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Constitution, Europe, External Affairs and Culture Committee

Thursday 11 November 2021

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Thursday 11 November 2021

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
9th Meeting 2021, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Dr 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:

Michael Clancy (Law Society of Scotland)
Alison Douglas (Alcohol Focus Scotland)
Jess Sargeant (Institute for Government)
David Thomson (Food and Drink Federation Scotland)
Vhairi Tollan (Scottish Environment LINK)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 11 November 2021

[The Convener opened the meeting at 09:00]

United Kingdom Internal Market Inquiry

The Convener (Clare Adamson): Good morning, and welcome to the ninth meeting of the Constitution, Europe, External Affairs and Culture Committee. We have received apologies from Maurice Golden MSP and Mark Ruskell MSP.

At 11 am today, we will pause for a short act of remembrance, which will take place throughout the Scottish Parliament. At that time, we will observe a two-minute silence.

Our first agenda item is an evidence-taking session for our inquiry into the United Kingdom internal market. The aim of the inquiry is to consider the UK internal market's implications for Scotland, including how devolution will work, going forward.

In our first panel of witnesses on the topic, we will hear from: Alison Douglas, who is the chief executive of Alcohol Focus Scotland; David Thomson, who is the chief executive of the Food and Drink Federation Scotland; and Vhairi Tollan, who is the advocacy manager for Scottish Environment LINK. I welcome you all and thank you for your submissions.

I remind committee members that, if they wish to direct a question to a particular member of the panel, they should say so at the start of the question. We are constrained by time, so I ask witnesses and my fellow committee members to be succinct, where possible.

All the submissions highlight the risks of the UK internal market and the risk that Governments might be more hesitant to consider innovative policies for tackling particular issues—a deposit return scheme, for example—in order to avoid competitive disadvantage to Scottish businesses. The risk is that there might be lower regulatory standards in order to retain a competitive internal market in the UK. How could we prevent that from happening?

Vhairi Tollan (Scottish Environment LINK): I thank the committee for the invitation to appear.

Scottish Environment LINK has taken an interest in that issue because of the potential effect, as the convener mentioned, on environmental standards in Scotland. In our submission, we outline the importance of developing strong common frameworks between all four Governments that are involved in the internal market.

A lot of what I will say is speculative. We do not have any case law and do not yet know quite how the internal market will operate in practice. However, we are clear that we need strong common frameworks. We have not received much in the way of public update in the past year or so about their development. They could provide a baseline of common minimum standards, particularly for the environment, to which all four nations of the UK could agree. That would help to clarify some of the uncertainty that exists at the moment.

David Thomson (Food and Drink Federation Scotland): Thank you for inviting us, convener. I represent the food and drink industry. It is vital that the industry has a clear opportunity to access markets throughout the United Kingdom. To some extent, the United Kingdom Internal Market Act 2020 provides us with that. However, you are right to point out that there are many ways in which the act interacts with devolved legislation. It is unclear how that will work and what the implications are for business. As we highlight in our submission, we can already point out numerous complexities in the deposit return scheme, which is the kind of thing that businesses will worry about in terms of how they comply with legislation in the different parts of the UK.

Alison Douglas (Alcohol Focus Scotland): Thank you for the opportunity to meet the committee this morning. It is clear that, over the past decade and more, Scotland has taken a much more progressive approach to improving public health than the UK Government has. For a decade, Scotland has had a very comprehensive alcohol strategy, and there are commitments to make further progress on issues such as alcohol marketing. An alcohol strategy is absent at UK level.

In that context, the internal market act poses the real risk of significantly constraining Scotland's opportunity to make further progress on what continues to be a profoundly damaging public health problem. Those concerns are echoed by our colleagues who work on smoking in ASH Scotland, and by Obesity Action Scotland.

Vhairi Tollan is right that, in practice, the common frameworks are the key opportunity for us to try to manage and limit the impact of the legislation; nevertheless, we feel that it severely curtails the Parliament's opportunity to make progress on all three of the World Health Organization's best buys for public health, which

are increasing the price, controlling the availability and restricting the marketing of those products.

The Convener: Thank you. We will move on to questions from the committee.

Donald Cameron (Highlands and Islands) (Con): Good morning, and thank you all for your written submissions. I think that we all accept that we are at an early stage in the process and that a lot of this is about finding our feet and seeing how the legislation and the common frameworks play out. That said, I want to focus on the principle of mutual recognition. Notwithstanding the uncertainty, can you give concrete examples of products—I am particularly focusing on alcohol products and food and drink products in general—that you are concerned about? Is there anything in particular that you are worried about in relation to there being sets of regulatory standards in other parts of the UK that are different to those in Scotland?

Alison Douglas: All alcohol products are of concern because, as things stand, there are fewer labelling requirements for a bottle of vodka or a can of beer than there are for any other food and drink products. That anomaly is a hangover, if you like, from the European Union context, where alcohol products are excepted from the labelling requirements that apply to all other food and drink products. That is just completely nonsensical. Why would you require more information on a bottle of water or a pint of milk than you require on alcoholic products, which are by their nature carcinogenic and cause a range of health harms?

We very much hoped that that anomaly could be addressed. With the UK leaving the EU, we had an opportunity to make progress on that. However, we understand that, although the UK Government is planning to consult on a limited range of measures on alcohol labelling, they will fall far short of what we hope and would expect to be on alcohol products, including health warnings.

David Thomson: In direct answer to your question, the FDFS is not concerned about anything as far as mutual recognition is concerned. However, on legislation in the various parts of the UK—in particular, through the Scottish Government's commitment to continuing EU regulation, on which we will have to see what the UK Government's stance will be—the issue might become more about divergence or differences between regulation, rather than being about higher or lower standards. If, as a result, goods were not allowed to be placed in the market in England, that would be of significant concern to the Scottish food industry, and vice versa.

Donald Cameron: Vhairi, do you have any comments on mutual recognition?

Vhairi Tollan: One product that we in the environment sector want to highlight is peat compost that is used in horticulture. Non-governmental environmental organisations have been campaigning for it to be banned for a long time, because we need to protect our peatlands, which are a vital carbon store and sink and are crucial to our efforts to reduce Scotland's climate emissions. The programme for government contains proposals to consult on a ban on peat compost in Scotland, but with regard to the principle of mutual recognition, limiting its use in Scotland could become difficult in practice if it were still allowed to be supplied from other parts of the UK. We have highlighted that as a concern.

Donald Cameron: I am interested in the peat issue. Am I right in saying that the UK Government has committed itself to a ban from 2024?

Vhairi Tollan: Yes. We would like action to be taken as soon as possible.

Sarah Boyack (Lothian) (Lab): I welcome the witnesses to the meeting and thank them for their submissions. It has been really interesting to work through them.

I want to follow up Donald Cameron's questions about different impacts across the UK, and to come back to the peat issue that Vhairi Tollan raised. Such matters are certainly at the forefront of our minds, given that we are in coming to the end of the 26th United Nations climate change conference of the parties, or COP26. In your submission, you say that

"The UKIM Act could pose challenges for Scotland's ambition to implement a ban on the sale of peat for horticulture in this parliamentary session",

although you have just said that that might or might not be the case. What interaction have you had on that policy issue with the Scottish and UK Governments, and to what extent have you been able to talk to parliamentarians in both Parliaments in order to start that conversation?

Vhairi Tollan: We have certainly noted the issue. With regard to engagement with the UK Government, we work on that with partners across the UK, particularly the Greener UK network. We have not had direct correspondence with the Scottish Government on the matter, but it is certainly on our radar. We would be concerned about the legislation having a chilling effect; we know that the Scottish Government intends to consult on the issue this year, so we would raise our concerns in that forum.

Sarah Boyack: Can you give us examples of other environmental challenges? You have talked about EU moves to ramp up environmental standards; do you have concerns about other products in respect of which the United Kingdom Internal Market Act 2020 could cut right across

Scotland's moves to meet environmental standards, either for nature or net zero reasons?

Vhairi Tollan: The deposit return scheme has been mentioned. The act will also affect efforts to limit the use of single-use plastic items—takeaway food and drink containers and anything that falls in the bracket of disposable plastics. Scotland has already taken a step ahead by banning plastic cotton buds; we are concerned that UK market regulation could have a limiting effect on such actions.

09:15

We also have concerns that are not directly about products. There are areas in which Scotland has gone above and beyond to protect wildlife species, including red squirrels. In the EU, Scotland and the UK were able to take that step to give extra protections to red squirrels, but it did not necessarily apply in other EU countries. We have concerns that such examples of going above and beyond might be limited. That is probably more relevant to the non-discrimination principle, so I will maybe expand on that later.

