might not personally agree on, because we have the capacity to at least have those debates.

Stuart Anderson: Can I come back in on that? We need movement from both parties. We need to be clear on that. This is not something where we think that we need the EU alone to move; we need the EU and UK both to move to find a solution. One of the things that we have been keen to see and have been asking of all five Executive parties in Northern Ireland, right across the political spectrum, is for them to recognise that, although they do not agree on everything, they should, in relation to issues such as the cost of living crisis in particular, prioritise the question of the consumers of goods coming from GB to Northern Ireland. They should put that down as their first question and then talk about democratic deficit representation? Why not do that, and then surely the UK and the EU will sit up and listen?

Declan Billington: Although there is no formal vehicle to engage, I give credit to the civil servants in Whitehall that I have been dealing with in the Treasury, DEFRA and Her Majesty's Revenue and Customs. My regret is that they are not the same ones I was dealing with four years ago on this, so we are going through the learning curve again. On delivering underpinning policy, they are keen to understand and have the problem defined that the policy options need to manage. I have found genuine and sincere engagement as they try to understand the problem throughout the policy solutions.

The problem then goes up to the secretary of state and the ministers. If they do not accept the inconvenient truth of their commitments around protecting the single market and avoiding a hard border—if they do not accept that their actions have consequences—how successful will the policy options that are designed to deal with those issues be when they are presented to ministers?

Credit where credit is due: Whitehall has engaged constructively and continues to engage with us and listen. I look forward to further engagement, but, when it gets to the floor in Parliament, a lot of the issues and concerns that we raise do not seem to make it to the debates.

10:15

The Convener: Our final two topics are potential solutions and a general opinion on the introduction of the Northern Ireland Protocol Bill. We have touched on some of that already. In our final few minutes together, can you give us an indication of how far apart people are? The EU's proposals have now been published, and the bill is going through Parliament. How far apart are some of the potential solutions, and has there been an analysis of the EU's proposals for some of these issues? I will come to Dr Whitten first.

Dr Whitten: I will speak generally and then pass on to the others to give the details. When you look at the two sets of proposals, it is perhaps helpful to separate out the practical and the political aspects and issues.

On the practical side, we have the movement of goods and, as already discussed, changing the definition of risk and strengthening the trusted trader scheme. There are clear areas of agreement, or potential agreement, that could be reached on those matters.

The dual regulatory regime proposal from the UK Government side seems to be much more problematic. There are a lot of unanswered questions and the policy paper that the UK Government has put forward does not have a lot of detail, which allows questions about what such a regime would look like to remain. That said, the possibility of derogations and changes in EU legislation could allow carve-outs—not the operation of a geo-regulatory regime, but perhaps we can see a read-across in principle to recognising the particular circumstances of Northern Ireland in specific areas. That takes us

back to the debate about the nature of the problem, but I think that you can see quite clearly an area for agreement on some of the practical issues.

On the governance questions, you could see a compromise around the role of the Court of Justice, but the two sides are still very far apart in how they are coming to that issue as well as the state aid issue.

I make the point that the proposals, particularly from the UK side but also in general, need more detail, and that detail is not publicly available. It is a negotiation—or it ought to be an negotiation, ideally. There is potential, but the politics are very difficult.

Declan Billington: There is one set of problems that needs to be resolved and that is the GB to NI flow. I see that as the main one for us. The jurisdiction of the Court of Justice is an issue, but it has never really been raised by the business community, because how can there be two different interpretations of the same rules on EU borders? There cannot be. In solving the problem of GB to NI flow, we need to make sure that we do not create new problems in NI to Europe flow. Every time I engage, I see a one-dimensional discussion on that.

On how far apart we are, if there was detailed policy underpinning the bill that gave us a clear view of the scope of the definition of trusted trader and so on, people could form an opinion. I believe that, in principle, the UK could deliver some good outcomes on goods for final consumption, but the Government has this binary view of the world that goods either go to Northern Ireland and never move from it, which is the green lane, or they go to Europe, which is the red lane. That does not take account of intermediate goods that could come in through free trade deals between the UK and the third countries that have tariffs in Europe, which could be sold two or three times. Such goods are circulating in Northern Ireland: steel comes in, is fabricated in one business, semi-processed in another, finally processed in a third and then crated into Europe. There does not seem to be any mechanism for addressing goods that are in free circulation.

I cannot actually answer the question because when I say, "Lift the bonnet under the bill and show me the detailed policies that we can engage with," I hear conversations about co-design and, therefore, I cannot benchmark. It boils down to the scope that the UK decides to allocate to the implementation of the green and red lanes on products when it works through the detailed proposals. There is a lot that can be solved by that, but in the agri-food subset, where differences in standards create food scares, we need to be very careful about what is allowed in through the green lane for free circulation. That is still a debate to be had.

