OFFICIAL REPORT
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Finance and Constitution Committee

Wednesday 26 August 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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FINANCE AND CONSTITUTION COMMITTEE
17th Meeting 2020, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Tom Arthur (Renfrewshire South) (SNP)
*Jackie Baillie (Dumbarton) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Angela Constance (Almond Valley) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Dean Lockhart (Mid Scotland and Fife) (Con)
*John Mason (Glasgow Shettleston) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenneth Campbell (Faculty of Advocates)
Michael Clancy (Law Society of Scotland)
Professor Michael Keating (University of Aberdeen)
Professor Aileen McHarg (Durham University)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Virtual Meeting

Scottish Parliament

Finance and Constitution Committee

Wednesday 26 August 2020

[The Convener opened the meeting at 09:30]

UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 1

The Convener (Bruce Crawford): Good morning and welcome to the 17th meeting in 2020 of the Finance and Constitution Committee. Before we begin agenda item 1, I note that there has been a change in committee membership. I thank Donald Cameron for his hard work and input, and I warmly welcome back Dean Lockhart as his replacement.

Dean, I invite you to declare any interests that are relevant to the work of the committee.

Dean Lockhart (Mid Scotland and Fife) (Con): Good morning, convener. It is great to be back on the committee. I am a member of the Law Society of England and Wales. I have no other interests to declare.

The Convener: Thank you very much.

The only item on our agenda is to take evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill at stage 1. I warmly welcome our first panel of witnesses. Professor Michael Keating is professor of politics at the University of Aberdeen, and Professor Aileen McHarg is professor of public law and human rights at Durham University.

I will start the questioning. In the bill, the Scottish Government has laid out the arrangements for parliamentary scrutiny through subordinate legislation. What are your views on those arrangements? I ask Professor McHarg to respond first.

Professor Aileen McHarg (Durham University): Good morning. I assume that you are talking about the keeping pace power. What surprised me about the scrutiny arrangements in the bill is that they are weaker than the scrutiny arrangements in the original UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, which was ultimately not proceeded with. Those stronger scrutiny provisions were partly a result of amendment during the parliamentary passage of the bill, but they were partly there from the outset.

There are two main respects in which the provisions are weaker. In the current bill, the choice is between negative procedure and affirmative procedure. Some types of regulations will have to be made by affirmative procedure, and although it will be possible to apply affirmative procedure to other types of regulations, the default will be negative procedure, whereas, in the first bill, the default was affirmative procedure, with some provision for the use of the super-affirmative procedure. The super-affirmative procedure requires regulations to be laid in draft form for a longer period, and to be subject to consultation. In addition, there was a sifting mechanism whereby the Parliament could decide whether the chosen procedure was appropriate.

It is surprising that the relevant part of the bill has come back with weaker scrutiny provisions. I suggest that the Parliament might want to try to reinstate the stronger procedural protections that were in the first iteration of the bill.

Professor Michael Keating (University of Aberdeen): I will answer the question, but I would like to back up a bit. First, we need to ask what the broad purpose of the bill is. I see two broad purposes that are not quite the same. The first is the idea of trying to remain in dynamic alignment with the European Union. I can see the logic of that, but it makes sense only as part of a broader strategy. What does Scotland want out of Europe? We might want to stay in dynamic alignment because we do not think that the European Union has been—[*Inaudible*.]—or maybe in some other kind of relationship.

I would like some kind of philosophical statement to be made about what the Scottish Government sees the possibilities for remaining in Europe in all sorts of ways as being. We had that in "Scotland's Place in Europe: Our Way Forward", but that did not get very far. We need something like that, and then we need something on how dynamic alignment might fit into that and something on how a special procedure might be justified, because of the necessity of keeping in dynamic alignment.

The other possibility is that we might just want to adopt European laws because we like those particular laws. In that case, I do not see the need for a specific fast-track mechanism to keep up, as that could simply be dealt with by ordinary law.

As far as the affirmative and the negative procedure is concerned, I agree with Aileen McHarg on that. There is a lot of negative procedure here, which is highly problematic for parliamentary accountability. It is part of a broad approach at Westminster and Holyrood, whereby Brexit is resulting in a loss of parliamentary accountability and an increase in ministerial discretion.

The Convener: Given that the number of EU regulations regularly exceeds 1,000 annually, how many can we reasonably expect to be introduced using the powers in question?

Professor Keating: That is the problem. We need some sort of broad statement as to what this is all about—that is, what the purpose of dynamic alignment is. Is it just to stay aligned with everything, is it so that we can we pick and choose, or is there some broad strategy that would make it important to stay in dynamic alignment—with agriculture, say? All that we have are some examples picked at random, rather than a broad philosophy that would allow us to know what to look for. It is clear that it would be impossible to keep track of everything that comes out of the European Union. We need to know on what basis things are going to be selected.

The Convener: Given the likely future volume of instruments, regardless of whether we keep pace with them, what level of scrutiny by the Parliament do you consider would be proportionate and appropriate in the circumstances? Perhaps Professor McHarg might like to kick off on that.

Professor McHarg: It really depends on what we are talking about. We might be talking about very technical amendments of existing areas of what will become retained EU law, in which case a relatively low level of scrutiny is appropriate. However, we might not be talking about that. We might be talking about something much more significant, such as entirely new policy developments or significant amendments to existing areas of policy, where a much higher level of scrutiny would be appropriate.

I tend to agree with Michael Keating that, first of all, the case needs to be made for the keeping pace power to be in secondary legislation at all. There might be a scenario in which the Scottish Parliament and the Scottish Government have no choice but to keep pace, perhaps because there will be some kind of future relationship with the EU that requires us to do so. If so, a power can be taken at that time, because there will need to be implementing legislation. However, if it is simply a question of choosing to keep pace as a matter of policy choice, it is much harder to justify the proposed level of ministerial discretion, except for the most minor and technical changes.

However, minor and technical changes are very hard to distinguish from more significant policy changes. We have seen that already with the powers to correct retained EU law that were conferred by the European Union (Withdrawal) Act 2018. There have been instances in which what were supposed to be minor and technical amendments have involved much more significant policy changes.

If we are talking about keeping up with the latest EU decision or possibly even the latest regulations, that might be one thing, but if we are talking about implementing a new directive, we must question whether a ministerial power is the appropriate way to go. In that case, I do not see pressure of time being a justification: directives have a long lead-in time and member states usually have a lengthy period to come into compliance with them. It is hard to see why such policy choices should be ceded to the Government rather than being retained by the Parliament.

The Convener: Are you suggesting that, in that case, primary legislation, or perhaps the super-affirmative procedure, should be used?

Professor McHarg: The super-affirmative procedure would be the least that you would want for something as significant as that. My preference would be for primary legislation, because ministerial powers of that nature ought to be seen as exceptional and as requiring special justification.

An analogy is drawn with section 2(2) of the European Communities Act 1972, but that is an imperfect analogy, for two reasons. First, we were, and still are, under an obligation to implement EU law. We will not be under that obligation after the end of the implementation period, subject to whatever the future relationship is. Secondly, the UK and Scottish members of the European Parliament participated in the formation of EU law, but that will not be the case in future—we will become purely rule takers. In those circumstances, it seems very hard to justify putting such an extensive power into the hands of ministers.

Professor Keating: I agree. As far as monitoring is concerned, the Scottish Government—as it admits in the explanatory notes to the bill—will have a big task in keeping up with what goes on in Brussels. That is the first challenge. The Parliament will face a similar, parallel challenge, which I am not sure that it is equipped to handle. A great deal of resource and effort will be required to keep up with what comes out of Brussels.

I repeat that we need some principles in advance, so that we know what to look for and what sort of things might be important.

The Convener: Do you think that the Parliament and the Government could come to agreement on which matters would be dealt with using the super-affirmative procedure and which would be dealt with using the negative procedure? We have managed to do that in the past—the Parliament and the Government have come to an agreement on how to proceed in such circumstances.

Professor Keating: Yes. There are examples in countries such as Switzerland or in European Economic Area countries such as Norway, which constantly deal with that issue, that can be looked at. It might be worth looking at the experience of the Norwegian Parliament. It is not exactly the same situation, because although Norway is sort of obliged to implement EU directives through the EEA arrangement, they still have to be transposed into Norwegian law. There has been quite a lot of discussion about the adequacy of parliamentary scrutiny in that case.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning. My questions follow on from the convener's line of questioning on parliamentary scrutiny. I should remind colleagues that I am a member of the Law Society of Scotland, as I will refer to the society's evidence and we will hear from it shortly.