Sarah Boyack: To pick that up, but also to move sideways, I will ask Alison Douglas and David Thomson about the challenge that you both highlighted with regard to sale of alcohol products. There is a very striking statistic in the evidence about alcohol-specific death rates, which are 68 per cent higher for men and 78 per cent higher for women in Scotland that they are in England and Wales. There is obviously a big issue about responsible alcohol drinking. What discussions have you had with both Governments? Certain products that are made in Scotland are part of our core economy, but there is also a discussion to be had about responsible drinking and getting the balance right. On the basis that public health is a devolved issue, I am interested in hearing, first from David Thomson, about discussions and engagement that you have had with both Governments. There is a debate in Scotland and a strong ambition to address that issue.

David Thomson: I will have to plead the fifth amendment on that. The Food and Drink Federation Scotland does not represent alcoholic drinks. However, if it is helpful, I can talk about public health more widely and, in particular, regulations in relation to obesity.

Sarah Boyack: I apologise for that; I misread the evidence.

The Convener: Please talk about that, Mr Thomson, because it is relevant to where we are going with the questions.

David Thomson: We have a very small number of alcohol producers, but none in Scotland at the moment, so we have not really engaged in that dialogue.

On the wider public health and nutrition angle, we know that bans on food advertising and promotions are being proposed and implemented in England, and that the Scottish Government previously proposed regulation, which was postponed because of Covid. However, we know that the Government intends to bring it back, because it was mentioned in the programme for government this year.

We have dialogue with the UK and Scottish Governments, Food Standards Scotland and the Food Standards Agency about that and a wide range of other things; I have previously given evidence on a number of common frameworks. I think that it is clear that civil servants are still trying to work through the implications and are keen to make sure that there is no competitive disadvantage for Scottish businesses when they sell into other markets, as the convener said at the very start. I apologise for any confusion.

Sarah Boyack: Sorry, that was probably my fault. I looked at the comments that you made about the deposit return scheme and I put both witnesses together on the issue of drinks and made assumptions about the kinds of drinks that were involved.

Alison Douglas, can you also comment on the point that I made at the start about different policies in different parts of the UK and the challenges for implementation?

Alison Douglas: Absolutely. The whole of the UK has a significant alcohol problem. As you said, Scotland's problem is more acute than those of England and Wales. However, the Welsh Assembly Government has also considered minimum unit pricing as an appropriate and proportionate response to the scale of the alcohol problem that it is facing. The Northern Ireland Assembly is also actively looking at minimum unit pricing. That is a clear example of where, because of the chronic and acute nature of Scotland's problem with alcohol, we led the way, and that was partly a creative response to the fact that we did not have other economic levers such as alcohol duty at our disposal. In scrutinising and identifying that mechanism, the Scottish Government realised that the policy had a more targeted effect on the people who suffer the greatest harm from alcohol.

That is an example of where the flexibility to implement a different policy in Scotland has been a significant advantage, and we have seen that policy deliver a reduction in the consumption of 3.5 per cent in the first year of operation, and a 10 per cent reduction in alcohol-specific deaths.

It would be a profound loss if we were unable to improve that policy. The Scottish Government has talked about the potential problems of uprating the minimum unit price because of the United Kingdom Internal Market Act 2020. Also, we all know that price alone will not turn the tide of alcohol harm, and we need to do other things. The Scottish Government is committed to consulting on alcohol marketing in the next year, for example. We would support that and hope that the Scofttish Parliament could make significant progress on it because of the clear evidence that, particularly when it comes to children and young people, it influences when they start to drink, how much they drink, and whether they go on to develop an alcohol problem in later life.

Jenni Minto (Argyll and Bute) (SNP): I thank the panel for their submissions. I would like to follow up on that vein of questioning. As Alison Douglas just said, devolution has given nation-specific organisations an easier link into the decision-making and policy-shaping process that is specific to each of our nations. I am interested to hear from all of you about how you think the legislation will impact on your ability to do that. I will go to Vhairi Tollan first.

Vhairi, at one point in your submission, you describe a race to the bottom. Could you also expand on that?

Vhairi Tollan: On the race to the bottom, we are concerned that, given that the market access principles accept the new common baseline, if one part of the UK was to decide to lower its standards—there is nothing to prevent that from happening—it might make the other nations feel that they also have to lower their standards to maintain a competitive advantage. As I was saying earlier, and we might come to it later on, the common frameworks would be a mechanism that could provide a common baseline across the UK, particularly, in our case, for environmental standards where minimum standards are agreed to. That would be a backstop that would prevent that race to the bottom.

We are concerned about it. I talked about red squirrels in answer to Ms Boyack's question. If protections for particular species were lowered to allow for development or other activities to take place, it could cause issues for other parts of the UK.

Jenni Minto: Thank you. How do you think you will be able to influence specific policies that Scotland's differences require?

Vhairi Tollan: The act makes it all much more difficult. It adds a layer of complexity to everything. We would certainly still look to raise issues with MSPs in the Parliament and the Scottish Government when we think that the situation with the internal market is causing problems or technical issues that need to be overcome. At the moment, it is unclear how that engagement with stakeholders will take place. We would like the Governments to provide more clarity on how any disputes will be resolved in practice, which is not clear at the moment.

Jenni Minto: Thank you. Alison, what is your view?

Alison Douglas: In Scotland, we have experience of the use of litigation to deter and delay the implementation of progressive public health measures. The most conspicuous example of that was in relation to minimum unit pricing, the legal challenge to which created a five-year delay in implementation of the policy. In our view, because of inflation during that period and since, the impact of that policy has been eroded in practice.

Internationally, it is well established that the use of litigation is a common tool for industry to use to protect its interests. More than that, the fear of litigation or the risk of being exposed to litigation can have the chilling effect that we have talked about.

There is a huge opportunity cost for an Administration in defending a case. While we were going through that five-year process with the various courts, there was action that we would have liked to have been taken to complement minimum unit pricing, such as action on marketing, labelling and controlling the availability of alcohol, all of which had to be put on hold because of the on-going legal process.

We should not underestimate the effect of the legislation. The Scottish Government has talked about the potential risks around minimum unit pricing, despite the fact that the issue was explicitly raised during the passage of the United Kingdom Internal Market Bill at Westminster. Although the UK Government said that it would not apply to MUP, that still seems to be a moot question among academics and the Scottish Government, which is a real concern.

In addition, people have raised the issue of the transparency of the common frameworks and the ability of civil society organisations and the voluntary sector to scrutinise and input into that process. That is a major concern for us.

We have limited capacity. We operate in Scotland and most of what we are trying to influence is here in Scotland. Like Scottish Environment LINK, we would collaborate with colleagues at the UK level in an effort to influence the UK Government, but that would be an overhead for us. Such work is beyond what we can do in practice.

All of that limits our ability to be part of the process and part of the decision making.

Jenni Minto: Thank you. Mr Thomson, how will your organisation have to shift in order for it to be able to contribute to policy that is being questioned from a UK-wide perspective, too?

David Thomson: Compared with Vhairi Tollan and Alison Douglas, I am in a lucky position, in that FDF Scotland is part of the FDF at UK level, so we have the ability to advocate for the industry at UK level. We also have a sister organisation in FDF Cymru, so we can do that in Wales, as well. In addition, we work closely with our colleagues at the Northern Ireland Food and Drink Association, which contributed to our submission. Therefore, we have the ability to advocate for the industry in different settings.

The internal market legislation will not really change what we do, because the Scottish Government will still set standards and approaches that will be different from those that are adopted in Wales, England and Northern Ireland. Therefore, I do not see that changing an enormous amount for us. It will depend on the reaction of the Governments across the UK and on the extent to which they work together on common frameworks—they have done that on labelling and they are working together on extended producer responsibility and a range of other things—or plough their own furrow, which is what is happening on public health promotions and promotion restrictions. We will have to be alive in all these arenas talking about that, and there will still be differing outcomes.

09:30

Jenni Minto: In her evidence, Vhairi Tollan talked about the race to the bottom. Do you have any concerns that Scotland's high-quality food and drink might get caught up in something similar?