Stuart Anderson: Where there is agreement, it is on the principle around goods that are moved into Northern Ireland and stay in Northern Ireland. What that means is open to debate, but where goods are moved into Northern Ireland and stay in Northern Ireland, they will benefit from certain flexibilities. There is significant divergence between the UK and the EU on what those flexibilities are. In its proposals, the UK is attempting to solve the question of regulatory divergence and simplify the process. The EU express lane proposal is principally about simplifying the process and does not address the question of divergence, which you will hear a lot of UK retailers talk about. As Declan Billington says, if you take that beyond goods for final sale to the consumer, you create significant difficulty for agri-food subsectors and for exporters in general when it comes to looking at issues around intermediate products.

On the dual regulatory regime, our view is that there is a question that needs to be answered. Retailers need to be consulted about how they will continue to supply the Northern Ireland consumer.

Setting that question aside, we see three principal issues with the dual regulatory regime for our exporters in agri-food. The first one is administrative. We have talked at length about the administrative challenges with the regime as it exists today. If we want to potentially double that workload, what will that look like in practice?

The second question is operational. If Northern Irish firms are able, by right, to construct their goods in accordance with UK standards, how will that play out commercially with their UK customers? Meanwhile, in theory, they will have to send goods built to EU standards to the south and on into Europe. Operationally, they will have two sets of standards, two sets of production lines, increased compliance costs and increased red tape.

Finally, and most importantly, there is the potential for reputational challenges to be created. Let us say that we accept the principle that GB goods moving into Northern Ireland have to be subject to some form of trusted trader status. Why are Northern Ireland businesses, under the definition of being in Northern Ireland, trusted—all 70,000 of them—given they are operating with an open border? What does that say about the reputation of Northern Ireland firms? That is where the difficulty is. It is not necessarily to do with the framework; the response to that framework from the customer base in the EU is what our members are most concerned about.

The challenge is to look at the issue from the point of view of people who have lead-in times with supply chains. Let us say that you are building a product now, or are signing a contract for 12, 14 or 18 months' time. If there are questions over trading in Northern Ireland now, that will create difficulty for our exporters now. When the question is addressed in theory and in the bubble of political circles, there is sometimes no understanding of the commercial realities that businesses are facing right now.

The Convener: That is very helpful.

I do not see any indications of further questions from the committee, which leaves me to thank you all for your contributions and for your briefings for today's session. I also thank our adviser Katy Hayward for being with us today. The session has been really helpful. I am sure that we will return to the issue so we might see you again in the future.

I suspend the meeting for five minutes to allow for a changeover of witnesses.

10:23

Meeting suspended.

10:28

On resuming—

Retained European Union Law

The Convener: Item 2 is consideration of the subject of retained EU law. This is the fifth and final session in a series of meetings focusing on post-EU constitutional issues.

I welcome Professor Kenneth Armstrong, professor of European law at the University of Cambridge, and Michael Clancy OBE, director of law reform, Law Society of Scotland, both of whom are joining us online. In the room, we have Dr Tom West, researcher with the Hansard Society; Dr Emily Hancox, lecturer in law at the University of Bristol school of law; and Kirsty Hood QC from the Faculty of Advocates. You are all very welcome. I hope that we can manage a panel with this number of people online. Our colleague Mark Ruskell is also joining us online.

We have four themes to cover. Our first theme is how best to understand retained EU law as a category of domestic law and the significance of the status that is attached to it. I will invite Professor Armstrong to start us off.

10:30

Professor Kenneth Armstrong (University of Cambridge): I have not submitted any written evidence thus far—I hope to get you something by the end of today.

When we think about what retained EU law is, one thing that is important for us to keep in mind is the substance of what that is. I think that we will talk a lot today about the status of it constitutionally and maybe the processes for its change and modification, but the substance of it is quite important. It embodies a particular European model of the regulatory state, which grew up post-war and accelerated through the 1980s with the EU single market programme. It is a model of regulation that says that trade between states should be free but also fair in the sense that the market is regulated.

The UK domesticated a large body of law, extending way beyond just the internal market to include all sorts of other aspects of EU law. Of particular interest to the Parliament are the regulated market aspects of that and the regulatory powers that are involved in that. That model of the regulatory state was retained—that is, the idea that we have free trade but under regulatory conditions to protect consumers, the environment, animal and human health and so on. Therefore, one of the key questions that the committee might want to explore is: what happens when that body of rules is then changed? What

type of regulated economy will we move to, and who has control over that? We can begin to see divergences between the position being taken by the UK Government and its a desire to diverge and move away from that European model of the regulatory state and the Scottish Government's keeping pace power and desire to remain closer to and aligned with that model of the regulatory state.

Given the conversation that I think that we will have this morning, I do not want us to lose sight of the substance—that is, that there are substantive rules to protect individuals and consumers, and to provide fair competition. We need to have a conversation about how that body of rules will evolve and change for the economy not only of the UK but of Scotland.

The Convener: Thank you. Before we move on, I offer my apologies for not mentioning that Professor Tobias Lock, who is a committee adviser, has also joined us and may take part in the discussion.

I ask Kirsty Hood to comment.