On the question of parliamentary scrutiny, the Law Society of Scotland and the Faculty of Advocates make a point in their submissions about the appropriateness of the powers that the bill gives to ministers to introduce new rules. The convener teased out the distinction between the making of relatively minor technical changes to existing legislation—which we would expect to be done through secondary legislation—and the introduction of entirely new policy areas where, as the submissions say, we would be a rule taker, not a rule maker, because those rules will have been made by an organisation in which we no longer have a formal role.

How do we draw a distinction between technical changes that can be legitimately made through secondary legislation and major policy changes that might be better made through primary legislation? Is that even possible?

09:45

Professor McHarg: That is a difficult thing to do, because distinctions between minor and technical changes and major and policy changes are, to some degree, in the eye of the beholder.

In the original UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, there was a requirement that anything that amended the functions or purposes of a public authority, or that abolished an existing EU function without replacing it with something else, would be subject to the super-affirmative procedure. Although such changes could be seen as proxies for significant policy changes, they are probably not exhaustive—there are other ways in which significant policy changes could be made.

What was more important in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill was the inclusion of the sifting provision, whereby the Parliament could say on a case-by-case basis, "Hang on a minute—you're saying this is to be subject to the negative procedure, but it's actually more important than that," or, "This is subject to the affirmative procedure, but it's actually quite significant and should be bumped up a level." That kind of procedural mechanism is probably more effective than trying to define exhaustively what is major and a policy matter and what is not.

The other thing that could be done—it might be another proxy, but not a perfect one—would be to distinguish between directives on the one hand and regulations and decisions on the other hand, because directives tend to be used for more significant policy changes, but that is not invariably the case, because regulations are sometimes used for significant policy changes.

It is also relevant to make the point that secondary legislation is always sub-optimal, because even under the super-affirmative procedure, there is no power for the Parliament to amend. There needs to be some mechanism not only for shifting between different levels of secondary legislative procedure, but for saying, "No—this needs to be primary legislation. This cannot proceed under this power."

Murdo Fraser: Before I bring in Professor Keating, I will ask a follow-up question on that point. The justification in the policy memorandum for proceeding in that way with secondary legislation is that the Government argues that the volume of legislation that is required means that it could not be done by primary legislation, because it would in effect clog up the statute book or the Parliamentary process. I asked the bill team last week if it could give us a number of likely new regulations that would be introduced, but it could not do that; it could not even give us a guess. Do you have any sense of the volume we might be talking about if we were considering using primary legislation to deal with the major policy shifts as opposed to the technical changes? What sort of volume of bills might we be looking at?

Professor McHarg: I do not have a figure that I can give you. The volume will depend on a range of factors, one of which will be where the Scottish Government decides to use that power. The Scottish Parliament information centre briefing said that the Scottish Government does not intend to try to keep up with every area of devolved competence that intersects with EU law, so that takes out some. There will be all sorts of other constraints on the ability to use the keeping pace power to the extent that those kinds of areas are replaced, for example, by UK common frameworks and other UK legislation, or potentially by new trade deals and so on. That would again reduce the area of discretion in which the power could be

used; so it is difficult to know what the volume will be.

A proxy might be to look at how much use is being made of section 2(2) of the European Communities Act 1972. That would be a starting point, but I would have thought that, whatever the figure is, it is likely to be lower than that. It certainly will not be higher, and it will not be the same, because I do not think that the power will be able to be used as extensively as section 2(2).

Murdo Fraser: Thank you. I will ask Professor Keating for his view on the same two questions.

Professor Keating: That takes me back to my first point about whether the objective is to stay in regulatory alignment as much as possible, keeping the dynamic alignment as much as possible, or—[*Inaudible*]—the power to still have regulations when we like them. If it is the former, the volume will be enormous; if it is the latter, we need to know what the purpose is and what areas the Scottish Government is thinking of. Without knowing that, it is difficult to put a figure on it. It could be minor, or not.

Things that might look technical can be very salient. Little things become important, because they are symbolic of bigger things. Therefore, we can never really anticipate what is going to be important politically, as opposed to substantively. There will be the need for a sifting mechanism, at both a governmental level and a parliamentary level.

Murdo Fraser: Thank you.

John Mason (Glasgow Shettleston) (SNP): Perhaps Professor McHarg could follow on from some of what she said to Murdo Fraser.

Our Delegated Powers and Law Reform Committee produces often quite boring reports, but the report on the bill is quite interesting. The committee has raised 16 questions—I will not go through them all. One of the questions concerns how possible it is for the Government to track all EU law. Is there not so much of it that it will be almost impossible to track it all and then choose which parts to follow?

Professor McHarg: It is not impossible—it is done at the moment, because there is a necessity at the moment to track what is happening in the EU and to keep up with it.

The difference is that we will not be involved in the early stages, so it will be more difficult to have notice of what is coming. There will also be resource implications because, at the moment, we rely a lot on the UK Government as it is the member state that primarily participates at EU level, although the Scottish Government participates as well.

It could be done, but it would not be terribly easy. It will be more difficult than it is at the moment.

John Mason: How much scope do you think that there will be for Scottish ministers to keep pace? As other witnesses have pointed out, we will have to comply with international obligations that the UK enters into, trade deals, common frameworks, the UK internal market and other arrangements. Will there really be much freedom?

Professor McHarg: Again, we simply do not know. It is likely that there will be significant constraints. If the internal market proposals are implemented in the form that appears in the white paper, they will not technically prevent the use of the keeping pace power. However, they will render it probably less useful in practice, because the effect of Scottish divergence will be overtaken by whatever happens in other parts of the UK.

It is difficult to know what is going to happen, because there is still much uncertainty.

John Mason: Professor Keating, do you have any thoughts on how constrained Scottish ministers will be?

Professor Keating: They will be enormously constrained. As you just mentioned, the internal market is problematic. Many of us have concerns about that bill because of its huge implications.

In addition, there is a risk of confusion if we have a rather ill-defined internal market provision that allows the UK to intervene by prescribing mutual recognition and undermining Scottish regulation. If we have trade deals and frameworks, and various sectoral bills, that could create a great deal of uncertainty, rather than more certainty, for stakeholders.

As far as keeping up is concerned, it will be important for the Scottish Government to anticipate what is coming up in Brussels rather than waiting for a directive or regulation to come out. It needs to be there at the beginning, and to be in touch with stakeholders in business and civil society to see what their concerns are, and—[*Inaudible*.]

In that case, there could be monitoring. It would be a question of not only the Scottish Government but policy stakeholders, being involved in all that. That said, it would be a monumental task, and we would need some guiding principles—we could not just go through those things one by one and look at everything. As I said previously, we would need to know what was important and what was less important.

I am very worried about the proliferation of sources of regulation, from trade deals through to internal markets and dynamic alignment. That

could make for a great deal of confusion for business and other stakeholders.

John Mason: I go back to the question of how the Government and the Parliament relate to each other. The Government may watch all those EU regulations coming out, and pick and choose the ones that it wants, but how would the Parliament know? Should it know? The Government may not be looking at areas that perhaps we should be looking at.

Professor Keating: Yes, indeed. The Parliament is simply not in a position to monitor everything that comes out of Brussels, but the parliamentary committees—at least, the specialist sectoral committees—should be aware of that, and should have a brief to see what is coming up in advance. I emphasise that I am talking about looking at what is in the pipeline and what is worth following through, rather than trying to monitor everything that comes out of the pipeline.

Professor McHarg: The bill includes a provision for the Scottish Government to report on the use of the power. That could be extended to cover non-use of the power: where it is not being used. The issue in that regard would be timing. There would be no point in knowing a year after the event that there was something there, but we decided not to use it. That would not be too problematic in some circumstances if the reporting is looking ahead, but if it was simply a question of saying "Well, we did this and we didn't do that", that would not be terribly useful.

You might want to look at those reporting mechanisms and exactly what it is that the Scottish Government will report on, and the timeframes in which it will report. Will it look ahead in those reports or will they be simply a static snapshot of what has happened in a particular period?

Alexander Burnett (Aberdeenshire West) (Con): My question is for Professor McHarg. In addition to your concerns, and the alternatives that you have voiced, NFU Scotland in particular is concerned about the lack of scrutiny and the lack of a process for consultation, especially given the risk to trade from policy divergence.