David Thomson: In food and drink, there is no evidence of a race to the bottom at all. In fact, there is probably a race to higher standards and to opportunities. From a food and drink perspective, it is really important to understand that the customer—whether that is a supermarket or a food supplier—puts in place incredibly high standards, and businesses match those. There is certainly no appetite from consumers across the UK for lower standards. I can understand why people are raising these concerns, but I do not see that in the food and drink sector, and there is certainly no evidence of that to date.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I have a question for Ms Douglas. In your written evidence, you say very directly that

"The Act undermines the ability of devolved administrations to legislate to protect and improve public health."

I am interested in that, and I think that there are many people in the devolved legislatures who would share that concern. For those who do not know about the act or what it does, can you elaborate on why you have that concern about the way in which it might restrict future legislation?

Alison Douglas: You will forgive me—I am not a lawyer, so my understanding of exactly how things operate or will operate is not a legal one. However, I have talked to lawyers about it. My understanding is that it may not actually proscribe the Scottish Parliament's legislating, but the practical effect of its legislation would be severely limited. The net effect of that is to significantly undermine the intended impact of the legislation. If, for example, the Scottish Parliament were to legislate on alcohol labelling, because that would not apply to products that originated from any other part of the UK or, indeed, any products that were imported through another part of the UK, the only organisations to which it would apply would be Scotland-based organisations. I do not have figures for the proportion of total sales that that would impact, but it would be a small percentage.

It is about the deterrent effect. Why would you legislate if it would apply to only a very narrow set of products? You would not have the intended policy effect. You would simply disadvantage Scottish-based companies. From that point of view, it curtails the Scottish Parliament's ability to make meaningful change and progress on protecting public health, the environment and so on.

Dr Allan: You mentioned some of the potential areas for new legislation around alcohol that it could affect. I do not want to ask you to speak for other organisations that represent health interests, but are there other areas of public health about which the same concerns are being or might be expressed?

Alison Douglas: Absolutely. Ms Minto's question was about our ability to participate in the process and put the case in Scotland and at the UK level for progress on public health. Our colleagues at ASH Scotland and Obesity Action Scotland share our concerns, and we are all struggling to understand the potential impacts and participate in the process. That is also true in relation to the common frameworks, which are really opaque—for example, three different common frameworks would apply to labelling. That is extremely challenging for a third sector organisation to engage with.

I note from the meeting papers that estimates of the number of common frameworks range from 21 to 33, so we do not even have accurate information on how many there are and what stage they are at. The most recent United Kingdom Government information came out in

May, so I presume that things have changed significantly since then, but we do not know. Our concerns are shared by other third sector public health organisations.

Dr Allan: I am interested in what you said about—I do not want to put words in your mouth—those changes implying the need to influence action at Westminster more than you would have to do at present. Did you say that that would present a resource issue or that that would be more difficult than influencing Holyrood?

Alison Douglas: Absolutely. It is clear that private sector organisations have considerably greater lobbying resources than the third sector has. As it stands, we have neither the expertise nor the capacity to significantly engage at Westminster.

Dr Allan: Similar concerns were expressed 300 years ago and they are written on the side of the Parliament:

"But naebody's nails can reach the length o' Lunnon."

Vhairi Tollan, could you comment briefly on something that the Scottish Crofting Federation said in its submission to the UK Government consultation on its internal market white paper? The submission states that

"we accept the need for an organised internal market but this must be designed and agreed by all four UK administrations, not imposed by one".

You have touched on those issues. Do you feel that legislatures or organisation such as yours have been involved in the design of the proposals for the internal market?

Vhairi Tollan: I agree with a lot of what Alison Douglas said. Our capacity and expertise to engage with the UK Government is limited, so it is difficult for us to be part of those conversations and influence the proposals. We have done what we can and have responded to consultations when opportunities have been presented, but it is difficult.

We want common frameworks to be agreed collaboratively with all four Governments across the UK. That is the best way to ensure that they can be effective; the intention to agree those jointly has been set out, but as Alison said, what is taking place is pretty opaque to us. We would like to have more information from the UK and Scottish Governments on what has taken place in recent months on the development of common frameworks.

Sarah Boyack: I have a quick supplementary question to ask David Thomson. You talked about different standards in different parts of the UK impacting negatively on producers. Towards the end of your written submission, you state:

"If one UK nation increased or lowered product standards in their own jurisdiction there might be areas where enhanced protection might, in principle, be desired."

What did you mean by that?

David Thomson: Our job is to make sure that we are working for and on behalf of the food industry, which wants high standards and does not want those standards to be undermined. Philosophically speaking, there might be a situation in which one part of the UK legislates in a way that the industry thinks is detrimental to its business model and reputation across the UK. In such cases, you might easily make the argument that that undermines the progress and the good reputation of our great food and drink industry, and you might ask, "Is there something that we can do to provide that protection to the rest of the UK's food and drink industry, whether that is in England, Scotland, Wales or Northern Ireland?"

Sarah Boyack: What do you mean by "enhanced protection"?

David Thomson: I think that that would mean protection in a way that perhaps the common frameworks and, in particular, the United Kingdom Internal Market Act 2020, do not allow. There might be things that we would argue should be carved out of the 2020 act because of one legislature undermining the standards.

Sarah Boyack: To draw a parallel, you have also talked about trade outwith the UK. For example, concerns have been raised about potential new UK trade deals with other parts of the world that have lower environmental standards. How would that impact on UK products? You have mentioned your worries about standards changing in the UK, but what about imports from the rest of world, where the standards might be lower? What about the impact of that on products that are produced here? Are you concerned about that?

David Thomson: Yes, absolutely, and those concerns are widely held across the food and drink industry. At the moment, there is significant concern because the UK has not yet put in place import controls and restrictions in the EU-UK trade and co-operation agreement. That is one element of concern. On the one hand, it helps in some ways, because we can import packaging and the raw materials that we need to produce food. On the other hand, UK products that are produced here are already not competing with imported products because the playing field is uneven.

The other element is that, if a trade deal is done with a country that has lower standards, that impacts on domestic production. If products from that country can be imported into any part of the UK and passed across the whole UK, there is a specific concern that that might, for example,

undermine our high production standards in Scotland and in other parts of the UK.

The Convener: I have a supplementary question, which is mainly for Alison Douglas. We have talked a lot about new innovations that we might want to introduce post-Brexit under the new common frameworks. You have also mentioned that you are concerned about the erosion of the impact of some of the existing innovations. If we take minimum unit pricing of alcohol as an example, Professor Kenneth Armstrong, who was an adviser to our predecessor committee, highlighted in a briefing paper that a modification of the policy, such as ensuring that the price increases in line with inflation, will not be dealt with under the EU laws as were and the Scottish legislation as was but will now come under the new frameworks. Do you fear that that could open up the possibility of further litigation against the policy, and that we could end up with our current policies on minimum unit pricing and smoking going backwards?

Alison Douglas: Absolutely—that is a real fear of ours. If existing legislation is substantially amended, it could come within the scope of the United Kingdom Internal Market Act 2020. There is no definition of what "substantially" amended means, but that could cover uprating minimum unit pricing. Obviously, the policy becomes less effective over time as inflation erodes its impact. When the Scottish Parliament first agreed to the legislation, the policy covered, I think, 64 per cent of all alcohol sold in Scotland. By the time of implementation, because of the five-year delay, that had reduced to 50 per cent. If we look at the comparator for England and Wales, today it would be 34 per cent. You can see that the scope and the impact of the policy has profoundly changed since 2012.

We are very much pressing for the Scottish Government to review the price, as it has undertaken to do, within two years. That has not happened, due to Covid, but we are saying that, in order to make good on inflation and to increase the impact—and now that we know that the policy has positive benefits, without any significant unintended consequences—we should be looking to increase the impact, to save more lives and to increase the minimum price to 65p per unit. However, we just do not know whether the Scottish Parliament could deliver that, because of the 2020 act.

The Convener: I do not think that there are any further questions from the committee. I thank you all, Ms Douglas, Mr Thomson and Ms Tollan, for your contributions this morning.

09:46

Meeting suspended.

09:47

On resuming—

The Convener: Welcome back. Our second panel will also be giving evidence on the UK internal market. The committee will hear from Michael Clancy, director of law reform at the Law Society of Scotland; and Jess Sargeant, a senior researcher at the Institute for Government. I welcome you both to the meeting. We will move straight to questions from the committee.

I will open with a general question about the impact of the UK internal market and of agreeing to UK common frameworks on the Scottish Government's commitment to align with EU law. Could we start with Ms Sargeant on that?