Kirsty Hood QC (Faculty of Advocates): I am coming at the topic very much from the point of view of a lawyer. I think it important to understand and see it from that perspective. When the UK was an EU member state it was subject to EU regulation and legislation, and it was necessary to have a way of deciding what took priority over what. Supremacy of EU law is, perhaps increasingly in some quarters, used in quite an emotive sense. That is very unfortunate, because some of the written evidence brings out that that is purely a way of trying to arrange and prioritise rules from different sources. While we were an EU member state, the UK and all the various parts of the UK, including Scotland, were subject to EU law that took effect in a variety of ways. Sometimes, that was because the United Kingdom or parts of it legislated to give effect to that. Sometimes, if the EU legal instrument took a particular form, that would take effect directly without the need for any of the Parliaments in the UK to take any action.

At the time when the decision was taken to come out of the EU, we had a situation in which, among the tapestry of law in the UK and all its parts, we had EU laws as various threads of that tapestry. That raised an issue in the legal system as to what was to be done about that.

As is quite normal with constitutional change, it is not necessary to have a complete reset of the law. It is not necessary and, indeed, I think that it would be quite unusual when there is constitutional change, however far reaching, for laws to be simply repealed or revoked. Unsurprisingly, as has happened on many occasions before, and particularly to avoid any cliff-edge change or vacuum, it was provided for that the various strands of the tapestry of the law that had been derived from the EU would remain part of the law in the UK. That would allow the various Parliaments, depending on their powers in the areas, to decide, at leisure, whether to retain, amend and make that law fit better perhaps with a new situation, or to revoke it altogether.

Of course, even at the end of the transition period, it was immediately apparent that some pieces of EU law would not be suitable for retention. Some of them, for example, relied on reciprocity. For example, on judgment recognition, the idea that there should be a free flow of legal judgments between EU member states, relies on everybody recognising each other's judgments. A consequence of coming out of the EU and not making a new judgment recognition arrangement with the EU was that those things could not be given effect to unilaterally; they would stop working.

There were some things that immediately were not retained as at the end of the transition period or implementation period, depending on the particular text description of that period. Other things were simply retained in the system, allowing the various Parliaments the leisure to decide whether they want to alter that law or retain it.

I suppose that alteration could mean a number of things. That could mean altering the law because, in a new situation or reality, it perhaps seems inappropriate. It could also be that, when we think about retained EU law, we are thinking about EU law roughly as it was at the end of the transition period. Of course, given the keeping pace agenda, that could also mean changing retained EU law to keep pace. Obviously, EU law is not preserved in aspic; it will change as we go through the years.

From a lawyer's point of view, it is important to try to remove some of the emotion and just to see EU law as part of our membership. We were in the EU for a long time. There are a great many different laws—sometimes, those are very detailed and technical—across many areas of our legal system, and various legal devices were used to keep that in the system. Those can be kept or changed.

This will be my final comment on the issue. On the supremacy of EU law—the idea that you had to try to prioritise if, on the face of it, there seemed to be a conflict between a domestic statute and the pan-European—that concept is woven firmly into the tapestry. If courts have to look back at what the law was while we were in the EU and look at how the law operated at that time, it seems to me that it would be quite normal and necessary for a court to consider how those particular phrases in EU legislation were interpreted and to approach the way in which they interacted with

domestic legislation while we were a member state in the way that they always did. That gives some certainty to litigants and general members of the public.

Dr Emily Hancox (University of Bristol): I want to make two points on my thinking about retained EU law. The first is about what retained EU law is and why we retained EU law. That is really about legal continuity and legal certainty. In that way, although I would say that retained EU law is a category or source of domestic law, it is quite a disparate source. We find retained EU law not only in statutory instruments and in acts of Parliament; we also have the new converted categories, such as direct EU legislation, which cover, for example, EU regulations that previously took effect by virtue of the European Communities Act 1972, and other converted rights such as treaty rights. If you look at the retained EU law dashboard, you can also see some case law and general principles in that residual category.

In some ways, retained EU law as a category was necessary to convert legislation or EU regulations where otherwise the conduit pipe of the European Communities Act 1972 would have been cut off. Retained EU law also reflects the fact, as has already been mentioned, of the principle of supremacy or primacy of EU law, and the various requirements in interpretation of EU law and domestic law. There are various legal consequences that attach to a measure falling in the category of retained EU law. That all reflects a desire to maintain legal certainty and continuity following the UK's departure from the EU.

Another important point to make—this perhaps reflects some of Professor Armstrong's comments—is that retained EU law was never intended to be permanent. The idea—this was always the intention—was to provide a springboard for introducing new policy choices. That has been done in Scotland and by the UK Parliament. Although there is provision for amending deficiencies in retained EU law in section 8 of the European Union (Withdrawal) Act 2018, retained EU law does not benefit from the principle of supremacy going forward. New acts of Parliament, and new statutory instruments, where they have the power to amend acts of Parliament or other sources of law, can amend retained EU law.

It is important to think about the issue in those two ways. One is a way of ensuring continuity and legal certainty; the other is allowing for change. I think that one of the things we will come on to is how change might best happen, but I will leave my remarks there for now.