Aside from those considerations, which look likely to produce unsatisfactory legislation, I have a more fundamental question: is the bill necessary at all?

Professor McHarg: With regard to the keeping pace power, it may become necessary, but that depends on what the future relationship with the EU looks like. At present, I would say that it is not necessary. It is a choice, but it is a legitimate choice for the Scottish Government to make—it wants to keep pace with EU law, which is a reasonable thing for a Government to do.

With regard to whether that justifies keeping pace through secondary legislation, I would suggest that the provisions in the bill are not justified in respect of their current breadth. They may be justified in terms of very minor technical amendments, but I am not sure how significant an issue that will be in practice; it is impossible to say at the moment.

10:00

Professor Keating: The UK Government has made it very clear that it is not going to keep pace in any shape or form; it will make its own regulations, which may or may not be the same. One can understand that the Scottish Government, which has a different attitude towards Europe, might want to take a different position, and might want to keep pace as a political choice. In the case of agriculture, for example, is it important for Scottish farmers and crofters that they should be able to keep pace with European regulations in order to get access to European markets? I would like to see more explanation of that kind of issue in the justification for this provision. What is the economic logic for it?

Alexander Burnett: My colleague Murdo Fraser asked whether there were any examples of a volume of legislation. The Faculty of Advocates also spoke about urgent changes at short notice, which is not something that most people would think of as synonymous with activities in Brussels. Do you have any examples of those?

Professor Keating: Do you mean things that have come up at short notice?

Alexander Burnett: Yes.

Professor Keating: I cannot think of an example. It does happen from time to time that emergency action is taken, some anomaly comes up, or perhaps a ruling of the Court of Justice of the European Union requires a change in policy. Mostly, though, I would think that it was a question of keeping pace with the broad thrust of policy.

The reform of the common agricultural policy is discussed endlessly, and there is no secret about where it is going. I think that it is more important in policy terms to keep in touch with the broad thrust of policy. Almost certainly, agricultural policy in Scotland and England will diverge, and the indications are that the divergence that already exists will increase. Brussels has been undergoing a long-term reform of the CAP—it has been going on for about 20 years. England and Wales will have some radical changes. It will be important to—[*Inaudible.*]—and from there comes the question of which directives and regulations you want to keep up with.

Patrick Harvie (Glasgow) (Green): There has been a bit of discussion so far in the meeting about the relationship between this bill and the UK internal market white paper, and trade policy, too. I wanted to explore that a little more and talk about whether they are in fundamental conflict or can be made to interact.

From my perspective, it looks as though they are incompatible. It looks as though the purpose of the Scottish Government is to keep pace with Europe, and the purpose of the UK Government is to diverge from Europe, to undercut Europe on standards and to impose those lower standards in Scotland, either through trade agreements with other countries or by giving the private sector the right to challenge regulations under the internal market proposals. Is that too ungenerous or sceptical an analysis?

If the UK internal market proposals are legislated for in roughly the shape that they are in the white paper, and this bill is passed in the Scottish Parliament, is there a way in which those two sets of apparently conflicting agendas can be made to work together, or are they fundamentally at odds?

Professor McHarg: Again, we just do not really know how much divergence there will be in future. The UK Government has said that it intends to maintain high standards of environmental protection and animal welfare and so on. We do not yet know whether that will be borne out in practice or whether there will be significant divergence.

It is clear that, if trade agreements require divergence from EU standards, they can be made binding on the Scottish Parliament, even if they affect devolved areas. As I said, the internal market provisions are more nuanced than that in that they do not deprive the Scottish Parliament and Scottish Government of the power to diverge, but they will tend to undercut it in practice because, in practice, goods and services complying with the standards applied in the largest part of the UK market—England—will be able to be sold in the other parts of the UK. That is a question of practical effect rather than being undermined in principle.

There is no incompatibility, I do not think, with the Scottish Government and Scottish Parliament having some discretion to maintain alignment with EU law, when in other areas it is bound to comply with international trade agreements or it is de facto driven by English standards, but the question is what is the extent of discretion? The concern is that the area of discretion is being whittled away significantly. However, on the idea in principle that there might be convergence in some areas and divergence in others—that is devolution; it is inherent in the idea of a distinction between reserved and devolved matters. We are talking about where the balance between those things lies.

Patrick Harvie: You could say that it is inherent in devolution, but if the evidence that the UK internal market proposals do, in effect, create new reservations is correct, it does seem as though what we currently recognise as the devolution arrangements would be fundamentally changed and unable to work in the way that they currently do.

Professor McHarg: Right—so we are talking about the balance between the de facto ability, or de jure ability in some cases, of the devolved institutions to diverge, and their being constrained to a UK-wide standard. That is where the issue lies. It is important that we focus on that as the issue. The issue is not whether Scotland is able to maintain alignment with EU law when England might not want to—that is fair enough and there is no problem with that—it is about how much scope there will be for that divergence in practice.

Patrick Harvie: Thank you. Could I ask Professor Keating to address the same issues please?

Professor Keating: [*Inaudible*]—scope of the internal market is going to be from the white paper. It seems to add something to the frameworks that are being negotiated so if it is going beyond the frameworks, it will be wider in scope, but just how wide in scope is not clear at all. It could be huge.

The key provision is about mutual recognition, which means that goods that are recognised for sale in one part of the UK must be recognised for sale in other parts of the UK. That is based upon the EU mutual recognition principle, although it is perhaps based on a misunderstanding of that. That is why there is a concern that it might undermine Scottish standards because goods could be placed on the market, approved in England in consequence of a trade deal with another country, and then be available in Scotland.

We do not know how wide that—[*Inaudible*]—because in the EU things are taken out of the market; they are not part of the—[*Inaudible*]. We do not know how wide that is going to be. For example, to go back to the question of agricultural policy, we simply do not know whether there will be scope to diverge from internal markets because of environmental concerns.

The other critical point is about how the internal market is going to be administered and negotiated, whether it will simply be adopted by the UK Parliament, which is what the white paper says, and be applicable everywhere or whether it will have to be negotiated with the devolved

institutions in the same way as the frameworks. That is of course a big point of conflict between the UK Government and the Scottish and Welsh Governments at the moment.

The answer to your question is potentially yes, there could be conflict.

Patrick Harvie: It seems to me that your second point is the fundamental one. You started by saying that the main difference is the scope, but if the UK Government and the devolved Governments wished for common frameworks with much broader scope than they are currently discussing, they are free to negotiate them and enter into them, then later to change their policy, revise them, renegotiate them, and what have you because that is based on consent and mutual agreement. However, the internal market proposals are about the imposition by one Government of something that others simply have to roll over and accept. It is the fundamental nature of that.

Professor Keating: The UK Government will define what the internal market needs as a subjective concept and then it will define the realities of implementing it mainly through mutual recognition.

Dean Lockhart: Last week, the Environment, Climate Change and Land Reform Committee heard evidence that, under the EU continuity bill, it is an open question whether Scotland keeps pace with the EU, adopts similar standards to the rest of the UK, or takes a completely different tack. Given the discretionary powers of the Scottish Government to keep pace with some but not all future EU laws, is there a risk that Scotland could end up in some kind of regulatory no-man's-land, in which we are out of sync with both EU regulations and those in the rest of the UK? Perhaps Professor Keating could take that question first.

Professor Keating: Yes, there is such a risk. It is not about what the regulations say but about how they are interpreted in the case of conflict. We do not know where that will end up. It could end up in the courts.

A problem that we have with intergovernmental relations generally is that we have poor capacity to resolve these issues. We have no independent source of intelligence or analysis of these kinds of things. We have said repeatedly at this and other committees that that is missing from the picture.

It could make things difficult and it could—[*Inaudible*.]

—in court in cases in where the law is not clear.

The Convener: I think that we got most of your answer, Professor Keating, but you were beginning to break up a bit. We might need to watch that, and at some stage, we might need to cut your camera but leave your sound on, to make sure that it does not continue to break up. I think that we are just about okay now.

Dean Lockhart: I got most of it, convener. Perhaps I could ask Professor McHarg to respond to that question, please.

Professor McHarg: Whether alignment with the EU, alignment with the UK, or some third way is the best way to go is a political choice and a matter for the Government, subject to parliamentary scrutiny.