Jess Sargeant (Institute for Government): Common frameworks were originally designed without the United Kingdom Internal Market Act 2020, which came later. There is a question as to what implications there will be for progress from what has been agreed so far. It looks like it is not an impediment, although there is outstanding disagreement on exactly how the common frameworks will treat the 2020 act.

As for how that interacts with the Scottish Government's plan to keep pace with EU law, one of the challenges will arise if the UK Government takes advantage—as it would argue—of its post-Brexit freedoms by taking action to make businesses more competitive compared with under EU regulation. If the Scottish Government keeps pace with EU law in some areas, only Scottish producers will be required to comply with the new requirements. Any goods that are imported from England, where the UK Government is acting for England only, will not have to continue to comply with the Scottish Government's regulations replicating EU law, which could put them at a competitive advantage, and therefore Scottish producers at a competitive disadvantage.

Michael Clancy (Law Society of Scotland): Good morning, convener, and thank you for that question.

Although common frameworks were thought about before the United Kingdom Internal Market Act 2020 came into effect, or perhaps even when it was only a glint in the draftsperson's eye, the concept of the internal market was at the basis of common frameworks.

In October 2017, when the joint ministerial committee agreed the principles for common frameworks, one of those was that they should

"be established where they are necessary in order to: enable the functioning of the UK internal market, while acknowledging policy divergence".

I think that they have generally been considered to be a success in terms of intergovernmental working between the UK and the devolved Administrations. That is perhaps shown by the recent report issued by the UK Government on progress on common frameworks on 9 November. It was indicated in that report that up to 32 common frameworks had been agreed, and there were essentially three that were outstanding, relating to carbon capture and one or two other things.

That aspect of common frameworks is part of the concept of the UK internal market and, as such, it is being operated in quite a responsible and respectful way by the various parties to those common frameworks. It is also significant that a large number of common frameworks have been brought together without any hint of legislation, and simply on the basis of agreements between the Governments. That, we could all agree, is a good sign.

As for the impact on continuity, we indicated in the paper that we submitted to the committee in advance of this evidence session that EU law is proceeding no matter what. As you will have seen in the table that my colleague Adam Marks produced, 1,356 basic acts were adopted over the course of last year, as well as 734 amendments to existing legislation. An enormous amount of EU law is being made while we are not considering it.

I still have to finalise the comments that we are going to make on the Scottish Government's policy in connection with the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. The Scottish Government has not, at the moment, taken any action to align with EU law.

How does that fit with the United Kingdom Internal Market Act 2020? We do not know, because nothing has happened to trigger its provisions. However, we do know that amendments to existing legislation will be captured by the two principles of mutual recognition and non-discrimination. When considering alignment with EU law, the Scottish Government will have to take into account very carefully the extent to which any changes that will be made will be captured by the 2020 act. That is probably enough to give any Scottish minister a moment to think about what they want to align with, and how they do that.

The Convener: Our previous panel represented Alcohol Focus Scotland, the Food and Drink Federation and Scottish Environment LINK. One of the concerns that they raised in their submissions involved dispute resolution. In the context of the frameworks, is it clear to businesses how dispute resolution will take place in the future, and is it clear where the challenges are likely to be? Will they be against the common frameworks or against the legislation itself? Are you able to comment on that?

Michael Clancy: What an interesting question. If we are thinking about dispute resolution processes in the context of intergovernmental relations, it is difficult to see how the existing memorandum of understanding between the UK Government and the devolved Administrations would satisfy many people on the outside. A dispute must first be considered by civil servants, who then take to ministers an idea for resolving the dispute. Ultimately, however, it is a political decision by ministers as to whether the dispute is resolved. That tells us something about the problems of the current structure. As you know, however, convener, the whole process of intergovernmental relationships has been under review, and new provisions are still being finalised. There are moves towards greater formality in connection with intergovernmental disputes. We need to wait until those are properly finalised and published before we can make an assessment of them, but that will require elements of trust that do not appear to be present at the moment in that connection. There are also elements of independence. All the Administrations concerned are well aware of the types of views that we have expressed.

Lord Dunlop made some comments about that in his report, which he produced at the instance of David Cameron when he was Prime Minister, but that report has not landed with the current UK Government in the way that had perhaps been hoped at an earlier stage. We need to see exactly what the final shape is, and that is a matter for the Governments to agree.

Jess Sargeant: As Michael Clancy has said, there are two elements to this. First, there is the political element. One of the challenges about dispute resolution is that we have not seen a lot of the common framework, so we do not know what the dispute resolution is. In the cases where we have seen the final stage of it, that has involved escalation to the overarching intergovernmental mechanism. That currently happens through the joint ministerial committee.

We know that the four Governments are working together on the review. We have seen progress reports on it, which suggest that there will be an improved dispute resolution procedure but, because that still does not have agreement, it has not been implemented. There are questions there at the political level.

For individual businesses, there is still a lot of uncertainty, particularly when it comes to how the United Kingdom Internal Market Act 2020 will be applied. Rather than it being a matter of preventing regulations that contravene the terms of the 2020 act from getting on the statute books,

the regulations will not be applied to businesses that they should not be applied to. For example, if the Scottish Parliament passed a law banning chlorinated chicken while it was permitted in England, the law would say that chlorinated chicken was banned but it would not be applied to a product that was imported from England.

On the question of who is responsible for determining whether such regulations should be applied and to which products, that might be at as low a level as councils, whose food standards teams might have to make what would be fairly politically contentious decisions that might have significant implications for businesses. Again, it is not clear how those businesses might be able to challenge decisions that they believe are made wrongly or whether they will end up in court, or whether there will be some sort of other process. We will not really know how that works until it is tested. There is still a lot that is quite unclear.

Dr Allan: Mr Clancy, you have given a picture of the considerations that have to go through the minds of ministers and others in the Parliament before legislating, and those are more complicated than they were when the Parliament was first re-established.

One of the other considerations is the Northern Ireland protocol. I ask either of the witnesses to say a bit more about the considerations that come into play in relation to that when Scotland acts.

10:00

Michael Clancy: The Northern Ireland protocol is in a bit of flux at the moment as negotiations between the UK in the EU continue to try to refine—the word "renegotiate" is probably prohibited—the terms of its application. However, there is quite a bit of law in the United Kingdom Internal Market Act 2020 that relates to the protocol.

Part 5 of the act deals with the protocol. Section 46 requires

"An appropriate authority",

which includes ministers of the Crown, the Scottish ministers and ministers in the other devolved Administrations, to

"have special regard … for … the need to maintain Northern Ireland's integral place in the United Kingdom's internal market".

That place is to be in the customs territory of the United Kingdom; the flow of goods between Great Britain and Northern Ireland is to be facilitated. [*Interruption.*] Sorry, there was a beep on my computer.

That is mirrored in the Northern Ireland protocol, article 6 of which also seeks to protect the internal market.

Section 47 of the act guarantees

"Unfettered access to UK internal market for Northern Ireland goods",

subject to the somewhat minor NI-GB checks that are found in the protocol. However, on goods transferring from Great Britain to Northern Ireland, the principle of unfettered access is slightly modified. Market access principles apply, subject to the extensive restrictions processes in the protocol.

We have to wait to see the outcome of the discussions between the UK and the EU. Changes might be made.

I do not know whether that is enough at the moment, Dr Allan, but you can say whether you want some more detail.

Dr Allan: No, that is helpful. I wondered—

Michael Clancy: Perhaps I will hand over to Jess Sargeant, who is eagerly awaiting the opportunity to speak.

Dr Allan: I was just going to suggest the same.

Jess Sargeant: As Michael Clancy said, the Northern Ireland protocol and the 2020 act have asymmetric effects. Northern Ireland-produced goods can be sold in Scotland without meeting any additional regulatory requirements or the need for any checks and paperwork, provided that they are considered to be qualifying goods. However, as the protocol is written—as Michael Clancy said, discussions are going on about the exact nature of how it will work in future—for Scottish goods to be sold on the Northern Ireland market, they will have to comply with EU law and be subject to certain checks and paperwork.

In future, the Scottish ministers will need to bear in mind the potential for divergence between Scotland and Northern Ireland and the effects that that might have in the UK internal market. In essence, if Scottish producers want to be able to sell in the Scottish and Northern Ireland markets, they will need to comply with the EU regime and the Scottish regime. At the moment, that is not a problem because the law is quite closely aligned and the powers that the Scottish ministers took in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 mean that continued alignment is likely. Therefore, those problems are likely to be mitigated in relation to the Scotland-NI dimension, though there are concerns about what it might mean for goods going from England to Northern Ireland, where there might be more divergence.