Dr Tom West (Hansard Society): We have ended up with the category of retained EU law because of the events of the past few years. On the one hand it is an integral part of domestic law—it is part of the tapestry and is very much part of the law, how it works, how we regulate and so on. On the other hand, it is a distinguishable and identifiable category: there is a thing called "retained EU law". For the most part, if someone was to ask the question, "Is this retained EU law or not?" we would be able to say yes or no, although there will be some edge cases for which that is difficult.

The question whether something is or is not retained EU law by no means tells the whole story about what retained EU law is. As we have already heard, it is a very diverse body of law; it is not a uniform set that you can look at and say that it is all the same, because it goes from EU treaties, directives and regulations down to some very technical implementing regulations. There is a swathe of it. The first point that I want to get across is that although we can say that there is a thing called "retained EU law", that is only part of the answer to the question that we need to ask. We also need to think about what else we need to know.

10:45

The particular reason why I want to draw attention to that is the question of the status of that law. In particular, our interest and concern at the Hansard Society is what that means for the law's future amendability and for parliamentary involvement in that. I know that we will talk in some detail about that later, but just as a starting point I will say that a result of the non-uniformity and diversity of retained EU law is that it is unlikely that there will in the future be a one-size-fits-all approach to amending it, updating it, replacing it, repealing it and so on that will be appropriate for all parts of retained EU law. Some of the very technical implementing regulations from the European Commission, which are perhaps analogous to secondary legislation here in the UK, might warrant a relatively light touch way of amending them, but there will also be quite significant overarching legal rules and principles that might warrant greater oversight and scrutiny by Parliaments across the UK.

That is crucial, because if that oversight is not there—in our wider work on delegated legislation, our research focuses on the Westminster Parliament—the processes for scrutiny by Parliament are not up to scratch and too often allow important changes to be made to the law without enough oversight by Parliament. A mismatch with retained EU law is of concern, from our point of view.

Michael Clancy OBE (Law Society of Scotland): Good morning, everyone. It is tempting to offer a critique of what we have already heard

and I probably should forbear from that, but let me pick out some of the themes that have come out of the discussion so far.

On the reason for retained EU law, as I mentioned in the Law Society's submission—I apologise for its arriving rather late yesterday—when Theresa May discussed the UK's withdrawal from the European Union in a white paper, she spoke about requiring certainty after the UK left the European Union. One of the main things that the Law Society of Scotland was advocating for when the build-up to the referendum was taking place was that if the UK was to leave the European Union there should be certainty about the law. No matter what that law was, it should at least be certain, after the day, because people require certainty and knowledge about the law.

I hear what Dr West said about the diversity in retained EU law. Of course, there was diversity in EU law too, so sometimes we have to realise that it was not always absolutely certain what was applicable at a particular point. We had access to the European Court of Justice to determine on points on which there might have been doubt about the applicability or interpretation of the law that was in place.

Obtaining certainty was important; retained EU law is the legislative mechanism for trying to get that certainty. Of course, it is not certainty as it was with the EU law that existed before, because it is not EU law as it was before. I can go into great detail, as everyone around the table can, about the various categories of retained EU law, EU-derived domestic legislation, direct EU legislation and other rights and obligations, and those parts of EU law that have been left behind, such as the Charter of Fundamental Rights of the European Union.

Retained EU law is not the same as EU law was because of those exceptions and because of the mechanisms in which it has come into being, through acts of Parliament in the UK Parliament and the Scottish Parliament, and through subordinate legislation. As we accept that it was never intended to be a permanent state of affairs to have retained EU law in all its manifestations—as we see under the European Union (Withdrawal) Act 2018—it is fair to say that the question of when and how retained EU law is changed is what confronts us today. As we have heard already from some of the participants in the conversation, the UK Government has stated its intention to introduce a bill and to use Mr Rees-Mogg's preferred nomenclature for that bill, which is "the retained EU law bill". We need to await the introduction of that bill to see what it contains, what the timetable is for removing retained EU law from the policy and legal landscape, how that removal will take place and what further elements of domestication will be needed.

I will leave off on discussion of that point just now, convener, because I know that we have run into time that is precious for us all.

The Convener: Thank you. I will turn briefly to Dr West on his comments about scrutiny and consent, and how the Sewel convention is being interpreted at the moment. Where will it leave the Scottish Parliament and this committee, which are responsible for scrutinising the Scottish Government, if EU law in devolved areas is amended through that process?

Dr West: Of course, if the UK Government introduces a bill in the UK Parliament that is seeking to touch on devolved areas, that will go through the normal Sewel process. The bit that we do a lot of work in and in which we are interested is the question of what happens when there are UK Government powers to make delegated legislation that will affect retained EU law in devolved areas? That does not just apply to retained EU law, but might be particularly felt within that area.

There is not a clear process that has to be gone through for the UK Government to lay UK statutory instruments that might affect devolved areas. The powers will often—in fact, normally—have requirements to consult or, rather, to require the consent of Scottish ministers, and one would expect that to be part of what you would see happening in respect of any such powers. There is then a question about the involvement of the Scottish Parliament. There is a protocol in place, which was first put in place as a result of the European Union (Withdrawal) Act 2018, to make sure that the Scottish Parliament is involved in the giving of consent by Scottish ministers to such statutory instruments. That has been expanded to include other areas related to EU law, which look to me as though they would probably be co-extensive to retained EU law. However, again, you might find some edge cases that would not. That appears to be the case.