Under the mutual recognition principle, we must remember that this works both ways. Anything that is compliant with Scottish regulations will also be able to be sold into English and Welsh markets. Goods would not be kept out of the market, but we would not be able to keep non-compliant goods out of our market. The risk of a regulatory no-man's-land is not that Scottish goods and services would be excluded from trading in other parts of the UK. The mutual recognition principle is intended to ensure that those goods can be traded.

10:15

Dean Lockhart: That is helpful. I have a related question.

If Scotland keeps pace with future EU law, which is designed as a compromise between the 27 EU member states, is there a risk that the rest of the UK will develop more appropriate and competitive regulatory systems, and that those systems will be more relevant to the needs of the UK internal market, thereby putting Scottish businesses and consumers at a disadvantage?

Professor McHarg: Is that question for me?

Dean Lockhart: Yes.

Professor McHarg: That takes us into questions about economic judgment. I am not qualified to answer on what is or is not appropriate.

There are technicalities with the keeping pace power. It is a power; it is not a duty. There is no obligation on the Scottish Government to use that power and there is no obligation on the Parliament to approve its use if the rules being implemented are felt to be inappropriate for Scotland's circumstances.

Professor Keating: The question of what is economically competitive is a matter of judgment. In any policy-making system, there is a trade-off between the needs of producing at low cost and of maintaining environmental protection and social considerations. [*Inaudible*.]—legitimate choice for the Scottish Parliament to make—and for the UK

Parliament to make on behalf of England—about how that balance is struck. If voters do not like it, they can vote the Government—[*Inaudible*.]

The Convener: Professor Keating, we will cut your camera so that we can hear you properly. There is a lot of disturbance.

Jackie Baillie (Dumbarton) (Lab): Our guests have covered some of my question in their earlier responses, but perhaps we can bring it all together.

The UK Government and the devolved Administrations will no longer have a formal role in influencing the EU's policy-making process. What are the implications of the keeping pace power in the bill?

Professor Keating: Are you asking what the implications of the power are?

Jackie Baillie: Yes. What are the implications of the keeping pace power in the bill, given that neither the UK Government nor the devolved Administrations will have any influence on the EU policy-making process?

Professor Keating: That is highly problematic. As I said, Norway is in that position. It has to take policy, but it has no way of making policy. Scotland could try to get involved in policy networks in various ways, not so much as a Government but through trade and business associations—[*Inaudible*.]—consulted in Brussels. It will be important to stay in those networks as well as in Governmental ones.

Scotland would be a policy taker, but it would still make decisions about whether to adopt those EU regulations. The bill is clear about that, whether that happens through the Scottish Government deciding by statutory instrument or whether the Parliament properly decides those things through primary legislation.

Professor McHarg: I would make the same point. The reduced influence and scrutiny at the EU level has to be compensated for by increased scrutiny at the domestic level.

I stress that we are talking about a power, not a duty—at least, it is not duty at the moment. Therefore, whereas our ability to reject regulations implementing EU law might be thought to be somewhat hypothetical, the ability to reject regulations made under this power is not hypothetical, because it is a political choice. It is incumbent on the Parliament, therefore, as it scrutinises the bill, to ensure that, if the power is to remain, the provisions for scrutiny have to be appropriate to the nature of what is being proposed and have to be sufficient to enable the Parliament to make that democratic decision about the content of the statute book.

Angela Constance (Almond Valley) (SNP): The evidence that the committee has received thus far, and what we have heard this morning, helpfully separates out some strands. On one hand, there are some important technical considerations around process and scrutiny. However, on the other hand, there are important political motivations and considerations around Scotland's future relationship with the EU and our economy, and around the UK Government treading all over the devolution settlement in what amounts to a power grab. I do not expect the panel to comment on my political views but, when I read the blog that Professor McHarg contributed to in July, which gave the history of continuity bills past and present, I noted that it had a vibe of despondency—I hope that I am not being unfair in saying that—as the authors were saying that, given what happened with the first continuity bill, we have a good idea how future disputes will end.

I do not want my Government to be sitting back and accepting that it will be overruled at every twist and turn. Perhaps Professor McHarg and Professor Keating could summarise what might be a better way for the Scottish Government to achieve its legitimate political interests, and whether there is a better way to mitigate some of the risks that have been outlined, particularly in the blog that I referred to.

Professor McHarg: That is a big question. Looking at the entirety of the Brexit process, we can see that what has been demonstrated is what has been true all along: the British Parliament remains sovereign and if it wants to have its way, it can. Any consent provisions or commitment to negotiated solutions operate at the political level rather than the legal level. Making that system work requires mutual commitment. Over the past three or four years, we have seen the breakdown of that mutual commitment to proceed by consent.

It is worth pointing out that even the common frameworks process—which is the preferred approach of the Scottish and Welsh Governments to the achievement of UK frameworks, because that is a negotiated procedure—is underpinned by the possibility of coercion, because the European Union (Withdrawal) Act 2018 makes it possible for the UK Government to enact so-called freezing orders that prevent the exercise of regulatory discretion by the Scottish, Welsh and Northern Irish institutions. Those have not been used yet, but that background threat of coercion remains; it is a reminder that, in every part of this process, the UK Government, through its ability to enact legislation in the UK Parliament, has the upper hand. That is an inevitable feature of the current constitutional settlement.

Angela Constance: Does that not suggest that the current settlement is broken?

Professor McHarg: That is beyond the remit of this particular session.

Angela Constance: I appreciate that. Professor Keating, do you have anything to add?

Professor Keating: What has happened has revealed something that we already knew about the UK constitution. The lacunae in the devolution settlement of 20 years ago—[*Inaudible.*]

—conserve the principle of parliamentary sovereignty—[*Inaudible*.]

That is not the quite the same thing as the ability of Westminster to impose its will whenever it wants to. There has been a slippage, and now parliamentary sovereignty means that Westminster can have the last word on everything, and—[*Inaudible*.]

When we were in the European Union, we had the idea of sovereignty being shared between its member states, and that was a principle that could apply within the UK as well. Brexit was all about restoring sovereignty at the centre—the sovereignty of Westminster, or the unitary British people. Increasingly, since the referendum, the Government in London has interpreted the UK constitution in a very unitarist framework. Brexit is part of that. We—the British people, or whomever—decided that Brexit should happen and everything else follows from that. No formal constitutional change has been introduced, but the process has revealed the weaknesses of the devolution settlement and the potential for UK Governments to roll back the sharing of power and sovereignty to an old-fashioned notion of Westminster supremacy.

Angela Constance: I have no further questions; the panel has described the current power imbalance.

Alex Rowley (Mid Scotland and Fife) (Lab): I have a quick question about the timing of the bill. I understand that some would argue that there is absolutely no need for the bill, but we could take a leap of faith and say that we need some kind of bill. Given the uncertain "mebbes aye, mebbes no" approach in the bill—because we have a white paper on the internal market but no knowledge of what the associated legislation will look like, and because we do not know whether we will have a deal with the EU in January—is there a good reason for introducing the bill now, or is it legitimate to argue that we should wait and see what position we will find ourselves in at the beginning of next year?

Professor McHarg: If you believe that you need the power, it is sensible to be prepared. The Scottish Government currently has powers under the EU withdrawal act to correct deficiencies in retained EU law, but that expressly says that deficiencies do not include failure to implement new developments in EU law. Therefore, that power clearly does not extend to the keeping pace provision. Further, those powers to modify retained EU law will expire two years after implementation day.

If you think that the power is necessary, it is a good idea to have it in place for when the implementation period ends and the European Communities Act 1972 ceases to be enforced. Certainly, with regard to the other provisions in the bill around environmental protection, the framework of EU enforcement will fall away.

The Convener: Professor Keating, do you want to say anything before we move on?

Professor Keating: No, I agree with Aileen McHarg.

The Convener: No one has indicated a wish to contribute further in this session, so I thank Professor Keating and Professor McHarg for their evidence.

We will suspend the meeting for two or three minutes.

10:30

Meeting suspended.

10:35

On resuming—

The Convener: I welcome our second panel of witnesses to the meeting: Kenneth Campbell QC, who is from the Faculty of Advocates, and Michael Clancy OBE, who is the director of law reform at the Law Society of Scotland. I remind members that they should direct their questions to a named witness.

I do not know how much of the previous evidence session that the witnesses heard, but we discussed the appropriateness of subordinate legislation for the keeping pace power, and whether it is adequate.