The Scottish ministers will need to bear that in mind because, if the costs of trying to comply with those two different regulatory regimes become too high, producers in Great Britain might pull out of Northern Ireland, which is likely to exacerbate some of the problems that there have already been around trade flowing freely within the UK internal market.

Sarah Boyack: Thanks for your excellent submissions; they have been helpful.

Michael Clancy, can you say more on the question that we asked about scrutiny, transparency and accountability challenges and how we, as a parliamentary committee, can engage in that area? You have explained the sheer number of potential legislative changes that we might be facing. Could you talk about the capacity of third sector and business organisations to give their views on the process for those changes?

Earlier, we heard that it is difficult for third sector organisations to cope with the scale of change that might take place. That is an issue for this committee, because the parliamentary process enables us to get views from third sector organisations. The issue of timing is important in that regard. Given the time constraints that we face and the sheer complexity of the situation, how can we improve how we take evidence? What would be your top issues? Would the issues of interparliamentary or intergovernmental work be at the top of your agenda?

Michael Clancy: I suppose that the problem is that, embedded in the 2020 act, which is a UK act, is the fact that changes to legislation could have impacts across the UK, because the act is predicated on market access for goods and services from any part of the UK to any other part of the UK. That is a very broad vista of change. Therefore, as we said in our submission, the Parliament would have to consider the resources necessary to devote to scrutiny of legislation that could come from the UK Parliament, Senedd Cymru and the Northern Ireland Assembly, as well as legislation that is home grown in Scotland. That situation could be exacerbated if individuals or businesses take court action in connection with any legislation that is affected by the act, and the decision of the court—which could be any court in the UK—might begin the process of interpreting the legislation and how it is being applied.

The first question, therefore, is how the Parliament deals with that large vista of legislation. Almost every committee in the Parliament might be engaged in having to deal with issues that are actually part of the question of the act. It is not only your committee that would be affected, but the Delegated Powers and Law Reform Committee, the Economy and Fair Work Committee, the Equalities, Human Rights and Civil Justice Committee, the Finance and Public Administration Committee and so on. All those committees could find issues arising from the act in their inbox at any time in the future. It is therefore important to consider the resources that the Parliament has available to deal with those matters.

The Scottish Government must also be asked what resources it is putting into the process and what it intends to do in certain situations. What is the plan for dealing with matters when, for example, a regulation is changed in Wales that has an impact on some aspect of food in Scotland—say, hill farming or certain agricultural produce that we hold dear—and which then begins to affect the surrounding economic, social and legal framework?

In the report of your predecessor committee's legacy expert panel, which, I am sure, forms part of members' bedtime reading every night,

"an overall approach to the scrutiny of ... policy development ... in areas previously within EU competence"

was highlighted as a significant factor, as was

"the extent to which the ... Government can provide the Parliament and its committees with regular updates on developments in EU law".

That takes us back to the committee's other inquiry on Scotland's presence in Europe and how the Scottish Parliament and Government can become aware of and act on information and intelligence that they receive from Europe.

Another significant factor is

"the appropriate and proportionate level of scrutiny of the operation of the future relationship with the EU".

As for joint parliamentary working, which you asked about, it would be very helpful for the Parliament to embark on that. I recall that, prior to Brexit, we had Lord McFall's parliamentary forum, which was, I think, welcomed by all the Parliaments involved. Under the trade and co-operation agreement, there is due to be a UK parliamentary delegation to the joint EU-UK parliamentary forum. I find it unfortunate that the devolved legislatures are not included in that—in that respect, I reference the recent letter on the matter—but that should not prevent us from thinking about how we re-engineer something at a domestic level to enable all the legislatures to get the best up-to-date information. The same applies to the intergovernmental sphere, but we have already discussed some of the issues around that.

Sarah Boyack: Thank you—that was very useful. I am particularly interested in the parliamentary and joint ministerial work. A tension arises around transparency when Governments talk together, but I note that there has been no

JMC for three years now and the structure has not been replaced with anything else. That is an issue to think about, and I thank you for your evidence on that.

I also note the point made by both Jess Sargeant and the Food and Drink Federation Scotland about the ability of local officials to act on food standards, for example. In a previous answer, Ms Sargeant, you talked about local authorities being able to make decisions on food standards. Can you say a little bit more about that, given that the Food and Drink Federation thought that such a move would be disruptive? Are you suggesting that, even though decisions on food and drink standards—you mentioned chlorinated chicken in that respect—would be made at UK Government level, it would technically be possible for action to be taken at the local level? We had assumed that that might not be the case.

Jess Sargeant: One of the challenges with administering the internal market act is the number of actors that are involved. It requires discussions not just between the UK Government and the devolved Administrations but between the UK Government and local councils, and there might also be a role for the courts in deciding on disputes that might arise over the interpretation of the act's application. It is not clear to me that anyone at the centre of things—particularly in the UK Government—is thinking about the various aspects and how they might be tied together. A real challenge is to ensure that all the people who are affected by this are in one room and can be consulted on the various decisions that have to be made.

Lots of different processes can be put in place—for example, the UK Government could talk to its local government, the Scottish Government could talk to its local government, and the UK Government and the Scottish Government could talk to each other—but it is not really clear exactly how all the processes would join up.

10:15

I want to pick on some of the points that were made about interparliamentary working and the JMC structure, as we highlighted that in a report on the UK internal market that we published in June. One of the key things about intergovernmental working is that, because the different Governments negotiate with each other, they have less latitude to negotiate with their own legislatures or with civil society groups, for example. The best way to address that is by all the legislatures and civil society groups trying to put pressure on the intergovernmental agreement process and to put pressure on their respective Governments. That is the best chance of getting change there.

As has been said, the JMC structure still has not been replaced. Proposals were set out to establish more interministerial groups so that ministers from different departments would come together to discuss issues that are relevant to their policy area. I think that some of those proposals are starting to be implemented, even though the formal intergovernmental relations review has not been concluded. One thing that we have recommended that could be really helpful is the establishment of committee chair forums between the four Parliaments to scrutinise interministerial groups.

Michael Clancy also mentioned the precedent set by the interparliamentary forum on Brexit. It could also be very interesting to explore that, and we recommend it. One of the main barriers to that at the moment is the lack of interest in the UK internal market and common frameworks, particularly among MPs in the House of Commons, although there is some work on the issue in the House of Lords. There is a question about the political appetite, but I think that the issue will be very important, and there should be more thinking about it.

Sarah Boyack: Thanks. It would be really interesting to pick up on that.

Donald Cameron: Good morning, and thank you for your submissions. I want to stick with the topic of intergovernmental relations, as it strikes me that that issue is absolutely fundamental. My question is a simple one, I hope. What should be the key elements of a new intergovernmental system? Trust and formality have been mentioned, but I would like a basic synopsis of what you think we need.

Michael Clancy: The issue, of course, is that we are currently working with an intergovernmental system that is based on a memorandum of understanding and various devolution guidance notes that were designed many years ago. Like all such things, it needs revision.

The system is in the process of being modernised, but that has not yet completed. That will work only if all the parties agree, and it will work in practice only if the parties can create an atmosphere of trust, which, on the face of it, does not appear to be present at the moment. The signal exception is the common frameworks, on which there seems to be very good intergovernmental working, especially at the official level but also at the ministerial level.

Trust is one thing; clarity about what the structure is is another. Towards the end of her question and reflections, Sarah Boyack mentioned confidentiality. Confidentiality is, of course, one of

the features that limits the transparency of the arrangements.

In our written submission, I reference the revised UK Government central collection web page and the joint review of intergovernmental relations that was published in March. Paragraph 7 of that paper states:

"Intergovernmental relations are best facilitated by effective sharing of information and respecting confidentiality of the content of the discussions."

Of course, the tension that is created between the confidentiality of the discussions and the transparency of the decision-making process is a difficult circle to square. I think that that is part of the problem. By and large, the communiqués from the joint ministerial committees are not very communicative. They might be just a list of the people present and the broad topic that was discussed. That does not apply to all the communiqués—some can be quite detailed and can delve into technical matters such as phytosanitary or agricultural issues. However, if much more light was shone on those discussions, that transparency would assist with trust building. It would mean that all of us on the outside would be able to judge exactly what the problems might be in the room, and we would perhaps be able to make representations on that.