This is all within the context, as I said earlier, of the Hansard Society's research and on-going projects, through which we find that scrutiny of UK statutory instruments in Westminster does not, in our view, provide for adequate oversight by the legislature of Executive action to make regulations. It is all plugging in to an overall system that we think does not give enough democratic accountability. There are clear constitutional democratic risks to that when there are important changes. This relates to what has been said about the diversity of retained EU law and the fact that potentially quite significant and long-standing aspects of the domestic legal framework are contained within retained EU law.

There is the potential for powers to change those aspects through a mechanism that does not give the democratic oversight that we think is commensurate with changes such as might be made.

Of course, as we have heard, we need to wait to see what the bill says, what it looks like, how it is designed and other important questions, but our concern is that it is not designed correctly to include the appropriate scrutiny.

Michael Clancy: Dr West is correct that there is an issue about subordinate legislation; under the devolution arrangements, the Sewel convention—or legislative consent convention—does not apply to subordinate legislation. Devolution guidance note 10 makes that pretty clear and has made that clear since the earliest days, when the guidance note was produced.

What we are left with is that UK legislation can contain a power for UK ministers, as Dr West described, to make subordinate legislation that can apply in Scotland. I do not need to remind the committee of the trials and tribulations that it faced in consideration of the United Kingdom Internal Market Bill, now the United Kingdom Internal Market Act 2020, or the Professional Qualifications Act 2022, which contained pretty similar provisions for UK ministers to be able to make subordinate legislation. That subordinate legislation is then put to the Scottish ministers for consultation and for their consent, but if Scottish ministers do not consent within the specified period of time, the UK Government can proceed with the legislation, setting out a statement that clarifies why it has decided to proceed without the consent of Scottish ministers.

That is a specific arrangement and is not the arrangement that applies more generally. If UK ministers have, within an act of Parliament, been loaned the powers to make regulations, they may do so. If the act does not prescribe procedures, there might be no interaction with the Scottish Government or, indeed, the other devolved Administrations, necessary.

That is important. The lack of, at the very least, a proper consultation arrangement is one of the things that the Law Society has been very concerned about, not only in terms of connectivity in respect of UK ministers enacting subordinate legislation that might apply in devolved areas, but in terms of the actions of Scottish ministers in making regulations on which they, too, should consult relevant interests.

It would be fair to say that in circumstances under UK legislation such as the Professional Qualifications Act 2022 or the United Kingdom Internal Market Act 2020, the requirement on seeking consent but then being able to make a statement on consent not being obtained and the need to proceed, needs substantial consideration of whether it is sufficient for purpose.

Alasdair Allan: Good morning, Mr Clancy. It is good to see you again at the committee. The Law Society made a written submission, which you alluded to there, that made some interesting historical comparisons with 1560, 1707 and 1999 as dates when bodies of law were retained. It is a bit more complicated this time, is it not? The question as to who gets to amend the body of preserved legislation is perhaps subject to more contention and more questions. Can you see that being a contentious issue in future?

Michael Clancy: That depends on the parties involved and whether they intend to be contentious. Let us remember, for example, that the provisions of the European Union (Withdrawal) Act 2018—originally in clause 11 of the bill and then in section 12 of the act—that related to the removal of the competence constraint on the Scottish Parliament and the other devolved legislatures of compliance with EU law and established a position where UK ministers could essentially freeze any attempt by the devolved legislatures to enact legislation that would affect retained EU law, have all been done away with. The relevant statutory instrument that was passed earlier this year essentially allowed section 12 to slip into memory rather than be anything that bit on the competence of the Scottish Parliament to legislate. It is open to the Scottish Parliament to legislate on such orders as they applied within devolved areas.

11:00

I think that the element of contention that you refer to in that sense has been quietly forgotten about. There was a lot of concern when the European Union (Withdrawal) Bill was going through, but there was hardly a mention of the removal of the freezing powers by UK ministers. Maybe that indicates that the nature of the debate has moved on.

Alasdair Allan: Do others want to come in on the question about the potential for contention over which Parliament amends these laws in future? Professor Armstrong is volunteering. You are muted, I think.

The Convener: The connection might be a bit sticky. Can we persevere for a few moments?

Professor Armstrong: Sorry, can you hear me?

The Convener: Yes, we can. Can we switch the video feed off? That might help. We can hear you, but the video connection is sticky.

Professor Armstrong: As they say, I have a good face for radio.

The Convener: I will go to Kirsty Hood first and then we will try to come back to Professor Armstrong.

Kirsty Hood: To some extent, the potential for contention, apart from on one particular aspect, need not particularly come from the status as retained EU law but might arise simply because it holds a mirror up to the potential for contention more generally, for example over issues to do with the Sewel convention and the extent to which that is enforceable, and the way in which that is given effect to technically. These are matters that apply more generally.