My first question is for Kenneth Campbell. Page 2 of the submission from the Faculty of Advocates in response to the committee's call for evidence says—if I have it correct—that, as far as utilising statutory instruments is concerned, the Faculty considers there to be some force in the policy memorandum for following that direction.

While I am on that topic, I highlight that the provisions in the UK Government bills will allow UK ministers to introduce statutory instruments in policy areas such as fisheries, agriculture and the environment that were previously within the competence of the European Union. Are the provisions not remarkably similar to those that are

being proposed in the UK Withdrawal from the European Union (Continuity) (Scotland) Bill that we are discussing at Holyrood? They are quite wide ranging.

Kenneth Campbell (Faculty of Advocates): I have not had the opportunity to look at the detail of the Fisheries Bill, but I am aware in general terms that it includes powers of the kind that you describe. Although I am not privy to the UK Government's thinking, I imagine that the rationale for taking such powers is similar to the rationale that Scottish ministers have said underlies the form in which the powers are sought in the continuity bill. One can see why that might be.

As the convener suggested, there is something in the rationale for taking powers through subordinate legislation, in part because we do not know—[*Inaudible.*]—a number of things about the areas in which those powers will be used. I heard part of the earlier session, and I know that that is an issue that you discussed with the witnesses. The committee may have questions for Michael Clancy and me about that later on.

The Convener: Do you want to reflect on that, Michael Clancy?

Michael Clancy (Law Society of Scotland): Good morning. I suppose that the point about whether UK ministers would adopt EU law in the fashion that is suggested in the continuity bill would depend on the powers that are in the relevant legislation. For example, if a bill that operated in an area relating to EU law in which there was a substantial corpus of EU law, the—[*Inaudible*.]. That might not be the same for every piece of legislation that relates to EU withdrawal. For example, the powers in the UK Agriculture Bill are pretty much specified as relating to direct payments or other such things. Of course, we have seen the legislative consent memorandum go through the Scottish Parliament on the red meat levy—[*Inaudible*.]

The Convener: Sorry to interrupt, Michael. We heard you up to "red meat levy", and then the audio started to fall over. Can you start again from there? Apologies.

Michael Clancy: Yes, but I will cut to the chase. It would depend on whether there were regulation-making powers in the parent legislation that would enable UK ministers to take a view on whether they could use EU law.

Having said that, there is a point at which EU law and domestically grown law might be very similar in their terms, albeit arrived at independently, or there could—[*Inaudible*.]—in a way that would enable UK ministers to be influenced, as, indeed, Scottish ministers might be influenced by developments in EU law that they think would be useful for people in the UK, or people in Scotland, as the case required.

The Convener: Yes, and, of course, we not only have UK bills in the areas of fisheries, agriculture and the environment. If I recall correctly, the UK Government gave itself wide-ranging statutory instrument powers in the legislation on EU withdrawal. Those enable that Government to choose—much like the Scottish Government is saying that it could choose—whether to implement similar EU law.

Michael Clancy: We must remember that that might be the case under the legislation on EU withdrawal, but it is not the case under the European Communities Act 1972. Therefore, it is not, in a sense, implementing EU law in the way in which it has been implemented in the past; it is implementing EU law as a matter of choice rather than as a matter of obligation. That is an important point to emphasise. That then gives whichever Government that chooses to pursue that path the opportunity to depart from the law that the EU is making at any time and to tailor it to the situation and the particular problems or issues that that Government is facing at the time.

The Convener: Of course, it is the same situation for the UK and for Scotland, because the Scottish Government is saying that it will choose whether and what to implement.

I am touching on these issues in a general way, because I know that other members want to come in on some of the specifics.

The witnesses will be aware that the UK Withdrawal from the European Union (Continuity) (Scotland) Bill is being considered at the same time as the UK Trade Bill and the UK Government white paper on the internal market. To what extent is it likely that the power to keep pace with EU law will be undermined by future restrictions on devolved competence by the UK Parliament or by UK ministers?

I ask Kenneth Campbell to pick up that issue, and I will come back to Michael Clancy.

Kenneth Campbell: That is an interesting and important issue. We have not seen what the shape of the legislation to implement the internal market will be, although a trade bill is before the UK Parliament, so one can see some of the issues that you describe, convener.

10:45

I suspect that there might not be formal provisions that preclude the exercise of powers of the kind that are in the continuity bill, but the practical effect of the interaction of those three pieces of legislation—that is, the continuity bill, the Trade Bill and the legislation to implement the

internal market, whatever shape that takes—might be, in some sectors, to limit the practical value of the powers that are sought in the continuity bill. It is difficult to give immediately an example of where that might happen, but it seems that, given what one can discern about the policy drivers, that is likely.

The Convener: In case people watching our proceedings wonder why we can no longer see Michael Clancy and Kenneth Campbell, we have cut the cameras to both of them in order, I hope, to boost the audio signal. I am sorry to interrupt, but I thought it important to make that point. On you go, Michael Clancy.

Michael Clancy: There are quite a number of constraints on the powers in the continuity bill. We have been looking at it, and it is not simply such constraints as might be in the Trade Bill or in any future trade agreements—there might be constraints on the power of the Scottish Government to act. There might also be issues around and about the internal market, as we heard in the first evidence session, and to do with whatever the internal market bill contains; and, of course, there are the self-evident constraints of working in the competence of the Scottish Parliament and Scottish ministers.

The continuity bill will require careful navigation—[*Inaudible*.] It is one of the few bills that I have seen that sets out the objectives—the purpose and effect—in the bill. Section 42 states that that is

"to make provision in connection with the withdrawal of the United Kingdom from the EU in consequence of the notification"

to withdraw.

It continues:

"In so far as any provision of this Act ... would, if it were in effect before the relevant time, be incompatible with EU law, the provision is to have no effect until the relevant time",

which is when the transition period finishes.

That sets out the constraints in the bill, in addition to the technical ones that we might come to later, such as not making criminal offences, not exceeding the competence of the Parliament and so on.

That is where I sit on the issue of the extent to which the bill is a wide or narrow one.

The Convener: Thank you. As I said, I intentionally asked wide-ranging questions in order to allow my colleagues to come in on some of the specifics. So, over to Murdo Fraser.

Murdo Fraser: I have some questions around parliamentary scrutiny, but I will start by asking a follow up to the convener's question about comparisons to equivalent UK legislation. Is there a distinction between what UK legislation is doing and what the continuity bill is doing insofar as the UK legislation is focused on retained EU law whereas the continuity bill is different in quality and character, as it is a keeping pace measure that seeks to import new EU laws into Scots law? Is that fair? My question is for Michael Clancy.

Michael Clancy: Yes, that is a fair assessment. The European Union (Withdrawal) Act 2018 is precisely that—its purpose is to remove the sections of the European Communities Act 1972 that oblige compliance with EU law and to establish retained EU law in domestic law. Those are the schematics of the 2018 act, which is different from the provisions of the continuity bill, which, as you pointed out, are focused on ensuring that the Scottish Government has the option to adopt solutions

"corresponding to an EU regulation, EU tertiary legislation or an EU decision,"

et cetera, as defined in section 1.

The reference to those elements—regulations, legislation and decisions—as

"having effect in EU law after IP completion day,"

which is 31 December 2020, is interesting. If one looks for the definition of "EU law" in section 8, which is entitled "Interpretation of Part 1", one does not see it there. It appears in section 42, where—let me express my delight at this—it refers back to the meaning given in section 126(9) of the Scotland Act 1998. That definition is applicable only for the purposes of section 42, not for part 1. That leaves the question: what does the Government mean when, in section 1, it refers to aspects of legislation that have "effect in EU law", and why does it not apply the definition of "EU law" in the Scotland Act 1998 to the provisions in part 1?

Murdo Fraser: Thank you. I hope that my colleagues were all following that.

Michael Clancy: You might see an amendment on that.

Murdo Fraser: My next question is for you again, Michael Clancy, and we can bring in Mr Campbell afterwards.

I do not know whether you caught the first witness session, but I will ask you the same question as I asked those witnesses, which is on levels of parliamentary scrutiny. In the Faculty of Advocates submission, you make the point that the provisions make Scotland a rule taker, not a rule maker.