Jess Sargeant: At a minimum, it is important that the interministerial machinery is functional, but it is not fully functional at this point. The priority is to create a new system that works. Covid has shown the problems that can be created when we do not have ready-made machinery that works. Initially, we saw a reliance on UK Government forums and meetings, through COBRA and interministerial groups. The main thing that we need in a reformed structure is machinery that facilitates engagement that reflects the devolution settlement. Where the four Governments come together to discuss matters that are devolved and over which they have equal powers, and where, in some senses, the UK Government speaks only for England, the way in which the forums are constructed should reflect that.

Some of what we have seen in the progress reports on the intergovernmental relations review reflects that, such as having a rotating chair and a shared secretariat. We are getting a lot closer to something that is suitable for the devolution settlements, although there are still disagreements as to what happens on those matters that are reserved and legitimately for the UK Government. It is important that there is still very good communication with the devolved Administrations on those matters, particularly when there are implications for devolved issues—you might want a slightly different arrangement in those cases.

At this stage, the priority is to conclude the IGR review and put in place mechanisms to ensure that there is prudent intergovernmental working. In this evidence session and in the previous one, the committee has discussed various matters that highlight the importance of ensuring that there is good intergovernmental working. At the end of the day, common frameworks do not cover all policy areas, even if they are working well. There are many other policy areas in which we need good intergovernmental co-ordination, and we need structures to facilitate that.

Donald Cameron: I have a question for Jess Sargeant. At the start of the session in answer to a question from the convener, you said that the United Kingdom Internal Market Act 2020 is "not an impediment" to the development of common frameworks. Clearly, we are in the early years of the act, but will you expand on what you meant by that?

Jess Sargeant: When the act was first introduced, there was a question as to how it would play into some of the politics and whether it would halt progress on agreeing common frameworks. That has not happened. We are still waiting for the final frameworks, but we are hearing that good progress is being made on them and that we will get to that end point.

There is still a question as to how the legislation interacts with common frameworks. In the paper that we published in June, I argued that common frameworks should be the primary mechanism through which discussions of divergence happen. We have to accept the reality that the legislation is now on the statute books. The act is a backstop to be used in the event that we cannot reach agreement through common frameworks and intergovernmental agreement, which is really important.

The other thing to mention is the amendment that was made to the United Kingdom Internal Market Bill in the House of Lords that allows new exclusions to be added to the market access principles on the basis of an agreement in common frameworks. That could allow the four Governments to agree that, in some circumstances, divergence is completely acceptable and absolutely fine, and we do not need the 2020 act and the market access principles to apply.

We have highlighted that that is a potential source of disagreement, if there is no shared understanding of when and how that power should be used, and we recommend that a clear process should be put in place to ensure that any proposals for new exclusions are considered on their merit, economic impacts and policy benefits that they could bring. As I understand it, discussions are on-going between the four

Governments to agree a process like that, which is positive.

Donald Cameron: I was very struck by the passage in the Institute for Government report that deals with the issue of policy divergence, which, fairly, says that it has its pros and cons. Policy divergence has allowed parts of the United Kingdom to pursue entirely different public health policies, for example—smoking has been mentioned in that regard. On the other hand, it can also lead to trade barriers and a lack of competitiveness among parts of the UK. How do we strike the right balance? Is the system of common frameworks, which I think is where you end up, the right way of doing that?

Jess Sargeant: That is the question. There is an argument that the United Kingdom Internal Market Act 2020, as it is written, with very few exclusions for things such as environmental objectives or public health, does not quite strike the right balance, and the legislation is something that we should be continually monitoring, thinking about and assessing.

We know that the office for the internal market will assess the economic impact of future regulatory divergence, the operation of the common frameworks and the 2020 act itself, but it is not clear who will assess the policy impact, which is really important. Committees such as yours have a really important role to play to collect evidence from various groups and sources to understand what policy impact the act is having, and the four Governments will also conduct their own assessments.

As I have said, to some extent the answer is the common frameworks because a lot will have to be done on a case-by-case basis. We will have to see how it is working. If a certain area of public health legislation, such as alcohol regulation for example, is continually coming up against the problem of not being able to be effective because of the terms of the act, there might be a strong case for creating an exclusion.

Common frameworks are a good mechanism for continuing the discussions about the interaction of common frameworks and the act. As I said earlier, they do not cover all areas that are in the act so there will need to be intergovernmental discussions about those, but I think that that is very much a living—[*Inaudible*.]—and all Governments, particularly the UK Government, should be open to tweaking, changing and letting things develop as we get more evidence about how they are working in practice.

Jenni Minto: Ms Sargeant, thank you very much that response. I hope that my next question asks for a wee bit more on that aspect. You will have heard some of the evidence from the witnesses on the earlier panel about minimum unit pricing for alcohol. Alcohol Focus Scotland's submission commented that the 2020 act might prevent the Scottish Government from fulfilling its legal obligation

"to put health before profit."

Could you comment more on that?

You also touched on the environment. I would be interested to know your thoughts and comments with regard to lower regulatory standards to remain competitive within the terms that are set in the act.

10:30

Jess Sargeant: One of the things that I have learned throughout my research on the 2020 act and through our report is that it is very difficult to distinguish how the act will apply in those slightly more hypothetical cases. There are certainly risks, particularly around single-use plastics, which were the example that was given earlier. That is one of the most clear-cut examples. In Scotland, there is a ban on some products, but those products could continue to be sold if they come from elsewhere.

Other cases are perhaps not as straightforward. For example, there is a question about minimum unit pricing, which seems to come under the non-discrimination principle. That has several caveats—you have to prove both that there is an adverse market effect and that the action is not a way of pursuing a legitimate aim—but, at the end of the day, all that it requires is that the regulation in question is not discriminatory; it is not quite as harsh in its application as mutual recognition.

We therefore do not really know exactly how cases will play out until they are tested. Nonetheless, it is right to raise those concerns and—I perhaps sound a bit like a broken record—the best way to address them is through intergovernmental working, particularly in the environmental space. We know that all four Governments have a commitment to raise intergovernmental standards, and a lot could be done if they all agreed to jointly raise standards.

I was looking recently at the example of adding folic acid to bread, which was initially proposed by the Scottish Government, which was particularly interested in doing that. It asked Food Standards Scotland to give an assessment, which was that it would not be a very effective policy if implemented on a Scotland-only basis. It therefore recommended that something UK-wide be considered, and the Scottish and Welsh Governments then wrote to the UK Government. I am not saying that the process was all easy; there was obviously a lot of discussion and back and

forth. However, at the end of the day, they were allowed to agree things on a UK-wide basis.

Despite the political challenges around working with Governments of different stripes, particularly in the environmental space, we know that the most effective policies have to be implemented on a wider scale—that is the reason for COP in Glasgow this week. That is an area in which I hope that good intergovernmental working could mitigate some of the risks that have been identified about potential aspects of the 2020 act.

However, as I said in my previous answer, we should keep an eye on the situation. If we see that the act is a regular impediment to the devolved Administrations implementing ambitious environmental public health policies, because intergovernmental working is not happening as we might like it to, the UK Government should seriously consider adding an exclusion to prevent that effect.

Michael Clancy: I agree that, at the moment, it is difficult to construct scenarios that are anything other than speculative. In our paper, we highlighted the scenario that Professor Nicola McEwen identified in one of her centre on constitutional change blogs about the position were the Scottish Parliament to pass a law to prevent obesity that might require producers to reduce the sugar content of food or drink, or to have bolder labelling on recommended daily intakes.

In essence, the market access rules—both the mutual recognition and non-discrimination rules—say that a law that is passed by the Scottish Parliament is not necessarily unlawful. In fact, they do not touch on the validity of that law at all—it would be a perfectly valid law. The issue would be when there is an importation into Scotland of a product that does not comply with that law but which complies with the law at its point of origin. The problem is the act of importation from another part of the UK, or when something has been imported into another part of the UK. That is when the issue will become real. That creates all the questions that have been circulating around the table this morning, in the earlier session and in this one, about the implications of two, on the face of it, perfectly valid products complying with the law that applies to them when in circulation in the market in Scotland. That reaches into the economics of the issues in relation to, for example, competition.

We have heard people talk about the race to the bottom on standards. I am sure that there will be an impact, because many of our food and drink producers—this does not apply exclusively to them, but let us take them as an example—vaunt very highly the high standards to which Scottish produce is produced. That of itself is a reason to buy the product in the face of products from elsewhere that are cheaper but inferior in terms of standards. Therefore, the picture is not clear cut. Until we have a real example, the discussion will have to be a lot more speculative than I would like.

The Convener: My apologies, Mr Clancy—you wanted to come in on a previous question that Mr Cameron asked. Do you want to do that now, please?