To some extent, the potential for contention is perhaps just what is always there, subject only to the one particular additional aspect, which is not so much to do with the strict, narrow retained EU law idea but comes from the generality of the situation. The pan-European apparatus, in which there is a need for consensus and flexibility among a number of states of different sizes with very disparate interests, is perhaps quite a different space for the Scottish Parliament to operate in from a much tighter internal market comprising only four different systems—England, Wales, Scotland and Northern Ireland—in which one particular part is, in geography and population, a great deal larger than the other three. That brings quite a different situation. Other than that, this issue may emphasise themes, but they are probably themes that are already there.

Dr Hancox: I want to echo what has already been said. We do not know what form this new bill will take or what the power to amend retained EU law is, but even if it does not include powers to amend retained EU law in devolved areas, we have to think about the different levels of governance now. In particular, we have to think that, if there is a wide-ranging power even just to amend retained EU law, particularly through statutory instruments in England, say, or in areas that do not touch on devolved matters, that will still have to interact with the Scottish policy of dynamic alignment with EU law in some areas and with common frameworks. Even if it is just change within England, I think that there is still quite a lot to be concerned about from a Scottish perspective. I suppose that it does not go to the contention point, but I think that it is contentious regardless.

Professor Armstrong: I want to recall the importance of the common frameworks programme. The common frameworks were deliberately a mechanism for dealing with modifications to retained EU law, to deal with the kinds of issues that have been discussed already about how we have mechanisms for co-operation and co-ordination between different levels of Government—between Westminster and Holyrood. Those are there as a way of trying to provide the channel of conversation about the kinds of policy changes that may happen, but of course a number of questions arise. One is about policy difference where there are very clear differences between what the UK Government wants to do in changing that model of regulation and what the devolved Administrations may want to do.

There is also then the question about parliamentary scrutiny. Those intergovernmental mechanisms are good in the sense that they provide that channel of co-operation and adjudication, but it may be very hard for Parliaments to get a handle on what kinds of agreements emerge out of those types of processes. For example, you talked about gene editing in an earlier discussion. At what point do we find compromises there and what sort of parliamentary oversight is there on when rules will remain aligned internally within the UK and when they will diverge?

I thought that it was important to remind us that the common frameworks programme is there. It is intended to be a structure for co-operation and communication, but in and of itself it raises some of the same types of challenge that Dr West was talking about in the scrutiny of secondary legislation.

Alasdair Allan: Dr West and Ms Hood touched on the Sewel convention. I will not speak for too long about the Sewel convention, but I am interested to know your views about whether you feel that it will be a real thing in the future, or whether you feel that it has been tested to breaking point already. This week, the Parliament has made pretty clear what it is likely to do with the Northern Ireland Protocol Bill in terms of consent. Is the Sewel convention a real factor in how these relationships are played out in future, or do we use the past tense about the Sewel convention?

Dr West: That is a very good question and I am afraid not one that I will be able to say much on, other than to say that, obviously, it has to date been a very important part of the devolution settlements. If, as you suggested, it may be becoming a thing of the past, there would need to be serious consideration about what happens next.

Kirsty Hood: If one thinks back to when the Sewel convention first came to life, it was thought to be quite powerful, if not in its legal status in how it would operate. When it was given the particular altered legislative form, that was thought to have strengthened it further. I think that “tested to breaking point” is quite a good phrase, because it

appears from the Supreme Court decision that the position on legal enforceability is as we know now. Therefore, it comes very much to how the various Parliaments and Governments work together. The withdrawal from the EU and the very different popular votes in the various parts of the United Kingdom on such a large issue have put the Sewel convention very much into the fire on such a controversial and far-reaching issue.

Donald Cameron: I refer to my entry in the register of members' interests as a member of the Faculty of Advocates. I enjoyed the historical references in the faculty's and the Law Society's submissions. Unlike Alasdair Allan, I seem to recall the reformation being fairly contentious, too, but that aside, I will ask about the issue of EU supremacy.

As we know, the principle is that, if there is inconsistency between EU legislation and domestic legislation, EU legislation has primacy. Retained EU law effectively operated as a kind of copy and paste on to the statute book and yet maintained supremacy prior to completion day. That seems to me to create quite a unique situation, because it basically creates a kind of hierarchy within law that has the same status. It is all domestic legislation now, yet there is a hierarchy within it. There are also two different approaches of statutory interpretation to law that has the same status. That may be negligible in the amount of law that it affects, but do people have reflections on that and, perhaps more importantly, given the UK Government's stated intention to end supremacy, how is that done practically in the situation that we now find ourselves in? I will start with Dr Hancox, because I think that she has written about this.