We all accept that there are areas of retained EU law that will need minor amendment or modification post-Brexit. Doing that by secondary

legislation might well be appropriate, but perhaps the more contentious area is the need to import into Scots law new EU laws that we have not been consulted on or been involved in making—that is of a different order. Is it appropriate to do the latter job by secondary legislation, as is currently proposed? Depending on your view on that, how easy is it to draw a distinction between minor technical changes that might be done by regulation and more substantial policy changes, which should be done by at least, for example, the super-affirmative procedure or perhaps separate primary legislation?

Michael Clancy: The bill makes it quite clear that Parliament is loaning the Scottish ministers the power to make these things law, for a specified period of time, which is in the bill: 10 years, with further accruals of 5 years, up to an additional 10 years. It is important that we recognise that the Scottish ministers will choose which legislation to align with. We will not know, unless there is some additional position, what legislation the Scottish ministers have decided not to align with. It is not up to Parliament to decide that; it is a ministerial decision. It is uncharted territory, and the bill does not make it clear. One might want to explore that with the appropriate people.

Given that the concept of scrutiny is dear to the Parliament's heart and is an essential part of its function, the bill may not satisfy the Parliament, because it restrains itself to secondary legislation, whether by affirmative or negative resolution procedure. The approach in the previous legislation, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, should be adopted in that context. As a minimum, a super-affirmative procedure should be applied to those cases in which there is a substantial policy consideration in the EU regulation, tertiary legislation or decision. If there is an insubstantial application of EU legislation, there might be a case for affirmative or negative procedure.

It is also clear that there is no indication of when the Scottish ministers would use primary legislation. One option for keeping pace is to use a bill rather than regulations. The Law Society of Scotland thinks that that should be an option that the Scottish ministers know they can use and that the circumstances and criteria that would apply to their doing so should be set out.

Kenneth Campbell: I will take the last part of the question first. We are considering how easy it is to make a distinction between a minor, technical amendment and something that is more substantive. Defining that in the bill is, from a legal point of view, difficult. We might feel that we would recognise that if we saw it, but that is different from defining it in a useful way that can assist ministers in deciding how they are going to introduce legislation and in a way that can assist the Parliament in taking an appropriate view of scrutiny. That is the harsh practical reality. Having said that, I suspect that many legislative instruments are likely to be relatively technical and will build on existing policy choices. I have that sense about a large proportion of the existing legislation that implements EU obligations.

Other witnesses have pointed to the more difficult cases, in which there is a new policy direction, and I agree with what Michael Clancy said about the need for a more exacting form of scrutiny for those. One model might be the use of the super-affirmative procedure, which is not currently provided for in the bill but was provided for in the continuity bill. The wording of section 1 of the current bill is permissive, and, in some circumstances, it would be open to the Scottish ministers to introduce primary legislation. The real issue is how the criteria for that choice could be defined.

11:00

The difficulty—which I think is genuine—is that that could not be done exhaustively, because of the range of policy competences that the EU currently has and that it might acquire in the future. Immediately, the question suggests itself: should the choice about the form of legislation be tied to existing policy? In other words, should one say that, if a proposal is made to change an existing policy area, that requires a particular type of legislation? That seems rather a blunt tool, and I suspect that it might give rise to unforeseen consequences, which is a real difficulty.

That said, the type of changes to the law that are envisaged in section 4(2) of the bill, for which the affirmative procedure is to be invoked, are extremely important. That might be a starting point. One might think that some of those require something more than simply the affirmative procedure, and there would be room for argument about whether they should require the super-affirmative procedure. That is probably all that I want to say about that.

Murdo Fraser: That is very helpful. Thank you.

John Mason: I thank the witnesses for what they have said so far. I will focus on some of the points that the DPLR Committee raised.

Given the volume of EU law, do you think that it is possible for the Scottish Government to keep track of it all, given that we do not have to? That question is partly about resources.

I do not mind who answers first—Mr Keating, perhaps.

The Convener: Mr Keating is no longer there.

John Mason: I am sorry; I was thinking of the earlier panel of witnesses. Does Mr Clancy want to answer?

Michael Clancy: Thank you. I am glad that you did not say, "Professor Clancy". That would have been even more confusing—[*Laughter.*]—and it is certainly a position that I will never achieve.

The question about monitoring EU law is very interesting. As you will have seen from our submission, the Law Society of Scotland collaborates with the law societies of England and Wales and of Northern Ireland in maintaining an office in Brussels, where we employ, I think, six people. It focuses on horizon scanning, interaction with the European institutions, discussion with European Commission officials and others, and arranging meetings for those of us who have something to say in the European arena. That is quite a big job, it is not cheap and we cannot cover everything that the European institutions decide to look at.

That is underscored by the type of work that solicitors do. We might have an idea for making sure that we follow developments in EU family law, on anti money laundering, on some aspects of criminal jurisdictional law or on issues of civil judicial co-operation. Those have typically been things that we have looked at over the years, but, of course, they are only a small portion of the EU's output.

There is an—[*Inaudible*.]—in terms of every European Commission work programme. I am sure that the Scottish Government has been looking at that; it would have been remiss of it not to have done so. Under the current Commission's work programme—which has, of course, been thrown off course by the coronavirus crisis—there are 44 workstreams in the EU, almost every one of which will result in legislation. I can send a copy of the work programme if the committee is interested. It is very broad indeed—it takes account of cultural development, the green agenda, environmental matters and other such things. It would be quite a job for the Scottish Government's office in Brussels to look at that with a view to highlighting those areas that it would put to the Scottish Government as germane for enactment in Scots law by the powers in this bill. A lot of thought, resources and time would have to be devoted to that process in both Brussels and Edinburgh.

John Mason: I appreciate that, but—before I come to Mr Campbell—where does that leave the Parliament and even this committee? The point has been made that we may not know what is going on in Europe. Would we rely totally on the Scottish Government telling us what it wanted to copy, or should we also try to follow what is happening in Europe?

Michael Clancy: It is difficult to do that exclusively from abroad, as it were. The UK Parliament maintains representation in Brussels, but the Scottish Parliament gave up its representation quite some time ago. I remember giving evidence around 10 years ago to the Parliament's European and External Relations Committee alongside Ian Duncan, who was the Scottish Parliament's representative in Brussels and is now Lord Duncan of Springbank—that just shows you where you can go if you get a job doing that work for the Scottish Parliament. Unfortunately, the Parliament no longer has that representation in Brussels. Paradoxically, at a time when the UK has left the European Union, the Parliament may want to consider how it monitors legislative change in Europe and what resources it wants to devote to that.

As I said, the Commission's legislative agenda has been thrown off course by the coronavirus crisis. Nevertheless, since the start of this year, the European Parliament has issued 32 regulations, 14 decisions and one directive on the coronavirus alone. That gives you an idea of the amount of legislation that the institutions can produce even in a time of stress.

John Mason: Mr Campbell, do you have the same view on the quantity of legislation?

Kenneth Campbell: Yes, I do, broadly. Michael Clancy identified in detail a range of areas in which the Law Society of Scotland takes an interest, all of which are within the competence of the Scottish Parliament, and there will be others. Even if only half of the Commission's 42 workstreams fall within devolved competence, that is still quite a large number of areas to monitor.

I agree with Michael Clancy that experience shows that being on the ground in Brussels is the best way to develop early awareness of the direction of future legislation. It is for this committee and others in the Parliament to decide whether parliamentary representation is the best way to secure that. There are pan-European networks of interest groups and stakeholders, the Scottish component of which the Parliament may already engage with, and they might be a source of useful information about on-going developments in Brussels. However, I suspect that Michael Clancy is right: it may be that there is no substitute for actually being there.

John Mason: The convener has talked about some of the constraints on the Scottish ministers. I notice that the Faculty of Advocates submission says that we cannot have reciprocal agreements. Will you confirm whether that is the case? Is it definitely not possible for Scotland to be part of the European arrest warrant or the European health insurance card schemes if the UK does not want to be part of them?

Kenneth Campbell: Yes, that is our view. The EU enters into such reciprocal arrangements with third states, and Scotland is not in that position. However much the Scottish ministers might want to do that, there would be practical reasons why they could not.

John Mason: Finally, I want to ask about the breadth of section 1. My impression, from the evidence that both witnesses have submitted, is that you are quite happy that section 1 should be broad and that it cannot be too specific. However, others consider that it should be more specific. Will you provide some of the thinking behind your view?

Kenneth Campbell: The choice about alignment—or not to align—is a policy choice. Once that decision is taken, because of the breadth of existing policy competence—first, on the part of the EU and, secondly, on the part of the Parliament and the Scottish Government—having a broadly defined power is a necessary starting point simply because we cannot foresee the direction of EU policy, particularly as Scotland and the UK are no longer part of that policy process.