Michael Clancy: Unfortunately, I think that the moment has passed.

The Convener: Mr Cameron has some more questions, so maybe it has not.

Donald Cameron: I want to ask about the Sewel convention, which is mentioned in the Law Society's submission. It is fair to say that the convention has come under a lot of strain in recent years. The Scottish Government has refused consent, and the UK Government has legislated without consent—I want to put that as neutrally as possible. The Law Society's submission says:

"there should be no inference drawn that the Sewel Convention has ... been diluted."

Will you expand on the convention as a tool or method of intergovernmental and interparliamentary working? What do you see its future being?

Michael Clancy: The legislative consent convention—let us not dwell too much on one person who has been involved in it—has quite a long pedigree. It was used in Northern Ireland during the time of the Northern Ireland Parliament from 1921 to 1971, and it featured in colonial administration, such as the "recent"—I put that in inverted commas—case relating to the Parliament of Southern Rhodesia in 1963: Madzimbamuto v Lardner-Burke.

I think that you know what the convention says, but let us put it on the record. Section 28 of the Scotland Act 1998 declares that the UK Parliament

"will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

The issue that has occurred most frequently in the past few years relates to "normally". The legislation that has been passed without the consent of the Scottish Parliament or, at times, the Welsh Assembly—or the Senedd Cymru now—has included important Brexit legislation and the United Kingdom Internal Market Act 2020. Can we view those examples as instances in which normality has been suspended because of their importance to the UK as a political entity?

In that statement about the importance of the legislative consent convention not being diluted, I suppose that we were trying to assert that it still

applies and it is declared in statute. There is case law that interprets it, such as the Miller case, where the Supreme Court was able to say that there are no legal consequences of not complying with the convention but that there might be political consequences.

A convention essentially means that, although there might be political and parliamentary consequences, there is no legal consequence to not complying with the convention. It is about the recognition that the convention still applies to lots of legislation that goes through the UK Parliament and affects matters that are within the devolved sphere in Scotland. It is a quite normal part of discussions between the Governments prior to introduction of legislation and in the way that it is passed. Issues that are contentious at a UK national level, such as the Brexit legislation and the United Kingdom Internal Market Act 2020, obviously attract the "not normally" provision, and that is the basis on which the UK Government would proceed to have the legislation enacted and put it into force. Therefore, in the ordinary course of events, the convention still works, but there will be exceptions to the ordinary course of events, although I hope that they will not be too numerous in future.

I was present when the convention was declared in July 1998, because I was in the Opposition advisers box in the House of Lords when Lord Sewel stepped up to the dispatch box to make it known that that was how the Government was going to deal with the issue. For most of its existence, the Scotland Act 1998, like other devolution legislation, has existed perfectly happily on the basis of the Sewel convention. It is only in relation to those particularly contentious matters that the convention has not functioned in the way that people expected it to.

Sarah Boyack: I have a question for Michael Clancy about the references to the domestic advisory group and civil society forum that he made in his submission. I was not aware of them before, but I note that an advert in the middle of October invited people to register their interest if they wanted to be a member of the UK domestic advisory group and civil society forum. Can you say a little more about that? The bodies are clearly an attempt to broaden involvement from third sector organisations and trade unions, to enable them to have some sort of say in the process, but they have not had a lot of public awareness. You talked about annual meetings not being appropriate, because meetings need to be more regular. Could you say something about the potential opportunities that come from membership and to what extent the bodies have relevance in Scotland? Are they established primarily at a UK level? The advert says that meetings

"will rotate between all four nations of the United Kingdom".

I was not aware of the domestic advisory group and civil society forum before. Have they gone under the radar for us? Will they be significant?

Michael Clancy: I am genuinely surprised, Ms Boyack; I thought that you read the TCA—trade and co-operation agreement—from cover to cover all the time. Up until now, only anoraks have had something to say about that provision. Before you accuse me of being an anorak, I freely admit to having come across the domestic advisory group and civil society forum before.

10:45

The TCA contains a number of institutional structures that, given the agreement's lofty position regulating the relationship between the UK and EU, try to make it something more concrete for the people who will actually be affected by the processes and decisions made by, for example, the partnership council. One such feature is the parliamentary assembly relationship, which we discussed earlier, and there are other things that drill down into more local aspects.

We welcomed the provisions in article 12 of the TCA relating to the participation of civil society, as well as article 13's provisions for "domestic advisory groups" and article 14's reference to the "civil society forum", which indeed reflects the Law Society of Scotland's suggestion with regard to the architectural structure of the withdrawal agreement in 2018. Article 12 says:

"The Parties"—

that is, the UK and the EU—

"shall consult civil society on the implementation of this"

TCA

"and any supplementing agreement",

which refers to the agreement on atomic energy and one or two other things,

"in particular through interaction with the domestic advisory groups and the Civil Society Forum".

Meanwhile, article 13 says:

"Each Party shall consult ... newly created or existing domestic advisory group or groups comprising a representation of independent civil society organisations"

on issues covered in the TCA, with a focus on

"non-governmental organisations, business and employers' organisations, as well as trade unions, active in economic, sustainable development, social, human rights, environmental and other matters."

We are therefore talking about a very broad sweep of civic society. Much like the Scottish civic forum in the early days of the Parliament, this is an attempt to ensure that there is more than the governmental voice at the table, and, indeed, it is

something that we have suggested, which we agree with and support. There should be such a forum, and the domestic advisory groups should be established and function well.

We have already talked about the idea of there being room for people who represent the legal professions in the UK to be party to this, because of issues arising out of the TCA, maintenance of the rule of law and the administration of justice. Such matters are key to the TCA's functioning.

We also thought that the kinds of bodies involved should be broad based and not just include what some might refer to as the usual suspects. Instead, they should be centred on the communities that, ultimately, the treaty should be able to serve.

Sarah Boyack: I am quite keen for the operation of that group and its relevance to us to be part of our scrutiny, too. Thank you, Mr Clancy.

The Convener: I am afraid that we are not yet finished. I have a few final questions.

The committee has a specific role to play on this matter, but other subject committees of the Parliament will be able to scrutinise certain areas, too. Going back to our discussion on the interparliamentary forum on Brexit, I should say that we have dropped the reference to Brexit from its title, and I also point out that it will be meeting on 10 December. That was an informal arrangement by different legislatures that came about so that they could work together. Does there need to be a more formal position for such for a at the moment? Does guidance on transparency and scrutiny, certainly for select committees across different areas, needs to be more formalised?

Michael Clancy: The TCA ensures that there is formality between the European Parliament and the national legislature, which is the UK Parliament. If it is good enough for the TCA to create such an institutional structure for parliamentary interchange, we have to ask for something similar, because the devolved legislatures are not included in that. As soon as we saw the TCA, we raised that point. We made representations to the UK Parliament in relation to the European Union (Future Relationship) Bill, way back between 26 and 29 December last year, in advance of the debates on the bill.

Having something that brings the devolved legislatures together, as well as the UK Parliament, is a way of informing those members of the UK Parliament who will be sitting at the table with their EU counterparts on that interparliamentary group.

The EU has identified its 30 members already and the process for identifying the UK Parliament members is being worked through. It is therefore an auspicious time for the devolved legislatures and those people in the UK Parliament who want to progress such an idea to get together and transmit ideas from their constituents to the UK members of the group under the TCA, so that we all manage to have some kind of a voice at that table.

The Convener: There is a Government relationship there, but there is also the relationship of the Parliaments. I may have picked this up wrong, but I thought you said that the parliamentary partnership assembly structure had been confirmed in the UK. Is it still possible that the PPA delegates could include people from the devolved legislatures?

Michael Clancy: No, I do not think so, because the TCA is quite specific about the nature of the UK-EU parliamentary group and it does not include devolved legislatures. I think that the phrase used in the TCA—I do not have it in front of me—is that either "the national Parliament" or "the Parties" are to establish that group. I would therefore be surprised if there was room to include devolved legislature members at this point, because I do not think that that fits with the TCA.

However, the legislatures can discuss among themselves and with the UK Parliament how there could be another stratum to bring together the devolved legislatures and the UK Parliament in a way which then informs the views of the UK Parliament members of the group.

The Convener: Thank you. I will bring in Ms Sargeant to comment on those points.

Jess Sargeant: I am pleased to hear that the interparliamentary forum—no longer on Brexit—is meeting next month. That is a great development.