Dr Hancox: Thank you very much for your question. In a sense, I agree that, now that retained EU law is simply domestic law, it might seem a bit unusual to give it supremacy or primacy. I think that it is a smaller issue than it might seem at first glance, in part because the principle of supremacy does not attach to any new acts of Parliament. It is a sort of conflict rule that is dealing with historical acts. It is not that it is not still important: there have been two recent cases in which, for instance, the Court of Appeal and the High Court have disapplied aspects of, in particular, the Investigatory Powers Act 2016 for being incompatible with the UK general data protection regulation. The issue that arises is that, if we remove the principle of supremacy, that might then interact with existing policy frameworks. For example, if we remove the principle of supremacy, we have to think about the fact that the UK might then be acting incompatibly with the GDPR and about what that means potentially for the UK's adequacy decision. I wonder whether this is a question that courts should be answering rather than it being part of legislative policy.

On different approaches to interpretation, it is unclear to me, at least, that removing the principle of supremacy from retained EU law would change how it is interpreted. In the recent Allied Wallet case, the court said that the Marleasing principle of interpretation—the principle that we should interpret domestic law as far as possible compatibly with EU law—is part of retained case law. I think that there are a lot of different issues bound up here. It is easy to remove the language of supremacy to say simply perhaps that all retained EU law should be taken as enacted in 2018 or something like that; in that way, you keep the legal continuity and legal certainty. What you do about interpretation is perhaps more complicated, because I think that it is separable from the principle of supremacy, and it might not make sense before there have been more wide-ranging policy changes to necessarily change how retained EU law is interpreted. I will end there. Thank you for the question.

11:15

Professor Armstrong: I want to remind everyone again that retained EU law is not only the substantive legacy of EU membership, but the constitutional legacy. The principle of primacy performed a particular function in EU constitutional order: it ensured the effectiveness and uniformity of the operation of EU law across 27 member states. Domesticating that in UK law does not necessarily make a whole heap of sense going forward.

As Dr Hancox identified, the use of the term "supremacy" is a distraction. It is a priority rule that says, between two different rules, which norm should prevail in the event of a conflict. You might want to have rules about that that relate to different types of sources of law, but I think that it extends more widely than the question whether it has its origins in EU law. In an odd way, I think it overconstitutionalises an awful lot of bits and pieces of rules and regulations that are not particularly significant and would not necessarily need to have any particular kind of constitutional protection against implied repeal.

In other words, we need to think about under what circumstances we would want to have constitutional rules about implied repeal of rules rather than simply holding on to the primacy of EU law in and of itself as a concept. In a way, I think that this is an area where we need to have a grown-up conversation about what exactly has been retained and why that principle is there, and whether it performs any useful function in our constitutional order and as a way of dealing with

the operation of the body of retained EU law as it evolves and changes in the future.

Professor Tobias Lock (Committee Adviser): Briefly, if I remember correctly, the House of Lords committee at the time objected to supremacy being in the European Union (Withdrawal) Bill and proposed that everything should have the status of primary legislation instead, which of course would have overconstitutionalised things even more. If the supremacy principle falls away—for which perhaps there are good reasons in the long term—it might be good to think very clearly about which pieces of what was retained EU law, which will be retained under a different name, should be protected in a certain way, whether that is by putting it on a primary legislation footing or by introducing some form of protection, perhaps in those individual pieces of legislation. That would be difficult, of course, because you would have to go through the entire statute book of retained EU law and prioritise certain policy decisions or elements over others. However, I think that that might be a way of resolving the situation in a less sweeping manner.

The Convener: Unfortunately Thursday morning committees do not have any flexibility to run on, and I am very conscious that we have about 10 minutes left.

Sarah Boyack: I want to follow up the answer that we have just had. From a devolved perspective, what specific issues could arise from changing the status of, and basis for amending, retained EU law that should be taken into account in the future? I am thinking particularly of our job as a committee. We have already heard comments about scrutiny and the challenges in that regard. What areas do you suggest we start focusing on? Scrutiny has been mentioned by a couple of our witnesses, such as Dr West, but I will continue with Professor Lock. What topics should we be focusing on and prioritising?

Professor Lock: We have to distinguish. On the one hand, we will have scrutiny of things that happen at UK level, and I think that probably the greatest danger is that there might be a black hole there. If a policy decision is taken by the UK Government, how do you ensure that there is devolved input? If a decision is taken at Westminster in primary legislation, you could say that we have Scottish MPs in the room and all of that, so there is some potential for devolved input, but there is less of that potential if it is Government legislation. I identify that as probably the biggest issue.

In Scotland, I think that it will be important for the committee to continue what it has started to do already in holding the Government to account and for proper scrutiny to happen in this house if the Government is given powers of amendment or replacement of retained EU law.

Sarah Boyack: That is very clear.

We have talked about cross-parliamentary liaison before. For example, we have the parliamentary focus with UK parliamentarians talking to the European Parliament—we are in the room, but we do not have speaking rights. Should committees in different UK Parliaments have such conversations among themselves, given the sheer weight of potential legislation, to share best practice or concerns?

Professor Lock: It makes sense to share experience and expertise because there is a danger of being overwhelmed with the sheer volume. The dashboard is a very helpful thing. It has been slagged off a lot on Twitter and all of that, but I think that it is a very good resource because it gives an idea of what is there. There is a danger of being overwhelmed and of different policy approaches being taken in Wales, Northern Ireland—if they get back to having a sitting Assembly—and here. It might be a good idea to try to co-ordinate, including on the internal market act, which also has repercussions.