John Mason: Will you give me a view on that, Mr Clancy? I think that you also want to say something about—if I can pronounce it properly—reciprocity.

Michael Clancy: Yes, and I will start with that. I agree with what Kenneth Campbell—[*Inaudible*.]—reciprocity. However, I think that it is quite difficult in certain instances within devolved competence for Scotland even to contemplate reciprocity. First, Scotland is not a state. The EU deals with and creates reciprocal arrangements with states; it does not do so with, as it were, elements of states. Secondly, some things, such as the European arrest warrant, are considered to be integral to the European Union and are quite difficult to extend beyond the boundaries of the EU. For example, in Germany and some other countries, there is a constitutional prohibition on extradition to third countries. It is important for us to realise that reciprocity is not necessarily in the gift of the EU, because member states may have their own requirements that prohibit such agreements.

On the question about the breadth of section 1, as I have said, that is based on section 2 of the European Communities Act 1972, and it details all the types of legislation that the Scottish ministers may, by regulations, bring into Scots law. However, there are constraints that lie outwith the terms of section 1, which imports the policy decisions that the Scottish ministers may take in deciding which legislation to apply section 1 to. That is a political question on which the Law Society would not comment, but there are various other constraints, which have been discussed in the previous evidence session and earlier in this one.

11:15

Alexander Burnett: My first question is for Michael Clancy. Importantly, you have said that the bill is about a choice, not an obligation. In the previous evidence session, we heard about many of the problems, drawbacks and alternatives in relation to what is being proposed. On top of that, bodies such as NFU Scotland have voiced their concern about the lack of a process for consultation, particularly given the risk to trade from policy divergence. To go back to a more fundamental question, do you think the bill is necessary at all?

Michael Clancy: That is really a question that you should address to the Scottish ministers. They are the ones who set policy and bring forward bills. It is not for the Law Society to comment on the necessity of a bill. Our comments are focused on how, if the Parliament wants to legislate in this way, certain things have to be taken into account, one of which is the lack of any kind of democratic trace, in Scotland or the wider UK, in terms of involvement in the creation of future EU law. It is quite obvious that no elected person from Scotland or the wider UK will vote on future EU law, and that will be a significant issue when people want to enact that law in Scotland. That is why appropriate scrutiny and proper consultation, and all the engagement that goes along with those concepts, are important in making sure that, when Scottish ministers bring forward proposals to legislate, as they might do under section 1, the people of Scotland, parliamentarians and wider stakeholders have the opportunity to make their views known about that legislation.

Kenneth Campbell: As with the Law Society, so it is with the Faculty of Advocates in terms of not having a position on policy decisions at root. Having said that, I agree with all that Michael Clancy went on to say about the operation of the legislative process. I do not think that I want to add anything to that.

Alexander Burnett: I can understand why you will not comment on the politics, but is there any actual necessity for the bill? That was my question.

Kenneth Campbell: A policy choice to maintain alignment with the EU having been made, a process for maintaining alignment is necessary, and the bill is the means by which the Scottish Government seeks to do that.

Alexander Burnett: Thank you.

Patrick Harvie: I am aware that I might be about to ask the witnesses again to stray into

areas that they will not be comfortable with. I have been discussing potential interaction or conflict with the UK proposals on the internal market, if the legislation on that comes forward as proposed, or indeed conflict with potential future trade agreements and whether the bill that we are discussing is compatible with those aspects of the context that we are working in. The witnesses may not be in a position to comment on the generalities of this, but the scope of the UK internal market proposals covers, for example, the regulation of professional qualifications and, potentially, issues that would impact on the provision of legal services.

With reference to those specific aspects, what problems do you see arising if there is a conflict or a misalignment between the UK-wide system for recognising professional qualifications and a Scottish system that emphasises keeping pace with the EU? Could that have unpredictable consequences? If there was such a conflict, where should it be resolved? Which Government should decide whether the public benefit of the approach that they wish to take outweighs any negative consequences of a mismatch between the two systems?

Kenneth Campbell: Even confining it to specific areas, that is a big question and an important topic. The faculty made observations about the regulation of the professions in a submission to the UK Government in response to the internal market white paper. I am happy to arrange for a copy to be sent to the committee, if that would be of assistance.

Patrick Harvie: That would be helpful, yes.

Kenneth Campbell: There are arrangements for cross-recognition of qualifications between the parts of the UK, and there are provisions that have their origin in EU legislation for the recognition of professional qualifications from other member states. The issue is a real one and is not confined to the legal profession. As I am sure committee members are aware, there are a number of professions that are regulated and whose qualifications are cross-recognised in that way.

On whether there is the possibility of conflict, we do not know the shape of the internal market legislation at the moment. The white paper that the UK Government published suggests a number of things about respect and equivalence, but quite the form in which that will be enacted in legislation remains to be seen. However, in principle, there is the possibility of conflict between legislative choices made in the continuity bill and those made in the internal market legislation.

How should such conflicts be resolved? In the earlier session, I heard Professor Keating talk about intergovernmental relations and the weaknesses of processes in that regard, which are sometimes evident. One would hope that there would be a clear and explicit process for resolution of the choice of who is going to legislate, or for resolution of differences between regimes—one crafted by the UK Government and Parliament, and one crafted by the Scottish Government and Parliament.

At an earlier stage, it appeared as if the common frameworks were to be the tool for that, but the relationship between the common frameworks and the internal market, as described in the white paper, seems not to be entirely clear. That is a matter that perhaps bears further scrutiny.

Patrick Harvie: There is some maximal understatement going on here. One would hope for an arrangement that could resolve conflict, but would it not be fair to say that that is a pretty far-off hope at the moment?

The Convener: Are you asking me that, or are you asking the witnesses?

Patrick Harvie: I wanted to follow that up with Mr Campbell; I will then come to Mr Clancy.

Kenneth Campbell: All I can say in response is that the white paper on the internal market is quite opaque on the issue, so how the issue will play out remains to be seen.

Patrick Harvie: Mr Clancy might wish to address the same issues, perhaps going beyond the point about professional qualifications to wider aspects of the provision of legal services. The Law Society obviously has an interest in that topic. Again, is there the potential for conflict? How should conflicts arising in the market for legal services be resolved?

Michael Clancy: That is a very interesting set of questions. I am not sure that we have long enough to explore them all sufficiently deeply. Let us give it a shot, however.

As Mr Campbell has indicated, there is provision in the law at the moment for intra-UK transfers; we have a set of qualified lawyers assessments, which allow lawyers from all parts of the United Kingdom, such as barristers and solicitors from England, Wales, Northern Ireland and the Channel Islands, to requalify into Scotland. That has been a very settled part of the law for a considerable period of time. In fact, I remember dealing with the Law Reform (Miscellaneous Provisions) (Scotland) Bill, which was enacted in 1990 and which contained provisions about intra-UK transfers.

I am not sure to what extent the proposed consultation on mutual recognition and international qualifications will apply to the legal profession. That is still to be provided: the consultation has not been issued. There is a one-

paragraph reference to the matter in the white paper on the internal market. It is therefore probably inopportune to dip into that to see whether there is an issue that is germane to your question about conflict.

There may be conflicts, depending on what the internal market bill provides. We know that the UK Government wants to ensure that there is a market access provision, determined by the two principles of mutual recognition and non-discrimination, which will apply to both goods and services.

Services are currently governed by the service regulation, which is part of and is fully adopted into UK law. It does not matter what services we are talking about. They could include accountancy services or services of other descriptions—information technology services might be a popular pick, for example. There are people providing video-screen services, and so on—all of these platforms that we now use might become subject to the provisions.

Is there potential for a conflict? Well, that depends on what EU law determines to do in the future, and on what Scottish ministers, seeing that EU law, decide to do in terms of implementation under the continuity bill. That is as far as I can go at the moment, without entering into vast realms of speculation, but I think that that is where things lie.

11:30

Patrick Harvie: I appreciate that we cannot speculate in detail about specific divergences that might arise if the Scottish Government keeps pace with the EU, the UK Government wants to diverge from it, and there is therefore a mismatch within the UK's internal market. However, if such a scenario did arise, should the Scottish Government be in a position to decide that the benefit that it seeks to achieve by keeping pace with the EU is substantial enough, and the downside of a mismatch with the UK is minor enough, that it should proceed with that plan? Alternatively, is there an argument in principle for saying that the Scottish Government should not be able to do that and that the UK must have the power to overrule it?