On your question about formalising structures, there are obvious benefits to it in that it means that these sorts of discussions do not rely on political interest from certain members who might, at any point, change or ebb away, and they can happen consistently and systematically. My one possible concern is about the participation of all the parties in the Northern Ireland Assembly. By formalising structures, there is a risk that that could become a bit more difficult, so it would be easier to have an informal structure there. I hope that that is not insurmountable but it might need to be treated sensitively and there could be further discussions on it.

The Convener: I have a very quick question on the frameworks. You said quite confidently that they have been developed and are being delivered, but that we will not really understand how they are working until we are further down the line. Does it concern you that what we are hearing that other areas such as the economy and civic Scotland do not feel that they have been included

in their development, and they do not feel that there has been transparency in how the frameworks have come about? Whose responsibility is it to inform wider civic society in the UK about the frameworks and the impact that they will have?

Jess Sargeant: It is incredibly hard to scrutinise common frameworks when you do not know what they look like. Their nature and how they have ended up is perhaps slightly different from what particular civic society groups were expecting at the beginning. That is partly a factor of how the discussions have, at times, been quite political. One of the big barriers to reaching agreement and publishing the frameworks more recently has been the sensitivities around the Northern Ireland protocol, which has meant that groups that might have been included have been shut out of the process.

We are waiting for the process to be published, but obviously that will not be tested until we actually have an incident of policy divergence to test. That is the point at which civic society's view will be most relevant and when civic society groups will be of most value in putting their views to the four Governments. It is important that they are able to feed into the process when the discussions are still on-going and not when a decision has been made at the end. Once a decision has been made on a policy, it is very unlikely that the four Governments will want to go back and reopen the discussions.

There is a question about how this fits with the scrutiny process, particularly in the relevant devolved legislatures, because they are a really good way for civil society groups to feed into the process, but there is a question about what the trigger will be for that scrutiny. As I say, if it comes at the end, once a policy is all tied up in a bow and an intergovernmental decision has been reached, there is little chance that such input will make a huge amount of difference.

Some of the frameworks have in-built review processes, so it is possible that that could be a point at which there is a bit more transparency around what is being discussed and evidence could be taken from various interested groups. However, that is still a bit of an open question and an area that needs more development.

Michael Clancy: I am sure that transparency around the negotiation of frameworks is yet another issue of difficulty because some of these frameworks are extremely technical. When the original list of 111 points was issued by the Cabinet Office a few years ago now, I undertook a piece of work to try to get my head around what it meant and we produced a paper tracking the 111 points through their European legal origins to the point at which they were listed in that list. The 111 then became 150 and, at its height, 163 areas of the law were subject to the process.

11:00

The Convener: I am sorry to interrupt but we are going to the two-minute silence. I have another question for you, so if you could stay with us, that would be helpful. We are pausing now for a two-minute silence. I ask members to stand if they are able.

11:02

The Convener: I thank everyone for observing our remembrance day two-minute silence.

We return to Mr Clancy.

Michael Clancy: The important thing is that all those areas of law had a basis in European law, which had gone through the relevant processes in whichever legislature was responsible for implementing them, so we know what the baseline is for all the common framework arrangements. We do not know how the common frameworks ethos applies to those areas in terms of the conditions that were decided on 17 October, which I mentioned at the start of the meeting.

As the frameworks progress through their process they are scrutinised in the legislatures. The progress report that was issued on 9 November is an example of the element of transparency that was brought the matter. I point to the hazardous substances planning framework, which was finalised and implemented in the previous reporting period and has been scrutinised in all four legislatures.

Such scrutiny could be a point at which one could affect the common frameworks. However, if someone made representations to the committee that was dealing with a framework that it was flawed in some way, it would have to be something quite dramatic—something that all the others who had considered it missed in highly technical areas, such as the law relating to radioactive substances, certain aspects of company law or agricultural support.

There ought to be an opportunity for people in civic society who have an interest in a common framework to make representations. In Scotland, that, in its most proper form, is probably the Scottish Parliament, because the Parliament probably implemented the original EU directive or regulation—some of them are quite elderly—that made the basis for the common framework necessary in the first place.

The Convener: My final question is a bit hypothetical, although much of what we have talked about has been hypothetical. In an ideal

world, the frameworks will work perfectly and there will never be a need for the Westminster Government to exercise executive power. My understanding is that, under the Scotland Act 1998, committees of the Scottish Parliament are empowered to scrutinise the Scottish Government, but how can such scrutiny take place if an executive power is used in a devolved area at Westminster? How would the Parliament and its committees consider that? Might it mean a change to the devolution guidance notes?

Jess Sargeant: There is a question about that. I assume that you refer to some of the powers for the secretary of state in the United Kingdom Internal Market Act 2020. Is that right?

The Convener: Yes.

Jess Sargeant: There is a question as to how the devolved legislatures scrutinise the exercise of those powers because it could change the 2020 act significantly. The most likely circumstance in which the powers would be used is to add new exclusions, which, I hope, would make the 2020 act more permissive rather than more restrictive, but there is a possibility that they could be used to make it more restrictive. The UK Government has to seek the consent of the devolved ministers but, if that is not forthcoming within a month, it can proceed anyway, so there is a risk that the powers could be used improperly.

There is certainly a question as to how that relates to the Scottish Parliament. There is an unresolved issue about how or whether something such as the Sewel convention should apply to secondary legislation. We saw a good mechanism to allow that through the European Union withdrawal legislation. However, we might see such situations more frequently, so, rather than considering them case by case and act by act, perhaps it would be more appropriate to have a broader convention that could apply to deciding secondary legislation as well as primary legislation.

There are obviously opportunities for the committee to do informal scrutiny even if it is not required by any specific process. For example, if it looks like a power has been used, the committee could to take evidence from the relevant Scottish minister—and potentially the UK minister—on their position on that. Although the Scottish Parliament can do nothing to compel a UK minister to appear before it, UK ministers have increasingly appeared before your committees and we have recommended doing that. Now that the lines of responsibility and accountability have been blurred slightly because actions that the UK Government takes will have implications for the exercise of devolved powers, it should happen more regularly. Perhaps there needs to be a commitment for UK Government ministers to be ready to appear before Scottish Parliament committees, Welsh Parliament committees and Northern Ireland Assembly committees to justify when and why they have used the powers.

Michael Clancy: As Jess Sargeant mentioned, the United Kingdom Internal Market Act 2020 provides for the secretary of state to seek the consent of the devolved Administrations when making certain exclusions from the market access principles under section 10 or services exclusions under section 18.

There is a process for waiting for that consent and, if it is not forthcoming, proceeding to make the order in any event. That is of course not the equivalent of a legislative consent motion for subordinate legislation. Under the devolution guidance notes, as you quite rightly point out, it is clear that the legislative consent convention does not apply to subordinate legislation; it applies only to primary legislation. That important feature has been there since the very beginning of devolution and the creation of the Parliament.

How does that work in terms of any future changes? A revision of the devolution guidance notes is part of the issue that revolves around the intergovernmental process, which we have been talking about periodically this morning. I have not heard anyone say that that issue is on the table.

Therefore, how does one affect UK or Scottish ministerial action in making regulations? One hopes that the relevant minister consults on the making of any subordinate legislation that we might be concerned about. One of the standard amendments that we promote when dealing with bills in the UK Parliament provides that ministers should consult with appropriate persons before making regulations. The fashion, which we have seen with coronavirus legislation, for the production of made affirmative regulations cuts across debate or discussion, and we have seen—and I am sure that you will be aware of—instances in which regulations have been made on 11 November at 5 pm precisely without there having been any significant debate in Parliament. That is a take-it-or-leave-it situation; however, we must take it, because there is no leaving it, and it becomes the law.

That begins to be a bigger issue about the nature of delegated legislation and the resources that are applied to scrutinise it. I am sure that, if you asked members of the Delegated Powers and Law Reform Committee whether, on the whole, they are satisfied with the nature of consultation on delegated legislation, they would probably have a number of criticisms to make about it.

It is the same in Westminster. The Hansard Society has recently published further thoughts on making delegated powers more habile to scrutiny.

Just the other day, it published such a report, which I recommend that the committee reads—it is on my reading list for later this week.

It is important for us to understand that it is not a problem that is related to the 2020 act; it is symptomatic of a wider issue about the scrutiny of ministerial law-making power, which is power that the Parliament lends to ministers in the acts that it passes.

The Convener: I thank both our witnesses for your attendance at the committee this morning. I close the public part of today's proceedings.

11:14

Meeting continued in private until 11:17.

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