Dr West: I am aware of time so I will try to be as quick as possible.

In addition to what has been said, I think that scrutiny of UK statutory instruments is very important. I know that the Delegated Powers and Law Reform Committee is interested in the operation of the protocol between the Scottish Parliament and the Scottish Government. It is certainly something to focus on. However, there is an issue with timing. What information should the Scottish Government and the Scottish Parliament receive from the UK Government and the UK Parliament, and at what point? It is not straightforward to work out the right sequencing to allow meaningful scrutiny to take place here while respecting the fact that these are UK Government instruments to be scrutinised by the UK Parliament.

There are three other issues that I think are worth thinking about. One is that there are ways in which retained EU law may now be amended through delegated powers that existed pre-Brexit. A number of statutory instruments are retained EU law. Many of them are made under the section 2(2) European Communities Act 1972 power, but many are made concurrently with other powers, and some of those still exist. Previously, they could be exercised only within the confines of EU law but, of course, that is no longer the case. To some extent, the scope of those powers has altered almost indirectly as a result of Brexit. I think that what happens with those is an interesting thing to consider.

On new powers, whether in the Brexit freedoms bill or in other bills, there is also a question about how long the new powers will last. There is some uncertainty about whether those powers will be one-off or sunsetted powers that will allow a decision to be made to repeal or do a one-off update and then, in a certain amount of time, they will go, or whether they are to be indefinite powers. If it is the latter, that potentially gives on-going policymaking power to the Executives. That is another area that is worth thinking about.

Finally, something that we look at in our general work on Parliament—as I said, our work is focused on the Westminster Parliament, but similar principles may apply—is the idea of sifting statutory instruments. Many are technical, uncontroversial and do not require significant amounts of time to be spent looking at them, but some are not. We think that mechanisms that allow Parliament to be able to identify those that are worthy of greater attention and those that do not necessarily need that attention are valuable. A number of those have come into play through Brexit; in Westminster they come under the 2018 act, but there are also sifting-style functions related to powers under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. I think that it is worth the committee looking at that in terms of retained EU law but also in terms of delegated legislation more widely.

Michael Clancy: I agree entirely with Dr West's analysis of sifting. It was quite clear that a great deal of work had to be done to put retained EU law in place and, therefore, one can with some confidence state that to unwind retained EU law will require a great deal of work also. That requires legislatures—not just the Scottish Parliament, but the UK Parliament and the others—to make sure that the processes are robust, that they engage with those who will be affected by potential changes and that that engagement is real.

That takes us back to the idea of supremacy. An issue that I suppose one would want to raise is that supremacy applies to pre-exit legislation, not post-exit legislation. I am trying to figure out in my head what kind of conflict there is with having supremacy in pre-exit legislation and how that works with the declaration of the sovereignty of the UK Parliament, which we find in the European Union (Withdrawal Agreement) Act 2018. I think that that is part of the key as to why supremacy will also be targeted in the retained EU law bill.

The Convener: Kirsty Hood and Professor Armstrong want to comment. We are very tight for time, so please be succinct. The last word will go to Professor Armstrong.

Kirsty Hood: I echo what has been said on the importance of scrutiny. It is important to remember that legislation that was passed through the European Union involved scrutiny, and that that scrutiny involved the United Kingdom and many other countries.

I will be very brief, but I have two other points to stress. My first point picks up on what Michael Clancy has just said and is about certainty and continuity. We must remember that, where we are preserving hierarchies that were in place in terms of how we understood, applied and interpreted the law prior to withdrawal, it provides certainty and continuity for members of the public to maintain that apparatus in a sensible way.

Finally, when you are thinking about these topics in future, I want to stress again something that many people have said. It is important that we do not think of EU law and retained EU law as some sort of monolith. It covers such a wide subject area and there is a very wide range of different sources and ways in which that legislation came into being.

Professor Armstrong: I have one very quick point. Kirsty Hood spoke earlier about legislatures being able to make modifications at their leisure as circumstances evolve. In the retained EU law bill, I think that we will need to look out for more automaticity in relation to the sunsetting of retained EU law, which would mean that legislatures at different levels would have to think very carefully about what they want to put in place to replace any of the retained EU law rules. I do not know whether that will be a feature of the bill, but if it is, it will require action by legislatures and, therefore, engagement by committees in what would replace those rules in the future.

The Convener: Thank you very much. I thank Professor Lock for joining us as our adviser this morning and everyone else who has contributed to our panels. We will consider a draft report covering all five of our round tables on these areas—the report will be available after summer recess.

Before we close, I thank members for their constructive and consensual approach to the committee's work over the past year. It has been demanding, productive and rewarding. I thank our parliamentary staff and our advisers for their support. I wish everyone a good recess and send special good wishes and congratulations to our colleague Maurice Golden, who is not with us today. Enjoy the summer. On that note, I close the meeting.

Meeting closed at 11:30.

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