Michael Clancy: That question is one that a future Scottish minister could answer. I am not in the position to be able to say what a future Scottish minister would do. However, I am quite sure that conflicts already arise in the approaches that the Governments of the four nations decide to take to their policy choices. Those conflicts have to be resolved, and that is part of the intergovernmental review process, although we have still to see the publication of its findings and what they mean for each of the four Governments within these islands.

We are certain to require some form of dispute resolution. Why do I say that? There is already some form of dispute resolution in the concordat and memorandum of understanding between the UK Government and the devolved Administrations, which sets out how certain forms of dispute can be resolved. Principally, those involve reference to civil servants to come up with solutions that will satisfy all the Governments. However, in the end, it becomes a political decision if that initial solution is not accepted by the Governments, and it depends on politicians being able to reach an agreement, and to resolve between them the question of what happens.

We have seen that in certain aspects of the common frameworks. In the Agriculture Bill, which we have talked about, the Scottish Government has agreed through a legislative consent motion passed by the Parliament to include provisions that are applicable to Scotland, but has not yet agreed on other parts, which might be part of a future LCM.

Clearly there has been discussion between the Governments and they have reached a decision about those parts of the legislation that they can live with and those parts that the Scottish Government cannot live with. It is a political process and I firmly expect that it will continue in the internal market discussions.

The Convener: I do not want to keep this particular thread going much longer, but an obvious question has come to mind. To what extent do UK ministers use the secondary powers in the UK Brexit bills to diverge from EU law, including in devolved areas? Given that Scottish statutory instruments do not apply, does that not give rise to even more potential areas of conflict and emphasise the need for such a dispute mechanism to be put in place?

Michael Clancy, could you start off? I am sorry to have interrupted the thread, but I think it is important to tease that issue out a bit more. Please keep your answers as snappy as you can; we have to move it on a bit here.

Michael Clancy: Let me consider the way in which you have phrased the question. I am not sure that the European Union (Withdrawal) Act 2018 provides the UK ministers with the power to depart from EU law. [*Inaudible.*] That will not be an issue for UK ministers to decide.

With EU retained law, which is domesticated law that is applicable to the UK and that derives from EU law, part of the project of enacting such legislation is to enable the UK Parliament and, in certain instances, the devolved legislatures to depart from retained EU law.

I am not sure how that will happen or at what point. I imagine that divergence will occur in the not-too-distant future, after the end of the transition period, if satisfactory policies are identified by the relevant ministers.

I would like to take the question back so that I can reflect further on it and write to you.

Kenneth Campbell: Michael Clancy has described the operation of the EU withdrawal act and the intentions that underlie it. I agree that it is foreseeable that divergence from the future direction of EU law is possible and is probably likely, and that it will happen by the amendment of what will become retained EU law. That is likely whether or not the powers in the bill that we are considering today exist. The broader effect of that is outwith the scope of this discussion.

The Convener: That might involve statutory instruments in devolved areas that are not Sewel-able. That takes us back into the potential area of conflict. Michael Clancy has said that he will reflect on that.

Dean Lockhart: I would like to raise an issue that I raised with the previous panel.

Last week, the Environment, Climate Change and Land Reform Committee heard evidence that, under the EU continuity bill, there will be an open question about whether Scotland keeps pace with the EU, adopts similar standards to those in the rest of the UK or takes a completely different tack. Given that the Scottish Government has discretionary powers to keep pace with some of—but not all—future EU laws, is there a risk that Scotland could end up in a regulatory no man's land where we are out of synch both with EU regulations and with those in the rest of the UK?

Michael Clancy: If one were to reflect on the current situation, it is possible for the Scottish Parliament to enact legislation that is different to that in any other part of the UK. We do not refer to that as anything other than a natural consequence of devolution.

Therefore if, in the future, there is EU law on one side and UK law on another and the Scottish Parliament decides to maintain a different approach to policy making and to enact legislation that reflects that difference, that would be a natural consequence of devolution.

It would be a political and policy question for those who were scrutinising legislation at that time, and they could argue the pros and cons—[*Inaudible.*]—devolution. That is probably as far as I would go in answering your question.

Dean Lockhart: The previous position was that, where European law applied, there would be no discretion in whether to follow that law. The EU continuity bill introduces an element of discretion by which the Scottish Government can take a pick-and-mix approach to which future EU laws it decides to follow. The continuity bill may therefore introduce an incremental level of additional uncertainty.

Michael Clancy: It is certainly the case that Scottish ministers can make regulations that correspond to EU law, however that is defined. That naturally creates a potential difference in approach from other Governments in the UK. However, that is part of any political legal process. Politicians set out the objectives that they want to attain and how they want to do so, and it is up to Parliament to scrutinise those questions closely when they arise.

Dean Lockhart: Perhaps I could ask Mr Campbell for his contribution on some of those issues.

Kenneth Campbell: I agree with the point that Michael Clancy made about what he described as the natural consequence of devolution, in the sense that the Scottish Parliament can legislate, and has legislated, in devolved areas in a way that is different from policy in the equivalent areas elsewhere in the UK.

The only other point that I would add in the specific context of variance in the UK goes back to our earlier discussion on the internal market white paper, on which the UK Government is currently consulting, and in which the principles of mutual recognition and non-discrimination are set to be central. Services and products that originate in Scotland and are produced and provided in accordance with rules devised by the Scottish Parliament under this bill ought therefore to be recognised, and to be able to be consumed, elsewhere in the UK by application of those principles, assuming that they are thereafter enacted in legislation to give effect to the current thinking about our UK internal market. If there is a concern about disadvantage to Scottish providers of goods and services, the principles in the internal market white paper will, on the face of it—if they are enacted—benefit those providers.

The Convener: I am conscious that we are now coming close to 11.45, and we must conclude by midday. Jackie Baillie and Angela Constance have still to come in—I am not sure whether Alex Rowley wants in as well. I will bring in Jackie Baillie first.

Jackie Baillie: Thank you, convener—I will try to be quick. My question is for Mr Campbell. With regard to the interaction of the continuity bill with the UK Government's proposals for the internal market, could the aims of the bill be undermined in practice by litigation?

Kenneth Campbell: It is always unwise to try to forecast the outcome of litigation in which one is

not involved as a lawyer, as I have found throughout many bitter years.

11:45

It is certainly possible that there will be litigation on the interaction of those aims with legislative structures, assuming that there is legislation on the internal market. However, although it is possible to foresee that happening, it is more difficult at this stage to foresee which components such litigation might concern, and therefore to be able to forecast, in any way that would be helpful in answer to your question, whether the aims of the bill would be undermined. It is just not possible to make a prediction at this stage.

Jackie Baillie: Nonetheless, I suspect that you could foresee a circumstance in which the Scottish courts might be encouraged, if you like, to diverge from existing EU case law at the same time as Scottish ministers are trying to maintain alignment. What would the implications of that be?

Kenneth Campbell: I think that you are alluding to yet a further post-Brexit development, which is the power that UK ministers have to specify that courts can depart from existing case law. The consultation on that has recently closed. I will not take up too much of the committee's time, but I highlight that the power is complex and challenging. In the faculty's view, it does not amount to a directive to the courts to change the law, but it seeks to explore circumstances in which the courts could, in some cases, decide to depart from existing case law. It is permissive rather than mandatory in that sense.

You are quite right that some people might take that as an opportunity to encourage the courts to exercise such a power. It is difficult to foresee the context in which that might be done, not least because cases are decided against the background of the law as it is, unless the underlying retained EU law, as it would be, has changed. It is difficult to see how a court would be persuaded to depart from case law in the absence of some compelling new factor. It might be that a compelling new factor could be the changed UK internal market—that is a possibility—but beyond that, it is difficult to forecast what that would look like.

The Convener: That takes us to Angela Constance.

Angela Constance: I have heard enough, convener—thank you.

The Convener: Okay. Does Alex Rowley want to come in? Is he still in the room?

I am not hearing anything back from him. Given that we are now almost at 11.50, I propose to conclude the meeting. I thank Kenneth Campbell QC and Michael Clancy for their helpful evidence today. That concludes the only item on today's agenda, and I close this meeting of the Finance and Constitution Committee.

Meeting closed at 11:49.

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